Clerk's Stamp

COURT FILE NUMBER	2101-06388
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ATB FINANCIAL
DEFENDANT	ALBERTA FOOTHILLS PROPERTIES LTD.
APPLICANT	FTI CONSULTING CANADA INC., in its capacity as the Court-appointed Receiver of ALBERTA FOOTHILLS PROPERTIES LTD.
RESPONDENT	THE TOWN OF OKOTOKS
DOCUMENT	**BRIEF OF THE TOWN OF OKOTOKS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	CARON & PARTNERS LLP 2120, 237 – 4th Avenue SW Calgary, Alberta T2P 4K3 Tel: (403) 770-4005 / (403) 770-4023 Fax: (403) 237-0111 **Attention: Jennifer Sykes / Dean Hutchison** File No.: 60889-000

BRIEF OF THE TOWN OF OKOTOKS

Respecting an Application to be heard before the Honourable Presiding Justice,
In Chambers (Via WebEx), on Wednesday, September 29, 2021 at 2:00 PM
(Booked on the Commercial List)

INDEX

I. INTRODUCTION

1. This brief is submitted on behalf of the Town of Okotoks (the "**Town**") in response to the application (the "**Receiver's Application**") brought by FTI Consulting Canada Inc. ("**FTI**" or the "**Receiver**"), in its capacity as the Court-appointed receiver of Alberta Foothills Properties Ltd. ("**AFPL**"), for advice and direction on whether the stay provisions of the Receivership Order granted in the within proceedings on May 17, 2021 by the Honourable Madam Justice K.M. Eidsvik (the "**Receivership Order**"), prevent the Town, an Alberta municipality responsible for the governance of the lands within its boundaries under the *Municipal Government Act*, R.S.A. 2000, c. M-26 (the "***MGA***"), from enacting certain bylaws that affect the lands owned by AFPL (which lands are defined below as the "Property"). This brief is also submitted in response to the Brief of the Receiver dated August 30, 2021 (the "**Receiver's Brief**").

2. The Receiver's position is that the stay provisions of the Receivership Order stay and prevent the Town for enacting the subject bylaws. The Town respectfully submits that the stay provisions of the Receivership Order do not stay, nor do the terms of the Receivership Order in any way prevent, the Town from enacting the subject bylaws forthwith.

3. As set out in further detail in this Brief:

   (a) an area structure plan does not grant development rights to a landowner. AFPL does not have any rights to develop the Property (as defined below) for residential development. There were no such crystallized rights at the time the Receivership Order was granted. The Receiver's proposed interpretation of the stay provisions of the Receivership Order has the net effect of creating rights for AFPL that AFPL (and by extension, the Receiver) does not have, which is contrary to fundamental insolvency law principles and greatly exceeds the scope of the Receivership Order;

   (b) the Receiver's proposed interpretation of the stay provisions of the Receivership Order is overly broad, purports to restrict the Town's statutory authority to make planning decisions regarding lands in its jurisdiction, and is not supported by the applicable law regarding the interpretation of stay provisions of Court Orders;

   (c) permitting the subject bylaws to be enacted now will create greater certainty regarding the Property and any process regarding its sale;

(d) imposing a stay on the Town that prevents it from enacting the subject bylaws until after the Property is sold and after the Receiver is discharged, will not affect the value of the Property in the manner asserted by the Receiver;

(e) many of the appraisals put forth by the Receiver do not accurately reflect the actual state of the Property and therefore do not accurately reflect the value of the Property; and

(f) interpreting the stay provisions of the Receivership Order in the manner proposed by the Receiver will create a dangerous precedent that places restrictions on a government body's, (in this case a municipality's), ability to make policy decisions and exercise its statutory authority.

II. FACTS AND BACKGROUND

4. For the sake of efficiency, the Town has included certain limited observations and arguments in the Facts section of this Brief.

A. The History of the Property

5. The history of the lands that are the subject of this matter, which is an approximately 58 hectare (145 acre) parcel legally described as Meridian 4, Range 29, Township 20, Section 16, Quarter Northwest (the "**Property**"), goes back to before it was annexed into the Town. Foothills County (then the M.D. of Foothills) had earmarked the Property through an area structure plan and land use designation for urban-style development.

6. When the Town annexed the Property, the Town adopted its own planning documents relating to that area. It adopted the Wind Walk Area Structure Plan (the "**WWASP**") and gave it designations under its own Land Use Bylaw at the time.

7. The WWASP was adopted on June 26, 2017.[1] As noted by the Receiver, this document created the framework for land development for the Property. Area structure plans do not grant any rights in and of themselves to landowners; instead they provide guidance to municipal subdivision and development authorities regarding the types of applications which they can approve. They may contain aspirational statements about what the municipality would like to see in the future or may

[1] Affidavit of Colin Gainer sworn September 2, 2021 (the "**Gainer Affidavit**"), paragraph 2 and Exhibit "A"

contain more binding and mandatory directives about what features developments must or must not have. The WWASP confirms that this is its intent in its introduction at section 1.1, where it states:

> The WWASP has been undertaken in accordance with the Municipal Government Act (MGA) and the Town of Okotoks' policies for the preparation of a statutory plan as a prerequisite to development. **This long-term policy document provides direction for more detailed planning stages**. To ensure it remains a living document and accounts for policy changes adopted by Town Council, it should be reviewed and updated as necessary following its adoption and until the Approving Authority considers the Plan Area fully built-out.[2]
>
> [Emphasis Added]

8. The land use redesignations were passed on August 17 and August 21, 2017. On August 17, 2017, the Town passed Bylaw 19-17, which redesignated 7.88 hectares of the Property as residential and public service districts.[3] On August 21, 2017, the Town passed Bylaw 34-17 which redesignated the remaining 50.66 hectares of the Property as Urban Holding (UH).[4]

9. These land use designations remained in place until the Town adopted a new, Town-wide land use bylaw which changed all of its land use districts. This happened on June 14, 2021. Under the Town's new land use bylaw, the 7.88 hectare portion of the Property was designated Traditional Neighbourhood (TN), Recreation and Open Space (ROS) and Neighbourhood Core (NC); and the remaining 50.66 hectares of the Property were designated Agriculture and Land Holdings District (ALH).[5]

B. The Subdivision Application

10. In its Brief, the Receiver has placed heavy emphasis on the subdivision application concerning the Property which was conditionally approved on February 21, 2019 (the "**Subdivision Application**"). Respectfully, that approval is not relevant to this application as the conditions of approval of the Subdivision Application were never met, and the conditional approval expired many months prior to the Receivership Order being granted.

11. The Subdivision Application was approved subject to a condition that the applicant provide satisfactory engineering plans.[6] Pursuant to section 657 of the *MGA*, subdivision approvals must

[2] Gainer Affidavit, Exhibit "A", section 1.1.
[3] Gainer Affidavit, paragraph 3 and Exhibit "B".
[4] Gainer Affidavit, paragraph 4 and Exhibit "C".
[5] Gainer Affidavit, paragraphs 5 and 6, and Exhibit "D"
[6] Gainer Affidavit, paragraph 9 and Exhibit "G"

be registered within one year, after which they expire.[7] AFPL, through its agent and consultant, Tronnes Geomatics as the "Applicant" under the Subdivision Application, provided 3 rounds of engineering plans. Each time the Town provided fulsome comments about the issues it required the Applicant to address. Many of the Town's comments were simply not addressed at all in the Applicant's revisions, as is evidenced by the labelling of several of them as "repeat comment".[8]

12. The Applicant never provided revised drawings after the comments the Town provided on March 25, 2020. Since the Applicant did not meet the conditions, the approval of the Subdivision Application expired and is of no further effect. No subdivision of the Property as contemplated by AFPL's Subdivision Application ever occurred, and there is currently no approved subdivision respecting the Property.[9]

C. The Proposed Bylaws

13. The Receiver's Application for advice and direction concerns two bylaws, Bylaw 19-21 and Bylaw 20-21, which the Town proposes to adopt and which the Receiver has described as the "**Proposed Bylaws**". As the Receiver noted in its Brief, both bylaws were given first and second reading, but third reading is on hold pending the outcome of this application.

14. The first of the Proposed Bylaws, Bylaw 19-21, changes the land use designations for part of the Property. The Town disagrees with the Receiver's characterization of this bylaw. At paragraph 17 of the Receiver's Brief, the Receiver states that this bylaw "would rezone the Property from residential development property to urban or agricultural holdings". Bylaw 19-21 redesignates less than 15% of the total area of the Property. It applies to approximately 7.88 hectares. The remaining 50.66 hectares of the Property are already designated as Agricultural and Land Holdings District and this would remain unchanged.

15. The second of the Proposed Bylaws, Bylaw 20-21, rescinds the WWASP.

16. The Proposed Bylaws are a result of the Town reassessing all of its long-range plans in the wake of its adoption of a new Municipal Development Plan in January 2021.[10]

---

[7] *Municipal Government Act*, RSA 2000 c. M-26, s.657 [**TAB 1**]
[8] Gainer Affidavit, paragraphs 10 and 11, and Exhibits "H", "I" and "K".
[9] Gainer Affidavit, paragraphs 11 to 14.
[10] Affidavit of Jeff Greene sworn September 3, 2021 (the "**Greene Affidavit**"), paragraph 3.

17. The Receiver has correctly noted that the Proposed Bylaws only affect the Property and no other lands within the Town. The Property is set apart from urban scale development within the boundaries of the Town. If residential development of the Property were to occur, such development would be the only residential area south of Highway 7, so the Town has accordingly addressed it individually.[11] The Property is also the only land affected by the WWASP, so by necessity, any change to the WWASP would only impact AFPL's property.

18. The Receiver has also suggested several times in its Brief that it should have received earlier notice of the Proposed Bylaws. The Town issued the notices that it is directed to issue by the *MGA* for these types of bylaws.[12] This included notices in the local newspaper and notices being sent in the mail to the adjacent landowners and to AFPL, as landowner.[13] As the Receiver noted in its materials, the Town even directed its counsel to provide additional notice to the Receiver directly.

D. The Current State of the Property

19. The Receiver states at paragraph 41 of its Brief that approximately $24 million has been expended on the Property and the development thereof. The Receiver states at paragraph 7 of its Brief that the purchase price it paid was approximately $4.9 million, apparently suggesting that the remaining $19.1 million was spent on the development of the Property. While the Town does not have any reason to dispute this amount, it is important to note that this level of expenditure is not reflected in development work that has been carried out on the Property itself.

20. The Property is virtually unchanged since at least 2016. In his Affidavit, Mr. Gainer has provided aerial photos from the Town's records which show this to be the case.[14] The aerial photos contained in the four respective appraisals of the Property appended to the Confidential Supplement to the First Report of the Receiver (the "**Confidential Supplement**") further illustrate that the Property has been unchanged from October 2018 to August 2021, and that there are no visible development improvements to the Property that have occurred. The Town is not aware of any servicing being put in place on the Property, nor any stripping or grading, or any other physical development work, (nor has the Town approved any such work).[15] The only work on the Property of which the Town is aware is the relocation of the AltaLink transmission line, which to the best of the Town's

[11] Gainer Affidavit, Exhibit "E".
[12] *MGA*, *supra* note 7, sections 230, 606, 692.
[13] Gainer Affidavit, paragraphs 20 and 21, and Exhibits "N" and "O".
[14] Gainer Affidavit, Exhibit "L".
[15] Gainer Affidavit, paragraph 15-17.

knowledge cost AFPL approximately $300,000.00.[16] It is noteworthy that this work was not particular to the development described in the WWASP, but instead is the type of improvement which would benefit any type of development by allowing more regular lot shapes.[17]

III. ISSUES

21. It is respectfully submitted that the issue for determination is whether the Receivership Order, in particular the stay provisions of the Receivership Order, prevent the Town from enacting the Proposed Bylaws until after the Property has been sold and the Receiver has been discharged.

22. The Town respectfully submits that this question should be answered in the negative. The Town is not stayed or otherwise prevented by the Receivership Order from using the statutory powers conferred upon it by the *MGA* to enact the Proposed Bylaws forthwith.

IV. LAW AND ARGUMENT

A. The Current Rights of AFPL, and by Extension, the Receiver

23. In its Brief, the Receiver asserts that the Receivership Order protects the rights of AFPL and that there would be prejudice to AFPL and its stakeholders if the Town were permitted to enact the Proposed Bylaws before the Property is sold and the Receiver is discharged. These arguments require an examination of what the rights of AFPL, and by extension the Receiver, are and the exact nature of those rights. In the respectful submission of the Town, AFPL's rights are far more restricted than the Receiver suggests.

i. The WWASP

24. One of the Proposed Bylaws, Bylaw 20-21 (the "**Proposed ASP Change Bylaw**"), proposes to rescind the WWASP. At paragraphs 37 and 38 of its Brief, the Receiver argues that the WWASP "functions like a licence in that the Town has permitted development on the Property so long as it follows the road map under the Wind Walk ASP". The Receiver equates the WWASP to a forestry licence that the Ontario Superior Court of Justice found the Ministry of Forestry was stayed from cancelling under a receivership order in the case of *G.E. Canada Equipment Financing G.P. v*

[16] Gainer Affidavit, Exhibit "F".
[17] Gainer Affidavit, paragraph 8.

Atikokan Forest Products Ltd.[18]. This position is contrary to both the general nature of area structure plans and the express wording of the WWASP.

25. Area structure plans are considered "statutory plans" under the *MGA*.[19] They do not grant rights; they establish a framework to guide future decisions about the subdivision and development of land. The *MGA* says as much about the purpose of area structure plans when it states:

> 633(1) For the purpose of providing a framework for subsequent subdivision and development of an area of land, a council may by bylaw adopt an area structure plan.[20]

26. This purpose of area structure plans is confirmed in other sections of the *MGA*, in particular:

(a) Section 654(1)(b) prohibits subdivision authorities from approving subdivision applications unless the proposal complies with applicable statutory plans;[21]

(b) Section 655(1)(a) allows subdivision authorities to impose conditions on subdivision approvals to ensure that such approvals comply with applicable statutory plans;[22]

(c) Section 680(2)(a.1) requires a subdivision and development appeal board or the municipal government board, when hearing an appeal regarding a subdivision application, to "have regard" to any applicable statutory plan;[23] and

(d) Section 687(3)(a.2) requires a subdivision and development appeal board or the municipal government board, when hearing an appeal regarding a development permit, to comply with any applicable statutory plan.[24]

27. The *MGA* does not treat an area structure plan, or any other statutory plan, as a stand-alone approval sufficient to allow development of land to proceed. In fact, the *MGA* makes it clear that a statutory plan is no guarantee that the projects it contemplates will go ahead, stating:

---

[18] *G.E. Canada Equipment Financing G.P. v Atikokan Forest Products Ltd.*, 2011 ONSC 2992 ("***G.E. Canada***"), Receiver's Authorities, TAB 3.
[19] *MGA*, supra note 7, section 616(dd).
[20] *Ibid,*, section 633(1).
[21] *Ibid*, section 654(1)(b).
[22] *Ibid*, section 655(1)(a).
[23] *Ibid*, section 680(2(a.1).
[24] *Ibid*, section 687(3)(a.2).

> 637 The adoption by a council of a statutory plan does not require the municipality to undertake any of the projects referred to in it.[25]

28. One of the preeminent texts on this subject, *Planning Law and Practice in Alberta (4th Ed)*, by Fredrick A. Laux Q.C. and Gwendolyn Stewart-Palmer, makes the following comment regarding the role of statutory plans:

> Consistent with this approach, **the courts have said that statutory plans are policy documents that set out "proposals" for future development in a municipality and are not intended to regulate in any definitive way what can be done at the present time.** They are subject to review and modification as circumstances change. This is to be contrasted with a land use bylaw, which sets forth the development rules and regulations that must be adhered to during the currency of the bylaw. A land use bylaw serves to implement the proposals set out in the plan. It is based on fact, not hypothesis. **There is no obligation on a municipal council to immediately input, through the land use bylaw or otherwise, everything that is proposed in its statutory plans nor, for practical reasons, can there be one**. Thus, the plans and the bylaw occupy a separate place and function in the scheme of the Act. It follows then, for purposes of assessing development rights, that the primary document to be scrutinized is the land use bylaw and not the statutory plan.[26]
>
> [Emphasis Added]

29. The express wording in the WWASP also makes it clear that this document was not intended to grant any independent rights, and that further studies and approvals are required. For example:

(a) Section 1.1 states "…This long-term policy document provides direction for more detailed planning stages. …", which clearly demonstrates that the WWASP is not the final approval for development of the Property;

(b) Section 1.2.2 discusses the direction that is given to the "Approving Authority", which reflects that there will be further levels of approval; and

(c) Section 1.3.3 states that land use areas, neighbourhood boundaries, intersections and road alignments are subject to further study and delineation at future approval stages.[27]

---

[25] *Ibid*, section 637.
[26] Fredrick A. Laux, Q.C. and Gwendolyn Stewart-Palmer, *Planning Law and Practice in Alberta*, 4th Edition, Edmonton, Juriliber Limited, 2019, at 5.6(3)(b) [**TAB 2**]
[27] Gainer Affidavit, Exhibit "A".

30. The rest of the WWASP is filled with references to future planning and design, making it clear that the WWASP is not a final approval of any development of the Property.

31. Returning to the Receiver's position that the WWASP is equivalent to a forestry licence, if anything, the WWASP would be equivalent to the *Crown Forest Sustainability Act* or the regulations thereunder in that it establishes a framework under which an application for a licence (or in this case, a development permit or subdivision approval) may be considered, but it does not grant the licence or any approval itself.

32. The WWASP, as an area structure plan, did not grant any rights to AFPL to develop the Property in any particular way, nor to did it create any *in rem* rights that run with the Property to have the Property developed in any particular way. Accordingly, it cannot be said that there are development rights flowing from the WWASP that are entitled to protection; nor can it be said that AFPL, (and by extension the Receiver), AFPL's stakeholders, or the Property itself, would be prejudiced if those non-existent development rights are not protected by the stay provisions of the Receivership Order. Accordingly, there is no prejudice to AFPL, its stakeholders, the Receiver or the Property created by the enactment of the Proposed ASP Change Bylaw.

ii. The Land Use Bylaw

33. Most of the Property is designated Agricultural and Land Holding District (ALH), and Bylaw 19-21 (the "**Proposed Redesignation Bylaw**") does not change this. The Proposed Redesignation Bylaw will only change the designation of the approximately 7.88 hectare area portion of the Property that had been identified for subdivision but was never actually subdivided due to AFPL's failure to meet the conditions of the subdivision approval within the required timelines. This area currently has a combination of Traditional Neighbourhood (TN), Recreation and Open Space (ROS) and Neighbourhood Core (NC) designations. The Proposed Redesignation Bylaw would change the designation of the said approximately 7.88 hectare area that had never actually been subdivided, to the same ALH designation as the rest of the Property. The net effect of the Proposed Redesignation Bylaw is to have the entirety of the Property, which currently is, and always has been throughout its ownership by AFPL, one titled parcel, with the same land use designation.

34. The redesignation of a portion of the Property will not take away any solidified or "crystallized" rights of the landowner to develop according to the WWASP. These rights do not crystallize until further planning approvals are granted.

35. The Alberta Court of Appeal explored the point at which development rights crystallize in *Love v Flagstaff*.[28] This case involved competing landowner rights. A residential development and an industrial farming operation were required to be separated by a minimum distance. In finding that development rights crystallize upon issuance of the development permit, the Court discussed the potential for an application to be started but never finalized, noting that the filing of an application does not create development rights. Development rights are not crystalized until the development permit is granted.

36. Similarly, in *698114 Alberta Ltd. v Banff*, the Court of Appeal discussed the moment at which a landowner's development rights crystallized and stated:

> Had the appellant's application been rejected, or deemed to have been rejected, by the development authority, and had an appeal been taken to the subdivision and development appeal board, the result would have been the same. In Planning Law and Practice in Alberta (2nd ed., 1998), Professor Laux says at para. 9.5(1) "[t]hat the filing of an application for a permit vests no rights in the applicant", that is rights do not crystallize at the date the application is filed with the municipality. He continues:
>
> > Thus, if a use amendment rendering the proposed development non-complying is made to the land use bylaw between the date the application is filed and the date that the decision is made, the development authority should apply the amendment and reject the application. The general rule is that the law in force at the time the decision is made is the operative law.[29]

37. In both of the foregoing cited cases, there was already a land use bylaw in place. If making an application did not crystallize the landowner's rights, then having the ability under the bylaw to make such an application surely did not do so either.

38. The land use designations currently in place for the non-subdivided, 7.88 hectare portion of the Property that was to form Phase 1 of the Wind Walk Development, do not give the landowner the right to develop the Property in accordance with the WWASP. At a minimum, subdivision approval would be required, and depending on the nature of any particular proposed development, a development permit would also be required.

---

[28] *Love v. Flagstaff (County of) Subdivision and Development Appeal Board*, 2002 ABCA 292 [**TAB 3**], at paras. 31-50

[29] *698114 Alberta Ltd. v Banff (Town of)*, 2000 ABCA 237 [**TAB 4**], at para 21.

39. There are currently no subdivision approvals or development permit approvals regarding the Property, nor were there any such approvals regarding the Property in place as of May 17, 2021, the date the Receivership Order was granted. Thus, there are currently no vested or "crystallized" rights to develop the Property, nor were there any as of the date of the receivership of AFPL.

40. In the interests of transparency, the Land Use Bylaw allows certain types of development without a development permit.[30] These exempt developments are immaterial to the current application. They are limited in scope and would not reflect the scale of development described in the WWASP. Even if they did, exempt developments do not vest a right in the landowner unless they have already been started while they were lawful under the land use bylaw, which is not the case here. This issue is discussed further in the next section regarding the powers of municipalities.

41. AFPL does not have the right to develop the Property at this time as described in the WWASP. Under the current legislative framework (the Land Use Bylaw and the WWASP), AFPL has the ability to apply for subdivision and development approvals, but those approvals are not guaranteed and the ability to make such an application does not constitute a crystallized right to develop the Property in any practical manner.

42. There is also no current, or even pending, subdivision approval in respect of the Property. Despite the Receiver's heavy emphasis on the past Subdivision Application approval, that conditional approval has expired and is of no further effect. Once an approval has expired, it does not continue to impose obligations on the municipality or give rights to the approval holder.[31]

43. The past Subdivision Application approval expired on September 30, 2020, several months prior to the Receivership Order being granted, and several months prior to when first readings of the Proposed Bylaws occurred. There were thus no crystallized development rights held by AFPL regarding the Property at either the time of its receivership, or at the time the first and second reading of the Proposed Bylaws occurred. Therefore the "status quo" at the time the Receivership Order was granted was that AFPL had no subdivision or development rights regarding the Property. That status quo was not affected when the Proposed Bylaws were brought forward by the Town, nor will it be affected if either of the Proposed Bylaws are enacted.

---

[30] Gainer Affidavit, Exhibit "M".
[31] *Pattison Outdoor Advertising Ltd v Calgary (Subdivision and Development Appeal Board)*, 2015 ABCA 317 [**TAB 5**] at para 16

iii. The Receiver Has No Better Rights Than AFPL

44. It is a fundamental principle of insolvency law that the court officer – a receiver in the case of a receivership, or a trustee in bankruptcy in the case of a bankruptcy – steps into the shoes of the debtor company or bankrupt. The receivership or bankruptcy does not place the receiver or trustee in any better position than that enjoyed by the debtor company or bankrupt as of the date of the receivership or bankruptcy.

45. This fundamental principle was noted by the Court of Queen's Bench of Manitoba in the *Bankruptcy of Rodney Gardham* which concerned whether the trustee could compel payment by a cooperative of the bankrupt's equity investment in such cooperative notwithstanding the legislation governing the cooperative. The Court noted that a trustee "steps into the shoes" of the bankrupt and further noted the respondent cooperative's argument that the shoes the trustee steps into "are not more expensive nor of a better quality than those worn by the bankrupt".[32] The Court agreed, noting that the trustee was caught by "the statutory characteristics of the respondent" which provided that an equity holder in the cooperative could not compel the return of their capital in the absence of discriminatory or oppressive conduct on the part of the cooperative (of which there was none).[33] The trustee had no better rights than that of the bankrupt.

46. In the present matter, the Receiver similarly has no better rights than that held by the debtor company, AFPL. AFPL had no right to market the Property as having been approved for the seven-phase Wind Walk Development as no such approval has ever been provided. As of September 30, 2020 when the Subdivision Application approval expired without AFPL having fulfilled the conditions of approval, AFPL had no right to even market the Property for sale as having been approved for Phase 1 development with a 7.88 hectare subdivided portion. The Receiver, in stepping into the shoes of AFPL, similarly has no rights to market the Property in this fashion.

47. As the Receiver does not have the ability to market the Property in this manner under subparagraph 3(k) of the Receivership Order, the Proposed Bylaws cannot be said to be interfering with the Receiver's ability to market and sell the Property.

[32] *Bankruptcy of Rodney Allen Gardham*, 2007 MBQB 223 [**TAB 6**], at para. 7.
[33] *Ibid*, at para. 20.

B. Early Appraisals Do Not Accurately Reflect the State of the Property or its Actual Market Value

48. Throughout the Receiver's Brief, the Receiver argues that there is significant value in the Property arising from the time and resources AFPL purportedly expended in developing the Property. In support of this argument the Receiver points to four different appraisals (the "**Appraisals**") completed by Avison & Young that are respectively attached as Appendix "A" to the Confidential Supplement, which the Receiver asserts provide an indication of the value of the Property at certain points in time, specifically: 1) October 18, 2018; 2) September 12, 2020; 3) April 21, 2021; and 4) August 26, 2021. The Receiver asserts that the August 26, 2021 Appraisal, which assumes that the Proposed Bylaws have been enacted, shows a significantly lower value as compared to the earlier Appraisals and the last listing price of the Property.[34] The Receiver implies that it is the Proposed Bylaws that diminish the value that has purportedly been created from the time and resources that AFPL supposedly spent developing the Property.

49. This assertion by the Receiver about the purported effect of the Proposed Bylaws on the value of the Property fails to acknowledge two things. The first is the fact that the earlier Appraisals did not appraise the Property in its actual state, which is as unsubdivided, undeveloped, bare land. Both the October 18, 2018 Appraisal and the April 21, 2021 Appraisal contain a section entitled "Hypothetical Conditions & Extraordinary Assumptions" that make extraordinary assumptions about certain developments have being made to the Property as of the date of valuation that had not in fact actually occurred at the time of the Appraisal, and have in fact never occurred. These earlier Appraisals do not value the Property in its actual state, which is as unsubdivided, undeveloped, bare land, and therefore do not provide an accurate indication of value.

50. The second is that an appraisal does not determine the true value of an asset. That is determined by the market. A comparison of the list price history of the Property, as against the appraised values for the Property, indicate that the Appraisals, (in particular two of the earlier Appraisals with the effective dates of September 12, 2020 and April 21, 20201), overvalue the Property. More significantly, the fact that the Property did not sell at any of the list prices demonstrates that the market, which looks at the Property in its actual unsubdivided, undeveloped state, views the Property as overvalued.

[34] Receiver's Report, at para. 55.

51. Since the Property has not been subdivided in any fashion, and since the Property has not been developed in any manner save for the relocation of the AltaLink transmission lines, any new owner of the Property interested in subdividing and or developing the Property will have to go through the time and expense of doing so. That time and expense will be necessary for any new owner of the Property regardless of the area structure plan or land use bylaws in place concerning the Property. The time and resources that AFPL purportedly spent in developing the Wind Walk Development did not result in there being any actual subdivision or development of the Property. No such development is in progress. There is not even any existing or pending subdivision applications, nor any existing or pending development permits. The Property is unsubdivided, undeveloped, bare land. Any potential purchaser of the Property will note that fact and will undoubtedly be factoring it into the price they are prepared to pay for the Property. It is the actual state of the Property as unsubdivided, undeveloped, bare land that is affecting its value, not the Proposed Bylaws.

C. Proposed Bylaws Being Enacted Now Creates Certainty

52. At paragraphs 60 and 61 of the Receiver's Report, the Receiver notes that the Town would not be prohibited from any steps it determines necessary in respect of the Property after the completion of the receivership process and the discharge of the Receiver, and that the timing of the Proposed Bylaws has created significant uncertainty with respect to the value of the Property and has caused a significant delay in the Receiver launching its sale process of the Property.

53. With respect to the claimed delay with the Receiver's sale process, any purported delay is completely of the Receiver's choosing. The Town has not done anything to prohibit the Receiver from marketing the Property for sale, or from otherwise engaging in a sale process. It is entirely the Receiver's choice to wait to market the Property for sale.

54. With respect to the issue of certainty, forcing the Town to wait until after the completion of the sale of the Property and discharge of the Receiver to enact the Proposed Bylaw does not create certainty, it does precisely the opposite and creates uncertainty. If the Town is stayed from enacting the Proposed Bylaws now as the Receiver asserts, then interested purchasers of the Property have no certainty as to whether the Proposed Bylaws will actually be enacted. An interested purchaser could purchase the Property now with the WWASP and current land use designation of the unsubdivided 7.88 hectare portion of the Property in place, but following the Receiver's discharge, the Proposed Bylaws could then get enacted, changing what the purchaser thought they were buying. That is an uncertain situation for an interested purchaser. Conversely, if the Proposed

Bylaws are enacted now, the interested purchaser knows what they are getting in purchasing the Property and what they will need to do if they want to develop it in the future. Again, having the Proposed Bylaws enacted now creates certainty concerning the Property. It is forcing the Town to wait to enact the Proposed Bylaws in the manner suggested by the Receiver, that creates uncertainty.

D. The Powers of Municipalities

55. The Receiver's proposed interpretation of the stay provisions of the Receivership Order is an attempt to impose on the Town's statutory planning authority. To evaluate this, it is necessary to review the scope of municipal powers when it comes to planning decisions.

i. Statutory Planning Powers of Municipalities

56. Like all other Alberta municipalities, the Town is a creature of statute. It is created by the *MGA*, and it derives its authority primarily from that legislation.

57. Section 3 of the *MGA* describes the general purposes of municipalities as:

> (a) to provide good government,
>
> (a.1) to foster the well-being of the environment,
>
> (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or part of the municipality,
>
> (c) to develop and maintain safe and viable communities, and
>
> (d) to work collaboratively with neighbouring municipalities to plan, deliver and fund intermunicipal services.[35]

58. The Proposed Bylaws are planning decisions. Planning decisions, such as land use designations and area structure plans, are governed by Part 17 of the *MGA*. The purpose of that Part of the MGA is described in section 617 as follows:

> 617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted:

[35] *MGA*, *supra* note 7, s.3

(a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and

(b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,

without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.[36]

59. The Town is required by the *MGA* to pass a land use bylaw.[37] That land use bylaw must divide the land within the Town's boundaries into districts as Council considers appropriate and must prescribe uses for each district.[38]

60. When the Town adopts or changes planning bylaws, there are processes which it must follow. These include holding a public hearing and giving notice of that hearing in a newspaper and by mail.[39] The Town satisfied its obligations in this regard.[40]

61. In short, municipalities like the Town are required to pass a land use bylaw which allows for the orderly, economical and beneficial development of land. It is left up to Council to determine what is appropriate given the local context. The Courts have confirmed that municipalities have broad power when it comes to making planning decisions. The Alberta Court of Appeal recently commented about that in *Koebisch v Rocky View (County)* where it stated:

> [19] In Catalyst, the court affirmed that in the context of municipal bylaws, "reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" and that courts will not "overturn municipal bylaws unless they are found to be 'aberrant', 'overwhelming', or if 'no reasonable body' could have adopted them", paras 19, 20.
>
> [20] McLachlin CJ writing for the Court said, para 24:
>
> > It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The

[36] *Ibid*, s. 617.
[37] *Ibid*, s 640.
[38] *Ibid*, s.642.
[39] *Ibid*, s. 230, s. 606, s. 692.
[40] Gainer Affidavit, Exhibits "N" and "O".

> fact that wide deference is owed to municipal councils does not mean that they have carte blanche.[41]

62. These comments were made in a case involving a challenge to a municipality's land use bylaw amendments. This is not the subject of this application, and it brings up a separate issue.

63. The Receiver has made several allegations regarding the merits of the Proposed Bylaws, their timing, and the notice that was given which are irrelevant to the question in this application. If the Receiver, or any other party, wishes to challenge a municipal bylaw they can bring an application to the Alberta Court of Queen's Bench pursuant to section 536 of the *MGA*.[42] By raising these issues here, the Receiver is attempting to subvert the usual process established by the Legislature to challenge a municipal bylaw.

64. For now, the issue is whether the Receivership Order had the effect of suspending the Town's rights and duties to provide for the orderly planning of development within its boundaries.

65. Municipalities generally have the right to do this at any time, particularly as the planning context changes. When the planning context changes, so do landowner rights. Landowners have the right to participate in the process through the public hearing, which the Receiver had the opportunity to, and did, participate in having its legal counsel attend and make submissions,[43] and the right to challenge the bylaw pursuant to section 536 of the *MGA* if there are grounds for doing so, but they cannot generally stop planning bylaw amendments made for planning reasons. Existing development may be allowed to remain as non-conforming uses or non-conforming buildings,[44] but all new subdivision and development applications would be governed by the new planning framework in force at the time of the application as discussed previously in this Brief. Allowing the Receiver to prevent the planning framework from changing would be giving the Receiver greater rights than the debtor company landowner, AFPL, and would further impose on the Town's statutory authority.

---

[41] *Koebisch v Rocky View (County),* 2021 ABCA 265 [**TAB 7**], paragraphs 19 and 20.
[42] *MGA*, *supra* note 7, s. 536.
[43] Receiver's Report, para. 39.
[44] *MGA*, *supra* note 7, s.643.

E. No Cogent Reason to Interfere With the Town's Statutory Authority or Grant Rights to the Receiver That AFPL Does Not Have

66. As discussed above, the Receiver's proposed interpretation of the stay provisions of the Receivership Order have the effects of: 1) imposing on the Town's statutory authority to make planning policies and decisions concerning the lands within its boundaries; and 2) giving the Receiver rights that the debtor company and owner of the Property, AFPL, does not enjoy. This would greatly interfere with the rights of the Town and should not occur without some cogent reason. Furthermore, such an extreme infringement on the statutory authority of a level of government by an Order of the Court should be clearly outlined and described. It should not occur following what is, respectfully, a very liberal reading and interpretation of the Receivership Order.

67. In *Credit Suisse AG v. Great Basin Gold Ltd.*,[45] which is cited by the Receiver in its Brief, the Honourable Madam Justice Fitzpatrick of the British Columbia Supreme Court dealt with the issue of the scope of stay provisions of a receivership order and noted the following at paragraph 40:

> …a receivership is a fundamentally different type of proceeding and the objective to be achieved in each type of proceeding must be considered in terms of how third parties are to be affected. That is not to say that a stay of proceedings against third parties will never be appropriate in a receivership; rather the court must be cognizant as was stated in *Re Woodward's*, that **the stay power should be used cautiously, and there must be some cogent reason underlying the interference with the rights of those third parties** in either a CCAA or receivership proceeding.
>
> [Emphasis Added]

68. Justice Fitzpatrick went on to note at paragraph 66 that preventing actions of third parties was an "extraordinary remedy" and at paragraph 74 she noted that the Court should consider if the "salutary effect of the stay would have been achieved" without the need of prejudicing the third parties.

69. In the present matter, the reasons the Receiver assert for claiming that the stay provisions of the Receivership Order prevent the Town from enacting the Proposed Bylaws is because the Proposed Bylaws purportedly diminish the value of the Property, create uncertainty for interested purchasers of the Property, and impede the Receiver's ability to market and sell the Property.

---

[45] *Credit Suisse AG v. Great Basin Gold Ltd*., 2015 BSCS 1199 ("***Credit Suisse***"), Receiver's Authorities at TAB 2, at para. 40.

70. As outlined in the previous sections of this Brief, these reasons are not "cogent reasons" to justify the extraordinary remedy of impeding or delaying the Town's statutory authority to make planning and policy decisions concerning the Property. The Proposed Bylaws do not diminish the Property's purported value. The Receiver's arguments appear to be premised on the assertion that there is a great deal of value in the Property due to the significant time and resources purportedly expended by AFPL, through financing provided by ATB Financial, in developing the Property. Whatever time and resources were expended by AFPL, they did not result in any subdivision or material development of the Property that needs to be protected. The Property's value is due to its actual state as unsubdivided, undeveloped, bare land, not due to the Proposed Bylaws. Also, neither the WWASP, nor any of bylaws concerning the current designations of the Property, grant the owner of the Property a "right" to subdivide or develop the Property in any particular manner that requires protection.

71. As discussed above, since the Property was never actually subdivided, nor developed in any material fashion by AFPL, any new landowner will have to go through the time and expense of subdividing and developing the Property regardless of what area structure plans and land use designations are in place. Having definite area structure plans and land use designations concerning the Property in place now, as opposed to having the possibility that those may change as soon as the Receiver is discharged, creates more, not less, certainty for interested purchasers. Any purported delay in the marketing and sale of the Property is solely due to the Receiver's choices. There is nothing stopping the Receiver from marketing and selling the Property now, no matter what the area structure plans and land use designations concerning the Property are.

72. With respect to the Receiver's argument that the Town is a "Person" as defined in paragraph 4 of the Receivership Order that is stayed from altering or interfering with any right, license or permit in favour of AFPL except with the written consent of the Receiver pursuant to paragraph 11 of the Receivership Order, AFPL does not hold any right, license or permit to subdivide or develop the Property in any particular manner. As discussed above, neither the WWASP nor any applicable bylaws granted AFPL any rights without further approvals. Furthermore, there were no existing licenses or permits, or even any pending applications for any licenses of permits, held or made by AFPL regarding the subdivision or development of the Property at the time the Receivership Order was granted.

73. As noted above, the Courts have stated that a stay is an extraordinary remedy and should be used cautiously. This is illustrated by the fact that in the two cases concerning stay provisions of

receivership orders cited by the Receiver in its Brief, the Court found that the stay provisions did not apply in the manner asserted (in the case of *Credit Suisse*[46]*),* or that the stay should be lifted to allow a government body to exercise its statutory authority (in the case of *G.E. Canada*) where the Court stated the following at paragraph 8:

> There is no purpose to be served in delaying the inevitable. The Ministry has the statutory right to take the actions that it proposes and there is no indication that the passage of further time will alter its stated intentions.[47]

74. The Receiver's interpretation of the stay provisions of the Receivership Order is extremely broad and would create a dangerous precedent of impeding upon a government body's (a municipality's) statutory authority without there being any targeted language to that effect in the Receivership Order. Municipalities, under their statutory authority, routinely take actions and make policies that have the potential of having some effect on lands under receivership. The Receiver's interpretation risks frustrating a municipality's ability to perform the statutory duties assigned to it under the *MGA*. There is no cogent reason for the Receiver's proposed interpretation of the stay provisions of the Receivership Order to warrant such an unprecedented intrusion into a government body's statutory authority.

V. CONCLUSION AND RELIEF SOUGHT

75. The Town respectfully submits that the provisions of the Receivership Order do not stay the Town from enacting the Proposed Bylaws and this Honourable Court should issue an Order making a declaration to that effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of September, 2021

CARON & PARTNERS LLP

Per: _____

Jennifer Sykes / Dean Hutchison
Counsel for the Town of Okotoks

[46] *Ibid*.
[47] *Supra* note 18, at para. 8.

LIST OF AUTHORITIES AND DOCUMENTS

1. *Municipal Government Act*, R.S.A. 2000 c. M-26; sections 3, 230,536, 606, 617, 633, 637, 640, 642, 643, 654, 655, 657, 680, 687 and 692.

2. Fredrick A. Laux, Q.C. and Gwendolyn Stewart-Palmer, *Planning Law and Practice in Alberta*, 4th Edition, Edmonton, Juriliber Limited, 2019, at 5.6(3)(b).

3. *Love v. Flagstaff (County of) Subdivision and Development Appeal Board*, 2002 ABCA 292

4. *698114 Alberta Ltd. v Banff (Town of*), 2000 ABCA 237

5. *Pattison Outdoor Advertising Ltd v Calgary (Subdivision and Development Appeal Board)*, 2015 ABCA 317

6. *Bankruptcy of Rodney Allen Gardham*, 2007 MBQB 223

7. *Koebisch v Rocky View (County),* 2021 ABCA 265

Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of June 17, 2021

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(3) For the purposes of this Act, a meeting or part of a meeting is considered to be closed to the public if

(a) any members of the public are not permitted to attend the entire meeting or part of the meeting,

(b) the council, committee or other body holding the meeting instructs any member of the public to leave the meeting or part of the meeting, other than for improper conduct, or

(c) the council, committee or other body holding the meeting holds any discussions separate from the public during the meeting or part of the meeting.

RSA 2000 cM-26 s1;2005 c14 s2;2012 cE-0.3 s279;2013 c17 s2;2015 c8 s2;2016 c24 s4;2017 c13 s1(2);2017 c22 s38;2018 c6 s2;2019 c22 s10(2);2020 cL-2.3 s24(2)

Application of Act

2(1) This Act applies to all municipalities and improvement districts.

(2) If there is an inconsistency between this Act and

(a) repealed 1995 c24 s3,

(b) the *Parks Towns Act*, or

(c) a special Act forming a municipality,

the other Act prevails.

1994 cM-26.1 s2;1995 c24 s3

Indian reserves

2.1 No municipality, improvement district or special area constituted under the *Special Areas Act* includes land set apart as an Indian reserve.

2016 c24 s5;2017 c13 s2(2)

Part 1
Purposes, Powers and Capacity of Municipalities

Municipal purposes

3 The purposes of a municipality are

(a) to provide good government,

(a.1) to foster the well-being of the environment,

(b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality,

(c) to develop and maintain safe and viable communities, and

(d) to work collaboratively with neighbouring municipalities to plan, deliver and fund intermunicipal services.

RSA 2000 cM-26 s3;2016 c24 s6;2017 c13 s1(3)

Corporation

4 A municipality is a corporation.

1994 cM-26.1 s4

Powers, duties and functions

5 A municipality

(a) has the powers given to it by this and other enactments,

(b) has the duties that are imposed on it by this and other enactments and those that the municipality imposes on itself as a matter of policy, and

(c) has the functions that are described in this and other enactments.

1994 cM-26.1 s5

Natural person powers

6 A municipality has natural person powers, except to the extent that they are limited by this or any other enactment.

1994 cM-26.1 s6

Part 2
Bylaws

Division 1
General Jurisdiction

General jurisdiction to pass bylaws

7 A council may pass bylaws for municipal purposes respecting the following matters:

(a) the safety, health and welfare of people and the protection of people and property;

(b) people, activities and things in, on or near a public place or place that is open to the public;

(c) nuisances, including unsightly property;

(3) Every page of a petition must contain a statement that the personal information contained in the petition

(a) will not be disclosed to anyone except the chief administrative officer and the chief administrative officer's delegates, if any, and

(b) will not be used for any purpose other than validating the petition.

2015 c8 s30

Meetings with the Public

Advertising

227 If council calls a meeting with the public, notice of it must be advertised and everyone is entitled to attend it.

1994 cM-26.1 s227

Improper conduct

228 The person chairing a meeting with the public may expel a person from the meeting for improper conduct.

1994 cM-26.1 s228

Petition for meeting

229 If a council receives a sufficient petition requesting that council call a meeting with the public, the council must call a meeting with the public to discuss the matters stated in the petition and the meeting must be held no later than 30 days after the chief administrative officer declares the petition to be sufficient.

1994 cM-26.1 s229;1995 c24 s27

Public Hearings

When to hold public hearing

230(1) When this or another enactment requires council to hold a public hearing on a proposed bylaw or resolution, the public hearing must be held, unless another enactment specifies otherwise,

(a) before second reading of the bylaw, or

(b) before council votes on the resolution.

(2) When this or another enactment requires a public hearing to be held on a proposed bylaw or resolution, council must

(a) give notice of the public hearing in accordance with section 606, and

(b) conduct the public hearing during a regular or special council meeting.

(3) A council may by bylaw establish procedures for public hearings.

(4) In the public hearing, council

(a) must hear any person, group of persons, or person representing them, who claims to be affected by the proposed bylaw or resolution and who has complied with the procedures outlined by the council, and

(b) may hear any other person who wishes to make representations and whom the council agrees to hear.

(5) After considering the representations made to it about a proposed bylaw or resolution at the public hearing and after considering any other matter it considers appropriate, the council may

(a) pass the bylaw or resolution,

(b) make any amendment to the bylaw or resolution it considers necessary and proceed to pass it without further advertisement or hearing, or

(c) defeat the bylaw or resolution.

(6) The minutes of the council meeting during which the public hearing is held must record the public hearing to the extent directed by the council.

RSA 2000 cM-26 s230;2015 c8 s31

Petitions for Vote of the Electors — Advertised Bylaws and Resolutions

Petition for vote on advertised bylaws and resolutions

231(1) Except for a bylaw under section 22, a resolution under Part 15.1 or a bylaw or resolution under Part 17, after a proposed bylaw or resolution that is required to be advertised under this or another enactment has been advertised, the electors may submit a petition for a vote of the electors to determine whether the proposed bylaw or resolution should be passed.

(2) A separate petition must be filed with respect to each advertised bylaw or resolution even if a council advertises 2 or more bylaws or resolutions in a single advertisement.

(3) A petition under this section for a vote of the electors on a proposed bylaw required to be advertised by Part 8 is not sufficient unless it is filed with the chief administrative officer within 15 days

(i) a municipality that provides, through a department, branch or other part of the municipality, fire services for that municipality or on behalf of one or more municipal authorities;

(ii) a regional services commission that provides fire services within its service area;

(iii) a special areas board or the Minister, in the case of a special area or an improvement district, who provides fire services for the special area or improvement district or on behalf of one or more municipal authorities;

(iv) a corporation or other entity, other than a municipal authority or regional services commission, that provides fire services in one or more municipal authorities in accordance with an agreement with, or at the request of, the municipal authority or municipal authorities;

(b) "firefighter" means a member, including a volunteer, of a fire service organization whose functions, duties or powers are to carry out fire services, notwithstanding that the member may carry out other functions, duties or powers for the fire service organization;

(c) "fire services" means services related to the suppression or prevention of fires, rescue and emergency services and other activities of a firefighter.

(2) Fire service organizations, members of a regional services commission and firefighters are not liable for loss or damage caused by anything done or omitted to be done in good faith in the performance or intended performance of their functions, duties or powers in providing or carrying out fire services.

(3) Subsection (2) does not apply in the case of an accident involving a motor vehicle.

2009 c49 s2

Division 3
Challenging Bylaws and Resolutions

Application to the Court of Queen's Bench

536(1) A person may apply to the Court of Queen's Bench for

(a) a declaration that a bylaw or resolution is invalid, or

(b) an order requiring a council to amend or repeal a bylaw as a result of a vote by the electors on the amendment or repeal.

(2) A judge may require an applicant to provide security for costs in an amount and manner established by the judge.

RSA 2000 cM-26 s536;2009 c53 s119

Procedure

537 A person who wishes to have a bylaw or resolution declared invalid on the basis that

(a) the proceedings prior to the passing of the bylaw or resolution, or

(b) the manner of passing the bylaw or resolution

does not comply with this or any other enactment must make an application within 60 days after the bylaw or resolution is passed.

1994 cM-26.1 s537

Validity relating to public participation

538 Despite section 537, a person may apply at any time

(a) for a declaration that a bylaw is invalid if

(i) the bylaw is required to be put to a vote of electors and the vote has not been conducted or if the bylaw was not given the required approval in such a vote,

(ii) the bylaw is required to be advertised and it was not advertised, or

(iii) a public hearing is required to be held in respect of the bylaw and the public hearing was not held,

or

(b) for an order requiring a council to pass a bylaw as a result of a vote by the electors.

1994 cM-26.1 s538

Reasonableness

539 No bylaw or resolution may be challenged on the ground that it is unreasonable.

1994 cM-26.1 s539

Effect of councillor being disqualified

540 No bylaw, resolution or proceeding of a council and no resolution or proceeding of a council committee may be challenged on the ground that

(a) a person sitting or voting as a councillor

(e) respecting the content or form of anything required to be done by a municipality under this Act.

1994 cM-26.1 s604

Altering dates and time periods

605(1) When this Act, the regulations or a bylaw specifies a certain number of days or a day on or by which

(a) something is to be done, or

(b) certain proceedings are to be taken,

and the day that the thing is to be done or proceedings are to be taken is a holiday, the thing or proceedings must be done or taken on or by the next day that is not a holiday.

(2) When this Act or the regulations specify a certain number of days or a day on or by which

(a) something is to be done, or

(b) proceedings are to be taken,

the Minister may by order specify another number of days or another day for doing it or taking proceedings.

(3) An order under subsection (2) may be made at any time before or after the day that the thing is to be done or proceedings are to be taken and the time for doing any other thing that is determined in relation to that day is subject to a like delay.

(4) Anything done or proceedings taken within the number of days or by the day specified in an order under subsection (2) is as valid as if it had been done or taken within the number of days or by the day specified in this Act or the regulations.

1994 cM-26.1 s605

Requirements for advertising

606(1) The requirements of this section apply when this or another enactment requires a bylaw, resolution, meeting, public hearing or something else to be advertised by a municipality, unless this or another enactment specifies otherwise.

(2) Notice of the bylaw, resolution, meeting, public hearing or other thing must be

(a) published at least once a week for 2 consecutive weeks in at least one newspaper or other publication circulating in the area to which the proposed bylaw, resolution or other thing relates, or in which the meeting or hearing is to be held,

(b) mailed or delivered to every residence in the area to which the proposed bylaw, resolution or other thing relates, or in which the meeting or hearing is to be held, or

(c) given by a method provided for in a bylaw under section 606.1.

(3) A notice of a proposed bylaw must be advertised under subsection (2) before second reading.

(4) A notice of a proposed resolution must be advertised under subsection (2) before it is voted on by council.

(5) A notice of a meeting, public hearing or other thing must be advertised under subsection (2) at least 5 days before the meeting, public hearing or thing occurs.

(6) A notice must contain

(a) a statement of the general purpose of the proposed bylaw, resolution, meeting, public hearing or other thing,

(b) the address where a copy of the proposed bylaw, resolution or other thing, and any document relating to it or to the meeting or public hearing may be inspected,

(c) in the case of a bylaw or resolution, an outline of the procedure to be followed by anyone wishing to file a petition in respect of it, and

(d) in the case of a meeting or public hearing, the date, time and place where it will be held.

(7) A certificate of a designated officer certifying that something has been advertised in accordance with this section is proof, in the absence of evidence to the contrary, of the matters set out in the certificate.

(8) The certificate is admissible in evidence without proof of the appointment or signature of the person who signed the certificate.

RSA 2000 cM-26 s606;2015 c8 s56;2017 c13 s3

Advertisement bylaw

606.1(1) A council may by bylaw provide for one or more methods, which may include electronic means, for advertising proposed bylaws, resolutions, meetings, public hearings and other things referred to in section 606.

(2) Before making a bylaw under subsection (1), council must be satisfied that the method the bylaw would provide for is likely to

and includes the thing that is provided for public consumption, benefit, convenience or use;

(w) "public utility lot" means land required to be given under Division 8 for public utilities;

(x) "redevelopment area" means an area of land that is the subject of an area redevelopment plan;

(y) "Registrar" means Registrar as defined in the *Land Titles Act*;

(z) "reserve land" means environmental reserve, conservation reserve, municipal reserve, community services reserve, school reserve or municipal and school reserve;

(aa) "road" means road as defined in section 1(1), but does not include highway as defined in this Part;

(bb) "school board" means the board of trustees of a school division;

(cc) "school reserve" means the land designated as school reserve under Division 8;

(dd) "statutory plan" means an intermunicipal development plan, a municipal development plan, an area structure plan and an area redevelopment plan adopted by a municipality under Division 4;

(ee) "subdivision" means the division of a parcel of land by an instrument and "subdivide" has a corresponding meaning;

(ff) "subdivision authority" means a subdivision authority established under Division 3;

(gg) "subdivision and development appeal board" means a subdivision and development appeal board established under Division 3;

(hh) "subdivision and development regulations" mean regulations made under section 694(1).

RSA 2000 cM-26 s616;RSA 2000 c21(Supp) s3;2004 cH-8.5 s69; 2008 c37 s4;2012 cE-0.3 s279;2016 c24 s91;2019 c22 s10; 2020 c39 s10(3)

Purpose of this Part

617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted

(a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and

(b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,

without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

1995 c24 s95

Non-application of this Part

618(1) This Part and the regulations and bylaws under this Part do not apply when a development or a subdivision is effected only for the purpose of

(a) a highway or road,

(b) a well or battery within the meaning of the *Oil and Gas Conservation Act*, or

(c) a pipeline or an installation or structure incidental to the operation of a pipeline.

(2) This Part and the regulations and bylaws under this Part do not apply to

(a) the geographic area of a Metis settlement, or

(b) a designated area of Crown land in a municipal district or specialized municipality.

(2.1) This Part and the regulations and bylaws under this Part respecting development permits do not apply to a confined feeding operation or manure storage facility within the meaning of the *Agricultural Operation Practices Act* if the confined feeding operation or manure storage facility is the subject of an approval, registration or authorization under Part 2 of the *Agricultural Operation Practices Act*.

(3) The Minister responsible for the *Public Lands Act* may make regulations designating one or more areas of Crown land under that Minister's administration for the purposes of subsection (2)(b).

(4) The Lieutenant Governor in Council may, by regulation, exempt an action, person or thing from the application of all of or any provision of this Part or of the regulations or bylaws under this Part.

(f) must contain policies respecting the protection of agricultural operations, and

(g) may contain policies respecting the provision of conservation reserve in accordance with section 664.2(1)(a) to (d).

(4) Repealed 2020 c39 s10(19).

RSA 2000 cM-26 s632;RSA 2000 c21(Supp) s4;2008 c37 s11; 2015 c8 s62;2016 c24 s98;2017 c13 s2(16);2020 c39 s10(19)

Area Structure Plans

Area structure plan

633(1) For the purpose of providing a framework for subsequent subdivision and development of an area of land, a council may by bylaw adopt an area structure plan.

(2) An area structure plan

(a) must describe

(i) the sequence of development proposed for the area,

(ii) the land uses proposed for the area, either generally or with respect to specific parts of the area,

(iii) the density of population proposed for the area either generally or with respect to specific parts of the area, and

(iv) the general location of major transportation routes and public utilities,

and

(b) may contain any other matters, including matters relating to reserves, as the council considers necessary.

(3) Repealed 2020 c39 s10(20).

RSA 2000 cM-26 s633;2015 c8 s63;2017 c13 s1(56); 2020 c39 s10(20)

Area Redevelopment Plans

Area redevelopment plans

634(1) A council may

(a) designate an area of the municipality as a redevelopment area for the purpose of any or all of the following:

General Provisions

Statutory plan preparation

636(1) While preparing a statutory plan, a municipality must notify the following and provide a means for suggestions and representations to be made:

(a) any members of the public who may be affected by the plan;

(b) the school boards with jurisdiction in the area to which the plan preparation applies;

(c) in the case of a municipal development plan,

(i) any adjacent municipalities,

(ii) the Indian band of any adjacent Indian reserve, and

(iii) any adjacent Metis settlement;

(d) in the case of an area structure plan,

(i) where the land that is the subject of the plan is adjacent to another municipality, that municipality,

(ii) where the land that is the subject of the plan is within 1.6 kilometres of a provincial highway, the Minister responsible for the *Highways Development and Protection Act*, and

(iii) where the land that is the subject of the plan is adjacent to an Indian reserve or Metis settlement, the Indian band or Metis settlement.

(2) Subsection (1) does not apply to amendments to statutory plans.

RSA 2000 cM-26 s636;2008 c37 s11;2017 c13 s1(57); 2020 c39 s10(22)

Effect of plans

637 The adoption by a council of a statutory plan does not require the municipality to undertake any of the projects referred to in it.

1995 c24 s95

Consistency of plans

638(1) A municipal development plan must be consistent with any intermunicipal development plan in respect of land that is identified in both the municipal development plan and the intermunicipal development plan.

(c) a summary of the policies described in subsection (1) and of how they relate to each other and how they relate to any statutory plans and bylaws passed in accordance with this Part;

(d) any documents incorporated by reference in any bylaws passed in accordance with this Part.

(3) A development authority, subdivision authority, subdivision and development appeal board, the Land and Property Rights Tribunal or a court shall not have regard to any policy approved by a council or by a person or body referred to in subsection (1)(b) unless the policy is set out in the list prepared and maintained under subsection (1) and published in accordance with subsection (2).

(4) Repealed 2020 c39 s10(25).

2016 c24 s99;2020 cL-2.3 s24(41);2020 c39 s10(25)

Division 5
Land Use

639 Repealed 2020 c39 s10(26).

639.1 Repealed 2020 c39 s10(27).

Land use bylaw

640(1) Every municipality must pass a land use bylaw.

(1.1) A land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality, including, without limitation, by

(a) imposing design standards,

(b) determining population density,

(c) regulating the development of buildings,

(d) providing for the protection of agricultural land, and

(e) providing for any other matter council considers necessary to regulate land use within the municipality.

(2) A land use bylaw

(a) must divide the municipality into districts of the number and area the council considers appropriate;

(b) must, unless the district is designated as a direct control district pursuant to section 641, prescribe with respect to each district,

(i) the one or more uses of land or buildings that are permitted in the district, with or without conditions, or

(ii) the one or more uses of land or buildings that may be permitted in the district at the discretion of the development authority, with or without conditions,

or both;

(c) must establish a method of making decisions on applications for development permits and issuing development permits for any development, including provision for

(i) the types of development permit that may be issued,

(ii) applying for a development permit,

(iii) processing an application for, or issuing, cancelling, suspending or refusing to issue, a development permit,

(iv) the conditions that are to be attached, or that the development authority may attach, to a development permit, either generally or with respect to a specific type of permit,

(v) how long any type of development permit remains in effect,

(vi) the discretion that the development authority may exercise with respect to development permits, and

(vii) any other matters necessary to regulate and control the issue of development permits that to the council appear necessary;

(d) must provide for how and to whom notice of the issuance of a development permit is to be given;

(e) must establish the number of dwelling units permitted on a parcel of land.

(3) A land use bylaw may identify additional land as adjacent land for the purpose of notification under sections 653, 679, 680 and 692.

(4) Repealed 2020 c39 s10(28).

(5) A land use bylaw may provide that when an application for a development permit or change in land use designation is refused another application with respect to the same lot

(a) for a development permit for the same or a similar use, or

(b) for a change in land use designation

may not be made by the same or any other applicant until the time stated in the land use bylaw has expired.

(6) A land use bylaw may authorize a development authority to decide on an application for a development permit even though the proposed development does not comply with the land use bylaw or is a non-conforming building if, in the opinion of the development authority,

(a) the proposed development would not

(i) unduly interfere with the amenities of the neighbourhood, or

(ii) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,

and

(b) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

(7) A land use bylaw must be consistent with the applicable requirements of the regulations under the *Gaming, Liquor and Cannabis Act* respecting the location of premises described in a cannabis licence and distances between those premises and other premises.

(8) Despite this section or any other provision of this Act, the authority to pass a land use bylaw does not include the authority to pass a bylaw in respect of the use of a building or part of a building for residential purposes that has the effect of distinguishing between any individuals on the basis of whether they are related or unrelated to each other.

(9) The Minister may by order direct a municipality to amend its land use bylaw in respect of the use of a building or part of a building for residential purposes if the land use bylaw has the effect of distinguishing between senior citizens on the basis of whether they are related or unrelated to each other.

RSA 2000 cM-26 s640;2016 c24 s100;2017 c21 s28;
2020 c39 s10(28)

640.1 Repealed 2020 c39 s10(29).

Transitional — alternative time period in land use bylaw

640.2(1) In this section, "alternative time period" means an alternative time period authorized by section 640.1 of this Act as it read immediately before the coming into force of this section.

(2) Where, on the coming into force of this section, a land use bylaw providing for an alternative time period is in force, the provisions of the bylaw providing for the alternative time period continue to have effect for a period of 6 months beginning on the day this section comes into force.

2020 c39 s10(30)

Designation of direct control districts

641(1) The council of a municipality that has adopted a municipal development plan, if it wishes to exercise particular control over the use and development of land or buildings within an area of the municipality, may in its land use bylaw designate that area as a direct control district.

(2) If a direct control district is designated in a land use bylaw, the council may, subject to any applicable statutory plan, regulate and control the use or development of land or buildings in the district in any manner it considers necessary.

(3) In respect of a direct control district, the council may decide on a development permit application or may delegate the decision to a development authority with directions that it considers appropriate.

(4) Repealed 2015 c8 s66.

RSA 2000 cM-26 s641;2015 c8 s66

Permitted and discretionary uses

642(1) When a person applies for a development permit in respect of a development provided for by a land use bylaw pursuant to section 640(2)(b)(i), the development authority must, if the application otherwise conforms to the land use bylaw and is complete in accordance with section 683.1, issue a development permit with or without conditions as provided for in the land use bylaw.

(2) When a person applies for a development permit in respect of a development that may, in the discretion of a development authority, be permitted pursuant to section 640(2)(b)(ii), the development authority may, if the application is complete in accordance with section 683.1, issue a development permit with or without conditions as provided for in the land use bylaw.

(3) A decision of a development authority on an application for a development permit must be in writing, and a copy of the decision, together with a written notice specifying the date on which the written decision was given and containing any other information required by the regulations, must be given or sent to the applicant on the same day the written decision is given.

(4) If a development authority refuses an application for a development permit, the development authority must issue to the applicant a notice, in the form and manner provided for in the land use bylaw, that the application has been refused and provide the reasons for the refusal.

(5) Despite subsections (1) and (2), a development authority must not issue a development permit if the proposed development does not comply with the applicable requirements of regulations under the *Gaming, Liquor and Cannabis Act* respecting the location of premises described in a cannabis licence and distances between those premises and other premises.

RSA 2000 cM-26 s642;2016 cs24 s102;2017 c13 s1(58);
2017 c21 s28;2018 c11 s13;2020 c39 s10(31)

Non-conforming use and non-conforming buildings

643(1) If a development permit has been issued on or before the day on which a land use bylaw or a land use amendment bylaw comes into force in a municipality and the bylaw would make the development in respect of which the permit was issued a non-conforming use or non-conforming building, the development permit continues in effect in spite of the coming into force of the bylaw.

(2) A non-conforming use of land or a building may be continued but if that use is discontinued for a period of 6 consecutive months or more, any future use of the land or building must conform with the land use bylaw then in effect.

(3) A non-conforming use of part of a building may be extended throughout the building but the building, whether or not it is a non-conforming building, may not be enlarged or added to and no structural alterations may be made to it or in it.

(4) A non-conforming use of part of a lot may not be extended or transferred in whole or in part to any other part of the lot and no additional buildings may be constructed on the lot while the non-conforming use continues.

(5) A non-conforming building may continue to be used but the building may not be enlarged, added to, rebuilt or structurally altered except

(a) to make it a conforming building,

(b) for routine maintenance of the building, if the development authority considers it necessary, or

(c) in accordance with a land use bylaw that provides minor variance powers to the development authority for the purposes of this section.

(6) If a non-conforming building is damaged or destroyed to the extent of more than 75% of the value of the building above its foundation, the building may not be repaired or rebuilt except in accordance with the land use bylaw.

(7) The land use or the use of a building is not affected by a change of ownership or tenancy of the land or building.

1995 c24 s95

Acquisition of land designated for public use

644(1) If land is designated under a land use bylaw for use or intended use as a municipal public building, school facility, park or recreation facility and the municipality does not own the land, the municipality must within 6 months from the date the land is designated do one of the following:

(a) acquire the land or require the land to be provided as reserve land;

(b) commence proceedings to acquire the land or to require the land to be provided as reserve land and then acquire that land within a reasonable time;

(c) amend the land use bylaw to designate the land for another use or intended use.

(2) Subsection (1) does not apply if the Crown in right of Canada, the Crown in right of Alberta, an irrigation district, a board of a drainage district or a local authority, within 6 months from the date the land is designated under that subsection,

(a) acquires that land, or

(b) commences proceedings to acquire that land or requires that land to be provided as reserve land and then acquires it within a reasonable time.

(3) Subsection (1) does not apply to land designated by the municipality as conservation reserve.

RSA 2000 cM-26 s644;2016 cs24 s103

(ii) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,

and

(b) the proposed subdivision conforms with the use prescribed for that land in the land use bylaw.

(3) A subdivision authority may approve or refuse an application for subdivision approval.

RSA 2000 cM-26 s654;2016 c24 s109;2018 c11 s13

Conditions of subdivision approval

655(1) A subdivision authority may impose the following conditions or any other conditions permitted to be imposed by the subdivision and development regulations on a subdivision approval issued by it:

(a) any conditions to ensure that this Part, including section 618.3(1), and the statutory plans and land use bylaws and the regulations under this Part affecting the land proposed to be subdivided are complied with;

(b) a condition that the applicant enter into an agreement with the municipality to do any or all of the following:

(i) to construct or pay for the construction of a road required to give access to the subdivision;

(ii) to construct or pay for the construction of

(A) a pedestrian walkway system to serve the subdivision, or

(B) pedestrian walkways to connect the pedestrian walkway system serving the subdivision with a pedestrian walkway system that serves or is proposed to serve an adjacent subdivision,

or both;

(iii) to install or pay for the installation of a public utility described in section 616(v)(i) to (ix) that is necessary to serve the subdivision, whether or not the public utility is, or will be, located on the land that is the subject of the subdivision approval;

(iv) to construct or pay for the construction of

(A) off-street or other parking facilities, and

(B) loading and unloading facilities;

(v) to pay an off-site levy or redevelopment levy imposed by bylaw;

(vi) to give security to ensure that the terms of the agreement under this section are carried out.

(2) A municipality may register a caveat under the *Land Titles Act* in respect of an agreement under subsection (1)(b) against the certificate of title for the parcel of land that is the subject of the subdivision.

(3) If a municipality registers a caveat under subsection (2), the municipality must discharge the caveat when the agreement has been complied with.

(4) Where a condition on a subdivision approval has, prior to the coming into force of this subsection, required the applicant to install a public utility or pay an amount for a public utility referred to in subsection (1)(b)(iii), that condition is deemed to have been validly imposed, whether or not the public utility was located on the land that was the subject of the subdivision approval.

RSA 2000 cM-26 s655;2009 cA-26.8 s83;2015 c8 s71; 2020 c39 s10(38)

Decision

656(1) A decision of a subdivision authority must be given in writing to the applicant and to the Government departments, persons and local authorities to which the subdivision authority is required by the subdivision and development regulations to give a copy of the application.

(2) A decision of a subdivision authority must state

(a) whether an appeal lies to a subdivision and development appeal board or to the Land and Property Rights Tribunal, and

(b) if an application for subdivision approval is refused, the reasons for the refusal.

(3) If an application for subdivision approval is refused, the subdivision authority may refuse to accept for consideration, with respect to the same land or part of the same land, a further application for subdivision approval submitted to it within the 6-month period after the date of the subdivision authority's decision to refuse the application.

(4) Subsection (3) does not apply in the case of an application that was deemed to be refused under section 653.1(8).

RSA 2000 cM-26 s656;2016 c24 s111;2018 c11 s13; 2020 cL-2.3 s24(41)

Subdivision registration

657(1) An applicant for subdivision approval must submit to the subdivision authority the plan of subdivision or other instrument that effects the subdivision within one year from the latest of the following dates:

(a) the date on which the subdivision approval is given to the application;

(b) if there is an appeal to the subdivision and development appeal board or the Land and Property Rights Tribunal, the date of the decision of the appeal board or the Tribunal, as the case may be, or the date on which the appeal is discontinued;

(c) if there is an appeal to the Court of Appeal under section 688, the date on which the judgment of the Court is entered or the date on which the appeal is discontinued.

(2) On being satisfied that a plan of subdivision or other instrument complies with a subdivision approval and that any conditions imposed have been met, the subdivision authority must endorse the plan or other instrument in accordance with the subdivision and development regulations.

(3) On being satisfied that a plan of subdivision or other instrument complies with a subdivision approval but conditions to which the approval is subject have not been met, a subdivision authority may endorse the plan or other instrument in accordance with the subdivision and development regulations if the subdivision authority is satisfied that the conditions will be met.

(4) If the plan of subdivision or other instrument is not submitted to the subdivision authority within the time prescribed by subsection (1) or any longer period authorized by the council, the subdivision approval is void.

(5) If the plan of subdivision or other instrument is not registered in a land titles office within one year after the date on which it is endorsed pursuant to this section or within the extended period prescribed under subsection (6), the subdivision approval of the plan or instrument and the endorsement are void and the plan or instrument may not be accepted by a Registrar for registration.

(6) The council may grant one or more extensions of

(a) the one-year period referred to in subsection (1), or

(b) the one-year period referred to in subsection (5),

whether or not the time period under those subsections has expired.

RSA 2000 cM-26 s657;2020 cL-2.3 s24(33);2020 c39 s10(39)

Cancellation of plan of subdivision

658(1) On the application of one or more owners of a parcel of land in a plan of subdivision, a council may by bylaw order the plan cancelled, in whole or in part.

(2) A council may pass a bylaw under subsection (1) only with the consent of

(a) the owners of the parcel of land in the plan of subdivision,

(b) every person shown on the certificate of title of the land in the plan of subdivision as having an estate or interest in it, and

(c) the Crown in right of Alberta, if the plan of subdivision shows a highway or road or other right of way vested in the Crown for which no certificate of title has been issued.

(3) A plan cancellation may not be effected only or primarily for the purpose of disposing of reserves.

(3.1) If all of a plan is cancelled, deferred reserve caveats and environmental reserve easements are also cancelled.

(4) If all reserve land has been cancelled from a plan of subdivision, the resulting parcel of land, if it is subsequently subdivided, is subject to Division 8.

(5) If a plan is cancelled in part, a deferred reserve caveat may be placed against the consolidated certificate of title reflecting any reserve land that was cancelled and that will be owing if the parcel is subsequently subdivided.

RSA 2000 cM-26 s658;2016 c24 s112

Collection of taxes

659 When a plan of subdivision or part of it has been cancelled, all taxes, assessments or rates in arrears or due on the separate lots or blocks within the area of which the plan has been cancelled become taxes, assessments or rates on or in respect of the area, and all the remedies for the enforcement and collection of taxes, assessments and rates formerly applicable for the recovery of the taxes, assessments or rates on the separate lots or blocks apply as if

(a) the applicant for subdivision approval,

(b) the subdivision authority that made the decision,

(c) if land that is the subject of the application is adjacent to the boundaries of another municipality, that municipality,

(d) any school board to whom the application was referred, and

(e) repealed 1996 c30 s66,

(f) every Government department that was given a copy of the application pursuant to the subdivision and development regulations.

(2) The board hearing an appeal under section 678 must give at least 5 days' notice of the hearing in accordance with subsection (3) to owners of adjacent land.

(3) A notice under subsection (2) must be given in accordance with section 653(4.2).

(3.1) Subsections (1)(c), (d) and (f) and (2) do not apply to an appeal of the deemed refusal of an application under section 653.1(8).

(4) For the purposes of this section, "owner" has the same meaning as in section 653.

RSA 2000 cM-26 s679;2008 c37 s10;2016 c24 s122; 2020 c39 s10(47)

Hearing and decision

680(1) The board hearing an appeal under section 678 is not required to hear from any person or entity other than

(a) a person or entity that was notified pursuant to section 679(1), and

(b) each owner of adjacent land to the land that is the subject of the appeal,

or a person acting on any of those persons' behalf.

(1.1) For the purposes of subsection (1), "owner" has the same meaning as in section 653.

(2) In determining an appeal, the board hearing the appeal

(a) repealed 2020 c39 s10(48);

(a.1) must have regard to any statutory plan;

(b) must conform with the uses of land referred to in a land use bylaw;

(c) must be consistent with the land use policies;

(d) must have regard to but is not bound by the subdivision and development regulations;

(e) may confirm, revoke or vary the approval or decision or any condition imposed by the subdivision authority or make or substitute an approval, decision or condition of its own;

(f) may, in addition to the other powers it has, exercise the same power as a subdivision authority is permitted to exercise pursuant to this Part or the regulations or bylaws under this Part.

(2.1) In the case of an appeal of the deemed refusal of an application under section 653.1(8), the board must determine whether the documents and information that the applicant provided met the requirements of section 653.1(2).

(2.2) Subsection (1)(b) does not apply to an appeal of the deemed refusal of an application under section 653.1(8).

(3) A subdivision and development appeal board hearing an appeal under section 678 must hold the hearing within 30 days after receiving a notice of appeal and give a written decision together with the reasons for the decision within 15 days after concluding the hearing.

(4) The Land and Property Rights Tribunal hearing an appeal under section 678 must hold the hearing within 60 days after receiving a notice of appeal and give a written decision together with the reasons for the decision within 15 days after concluding the hearing.

RSA 2000 cM-26 s680;2009 cA-26.8 s83;2016 c24 s123;
2020 cL-2.3 s24(41);2020 c39 s10(48)

Failure to make decision

681(1) If a subdivision authority fails or refuses to make a decision on an application for subdivision approval within the time prescribed by the subdivision and development regulations, the applicant may, within 14 days after the expiration of the time prescribed,

(a) treat the application as refused and appeal it in accordance with section 678, or

(2) The board hearing an appeal referred to in subsection (1) must hold an appeal hearing within 30 days after receipt of a notice of appeal.

(3) The board hearing an appeal referred to in subsection (1) must give at least 5 days' notice in writing of the hearing

(a) to the appellant,

(b) to the development authority whose order, decision or development permit is the subject of the appeal, and

(c) to those owners required to be notified under the land use bylaw and any other person that the subdivision and development appeal board considers to be affected by the appeal and should be notified.

(4) The board hearing an appeal referred to in subsection (1) must make available for public inspection before the commencement of the hearing all relevant documents and materials respecting the appeal, including

(a) the application for the development permit, the decision and the notice of appeal, or

(b) the order under section 645.

(4.1) Subsections (1)(b) and (3)(c) do not apply to an appeal of a deemed refusal under section 683.1(8).

(5) In subsection (3), "owner" means the person shown as the owner of land on the assessment roll prepared under Part 9.

RSA 2000 cM-26 s686;2016 c24 s128;2017 c13 s1(65); 2018 c11 s13;2020 c39 s10(51)

Hearing and decision

687(1) At a hearing under section 686, the board hearing the appeal must hear

(a) the appellant or any person acting on behalf of the appellant,

(b) the development authority from whose order, decision or development permit the appeal is made, or a person acting on behalf of the development authority,

(c) any other person who was given notice of the hearing and who wishes to be heard, or a person acting on behalf of that person, and

(d) any other person who claims to be affected by the order, decision or permit and that the subdivision and development appeal board agrees to hear, or a person acting on behalf of that person.

(2) The board hearing the appeal referred to in subsection (1) must give its decision in writing together with reasons for the decision within 15 days after concluding the hearing.

(3) In determining an appeal, the board hearing the appeal referred to in subsection **(1)**

(a) repealed 2020 c39 s10(52);

(a.1) must comply with any applicable land use policies;

(a.2) subject to section 638, must comply with any applicable statutory plans;

(a.3) subject to clauses (a.4) and (d), must comply with any land use bylaw in effect;

(a.4) must comply with the applicable requirements of the regulations under the *Gaming, Liquor and Cannabis Act* respecting the location of premises described in a cannabis licence and distances between those premises and other premises;

(b) must have regard to but is not bound by the subdivision and development regulations;

(c) may confirm, revoke or vary the order, decision or development permit or any condition attached to any of them or make or substitute an order, decision or permit of its own;

(d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,

(i) the proposed development would not

(A) unduly interfere with the amenities of the neighbourhood, or

(B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,

and

(ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

(4) In the case of an appeal of the deemed refusal of an application under section 683.1(8), the board must determine whether the documents and information that the applicant provided met the requirements of section 683.1(2).

RSA 2000 cM-26 s687;2009 cA-26.8 s83;2015 c8 s74; 2017 c21 s28;2018 c11 s13;2020 c39 s10(52)

Court of Appeal

Law, jurisdiction appeals

688(1) An appeal lies to the Court of Appeal on a question of law or jurisdiction with respect to

(a) a decision of the subdivision and development appeal board, and

(b) a decision made by the Land and Property Rights Tribunal

(i) under section 619 respecting whether a proposed statutory plan or land use bylaw amendment is consistent with a licence, permit, approval or other authorization granted under that section,

(ii) under section 648.1 respecting the imposition of an off-site levy or the amount of the levy,

(iii) under section 678(2)(a) respecting a decision of a subdivision authority,

(iii.1) under section 685(2.1)(a) respecting a decision of a development authority, or

(iv) under section 690 respecting an intermunicipal dispute.

(2) An application for permission to appeal must be filed and served within 30 days after the issue of the decision sought to be appealed, and notice of the application for permission to appeal must be given to

(a) the Land and Property Rights Tribunal or the subdivision and development appeal board, as the case may be, and

(b) any other persons that the judge directs.

(2.1) If an applicant makes a written request for materials to the Land and Property Rights Tribunal or the subdivision and

Division 12
Bylaws, Regulations

Planning bylaws

692(1) Before giving second reading to

(a) a proposed bylaw to adopt an intermunicipal development plan,

(b) a proposed bylaw to adopt a municipal development plan,

(c) a proposed bylaw to adopt an area structure plan,

(d) a proposed bylaw to adopt an area redevelopment plan,

(e) a proposed land use bylaw, or

(f) a proposed bylaw amending a statutory plan or land use bylaw referred to in clauses (a) to (e),

a council must hold a public hearing with respect to the proposed bylaw in accordance with section 230 after giving notice of it in accordance with section 606.

(2) Despite subsection (1), if a proposed development relates to more than one proposed bylaw referred to in subsection (1), the council may hold a single public hearing.

(3) Despite subsection (1), in the case of a public hearing for a proposed bylaw adopting or amending an intermunicipal development plan,

(a) councils may hold a joint public hearing to which section 184 does not apply, and

(b) municipalities may act jointly to satisfy the advertising requirements of section 606.

(4) In the case of an amendment to a land use bylaw to change the district designation of a parcel of land, the municipality must, in addition to the requirements of subsection (1),

(a) include in the notice described in section 606(2)

(i) the municipal address, if any, and the legal address of the parcel of land, and

(ii) a map showing the location of the parcel of land,

(b) give written notice containing the information described in clause (a) and in section 606(6) to the assessed owner of that parcel of land at the name and address shown on the assessment roll of the municipality, and

(c) give a written notice containing the information described in clause (a) and in section 606(6) to each owner of adjacent land at the name and address shown for each owner on the assessment roll of the municipality.

(5) If the land referred to in subsection (4)(c) is in another municipality, the written notice must be given to that municipality and to each owner of adjacent land at the name and address shown for each owner on the tax roll of that municipality.

(6) Despite subsection (1), a bylaw referred to in subsection (1) may be amended without giving notice or holding a public hearing if the amendment corrects clerical, technical, grammatical or typographical errors and does not materially affect the bylaw in principle or substance.

(6.1) Subsection (1)(f) does not apply in respect of a proposed bylaw amending a statutory plan or land use bylaw to specify the purposes of a community services reserve.

(7) In this section,

(a) "adjacent land" means land that is contiguous to the parcel of land that is being redesignated and includes

(i) land that would be contiguous if not for a highway, road, river or stream, and

(ii) any other land identified in the land use bylaw as adjacent land for the purpose of notifications under this section;

(b) "owner" means the person shown as the owner of land on the assessment roll prepared under Part 9.

(8) If an ALSA regional plan requires a council to pass a bylaw referred to in this section, the council must

(a) consider whether, in view of the requirement in the ALSA regional plan, consultation is necessary, desirable or beneficial, and

(b) decide whether or not to proceed with consultation.

(9) If a council decides under subsection (8) that consultation is neither necessary nor desirable or would not be beneficial, subsections (1) to (7) do not apply to the council in respect of the bylaw concerned.

RSA 2000 cM-26 s692;2008 c37 s9;2009 cA-26.8 s83

Airport vicinity regulations

693(1) The Minister may make regulations

(a) establishing airport vicinity protection areas surrounding airports;

(b) controlling, regulating or prohibiting any use and development of land within an airport vicinity protection area.

(2) Unless the contrary is expressed in regulations made under subsection (1), those regulations

(a) operate despite any statutory plan, land use bylaw or other regulations under this Part, and

(b) are binding on any subdivision authority, development authority and subdivision and development appeal board and the Land and Property Rights Tribunal.

(3) If a municipality is affected by a regulation under subsection (1), the municipality must amend the statutory plan relating to that area and its land use bylaw to conform with the regulation.

(4) Section 692 does not apply to an amendment pursuant to subsection (3).

(5) A regulation under subsection (1) may apply generally or specifically in Alberta.

RSA 2000 cM-26 s693;2020 cL-2.3 s24(41);2020 c39 s10(55)

Development in floodways

693.1(1) The Lieutenant Governor in Council may make regulations

(a) controlling, regulating or prohibiting any use or development of land that is located in a floodway within a municipal authority, including, without limitation, regulations specifying the types of developments that are authorized in a floodway;

(b) exempting a municipal authority or class of municipal authorities from the application of all or part of this section or the regulations made under this subsection, or both;

apply the plan than are the courts. It is questionable whether these qualities in fact exist in most planning agencies, which are frequently composed of persons who are neither planners nor lawyers. Why should such persons' opinions on the meaning of a provision of a plan be given a higher status than an appeal court gives, for example, to the views of a trial judge on the meaning of a term of a contract?[64] However, where the interpretation of a plan by the planning agency is concerned with procedures prescribed in the plan it has been held that the standard of review is correctness.[65]

All the above said, it now seems to be settled law that reasonableness is the standard of review of a planning agency's interpretation of a statutory plan.[66]

§5.6(3)(b) Plans State Goals and Do Not Regulate

Perhaps a more principled way of achieving the same result that occurs when a court defers to the interpretation of planning agencies is for a court to emphasize the nature of the document being interpreted, rather than the nature of the interpreting agency. It should be recognized that an instrument such as a municipal development plan is intended as a broad statement of general objectives rather than as one setting binding rules. For that reason it is open to a reviewing court to conclude that a particular development project is not illegal merely because it is at variance with a municipal development plan. In this way the courts may allow a considerable amount of freedom

64 The Supreme Court of Canada has, for over a decade, wrestled with the extent of deference courts ought to accord to the interpretation of legislation by administrative tribunals generally and why. For a discussion of the rationale for judicial restraint, see e.g., *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, 2016 SCC 47, [2016] 2 R.C.S. 293, [2016] S.C.J. No. 47, [2016] A.C.S. no 47, *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, [2008] 1 R.C.S. 190, [2008] S.C.J. No. 9, [2008] A.C.S. no 9; *Cañada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 226 N.R. 201, 160 D.L.R. (4th) 193, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, amended [1998] 1 S.C.R. 1222, 11 Admin. L.R. (3d) 130; *Pezim v. British Columbia (Superintendent of Brokers)* (1994), 4 C.C.L.S. 117, [1994] 7 W.W.R. 1, 92 B.C.L.R. (2d) 145, 14 B.L.R. (2d) 217, 22 Admin. L.R. (2d) 1, 114 D.L.R. (4th) 385, [1994] 2 S.C.R. 557, 168 N.R. 321, 46 B.C.A.C. 1, 75 W.A.C. 1; *C.J.A., Local 579 v. Bradco Construction Ltd.* (1993), 12 Admin. L.R. (2d) 165, 93 C.L.L.C. 14,033, 153 N.R. 81, 102 D.L.R. (4th) 402, [1993] 2 S.C.R. 316, 106 Nfld. & P.E.I.R. 140, 334 A.P.R. 140 [Nfld.]; *National Corn Growers Assn. v. Canada (Import Tribunal)*, 45 Admin. L.R. 161, 114 N.R. 81, 74 D.L.R. (4th) 449, [1990] 2 S.C.R. 1324, 4 T.T.R. 267 (sub nom. American Farm Bureau Federation v. Canadian Import Tribunal) 3 T.C.T. 530 (S.C.C.); and *C.A.I.M.A.W., Local 14 v. Paccar of Canada Ltd.* (1989), 40 Admin. L.R. 181, (sub nom. C.A.I.M.A.W. v. Paccar of Canada Ltd.), [1989] 6 W.W.R. 673, [1989] 2 S.C.R. 983, 40 B.C.L.R. (2d) 1, 62 D.L.R. (4th) 437, 89 C.L.L.C. 14,050, 102 N.R. 1.

65 *Argyll Community League (1978) v. Edmonton (City)*, [2009] A.J. No. 85, 2009 ABQB 66. In this case the issue was whether, in approving a development on land covered by an area redevelopment plan, the city council had followed the requirement in the plan that no major public facilities were to be allowed in the plan area unless the development was "deemed essential" by council. There was no evidence before the reviewing court that council even addressed its mind to the matter. Consequently, it was held that a motion approving the development was invalid.

66 *Lor-al Springs Ltd. v. Ponoka County Subdivision and Development Appeal Board*, 2000 ABCA 299, 271 A.R. 149 (¶'s 7-8) and *Mountain View (County) v. Mountain View (Subdivision and Development Appeal*

to planning agencies while remaining the sole and final arbiter of a plan's significance.[67] This approach, however, must not be taken too far lest statutory plans be ineffectualized.

Consistent with this approach, the courts have said that statutory plans are policy documents that set out "proposals"[68] for future development in a municipality and are not intended to regulate in any definitive way what can be done at the present time. They are subject to review and modification as circumstances change. This is to be contrasted with a land use bylaw, which sets forth the development rules and regulations that must be adhered to during the currency of the bylaw. A land use bylaw serves to implement the proposals set out in the plan. It is based on fact, not hypothesis. There is no obligation on a municipal council to immediately implement, through the land use bylaw or otherwise, everything that is proposed in its statutory plans nor, for practical reasons, can there be one. Thus, the plans and the bylaw occupy a separate place and function in the scheme of the Act. It follows then, for purposes of assessing development rights, that the primary document to be scrutinized is the land use bylaw and not the statutory plan.

Viewed superficially, this approach might be construed as turning the planning hierarchy upside down. But that is not the case. Those parts of a statutory plan characterized as goals and objectives, but which are not yet implemented in the land use bylaw, still stand as future aspirations. They serve as a guide for planning administrators and are to be given effect where the land use bylaw does not prescribe a different course of action through its implementive role. However, in those instances where a statutory plan speaks to the present and employs unequivocal mandatory language, it may well be that conflicting provisions in the land use bylaw are *ultra vires*.

In one of the leading cases dealing with Alberta's municipal planning regime, *Hartel Holdings Ltd. v. Calgary (City)*,[69] the operative municipal

67 This approach was used in *Rogers v. Saanich (District)* (1983), 22 M.P.L.R. 1, 146 D.L.R. (3d) 475 (B.C.S.C.) and *Eddington v. Surrey (District)* (1984), 26 M.P.L.R. 229 (B.C.S.C.). It was also hinted at in *Hartel Holdings Ltd. v. Calgary (City)* (1982), 18 Alta. L.R. (2d) 1, 17 M.P.L.R. 87, 131 D.L.R. (3d) 723, 36 A.R. 76 (C.A), affirmed [1984] 4 W.W.R. 193, 31 Alta. L.R. (2d) 97, 53 A.R. 175, 8 D.L.R. (4th) 321, [1984] 1 S.C.R. 337, 25 M.P.L.R. 245, 8 Admin. L.R. 231, 53 N.R. 149. More lately, see also *Heritage Trust of Nova Scotia v. Nova Scotia (Utility & Review Board)* (1994), 20 M.P.L.R. (2d) 84, 128 N.S.R. (2d) 5, 359 A.P.R. 5 (C.A.), leave to appeal to S.C.C. refused (1994), 23 M.P.L.R. (2d) 313n, 136 N.S.R. (2d) 80n, 388 A.P.R. 80n, 178 N.R. 393n (S.C.C.) and *Brown v. Sturgeon County*, [2001] A.J. No. 1439, 2001 A.B.Q.B. 920, (2001) 302 A.R. 166, (2001) 24 M.P.L.R. (3d) 61.

68 Section 632 (municipal development plans), s. 633 (area structure plans) and s. 634-5 (area redevelopment plans) employ the words "proposed" and "proposals". This is to be contrasted with s. 640(2), which requires a land use bylaw to "prescribe" permitted and discretionary uses of land or buildings in a given district, and with s. 640(4), which authorizes a bylaw to "provide for" site requirements, densities, building size and the like.

69 *Hartel Holdings Ltd. v. Calgary (City)* (1982), 18 Alta. L.R. (2d) 1, 17 M.P.L.R. 87, 131 D.L.R. (3d) 723, 36 A.R. 76 (C.A), affirmed [1984] 4 W.W.R. 193, 31 Alta. L.R. (2d) 97, 53 A.R. 175, 8 D.L.R. (4th) 321, [1984] 1 S.C.R. 337,

development plan in issue earmarked certain lands to be part of a future municipal park. The applicable land use bylaw designated the same lands as "agricultural open-space", listing a number of authorized uses, which included extensive agriculture, parks, playgrounds and single detached dwellings as permitted uses. Riding academies, private clubs, kennels, and several other similar works were listed as discretionary uses. For approximately ten years the owner had unsuccessfully attempted to either develop an urban residential subdivision on the land or to sell the land to the city. In frustration, it applied for an order in the nature of mandamus, based on s. 72 of the *Planning Act* (now s. 644 of the *Municipal Government Act*) to compel the city to acquire the land at fair market value. The argument advanced was that, since the operative provisions of the bylaw were in conflict with the plan and since that plan was paramount to the land use bylaw, the land use bylaw should be read to be designating the land as a public park for purposes of s. 72. In other words, since the municipal plan was the dominant instrument, the land use bylaw should be read to reflect the plan. At trial, that argument prevailed and an order was issued. However, the Alberta Court of Appeal reversed the trial judge and its decision was ultimately upheld by the Supreme Court, which employed the very reasoning set out above.[70]

In the earlier case of *Bridgeland-Riverside Community Assn. v. Calgary (City)*,[71] the Alberta Court of Appeal was faced with having to reconcile the provisions of the *Planning Act* that conferred jurisdiction on a development appeal board to grant a waiver or variance of non-use provisions of a land use bylaw,[72] with the provisions of the Act obligating the same board to comply with any operative statutory plan.[73] A typical scenario giving rise to the need to reconcile is as follows: A land use bylaw contains a mandatory height restriction for a particular district. The same restriction appears in an area structure plan. A developer appeals to the subdivision and development appeal board for a waiver of the bylaw requirement pursuant to the variance jurisdiction of the board conferred by the Act. Can the board grant the waiver or must it refuse it on the basis that its variance power only applies to a land use bylaw provision and, since the Act expressly obligates it to comply with the plan, not to a provision contained in an area structure plan? In Bridgeland, the Court of Appeal held that a waiver could be granted because the variance power was not sterilized by a statutory plan. While the judgment of the court is somewhat ambiguous,[74] it does illustrate that the court recognizes ostensibly

70 See comments of Wilson J., writing for a unanimous five person panel: *Hartel Holdings Ltd. v. Calgary (City)* (1982), 18 Alta. L.R. (2d) 1, 17 M.P.L.R. 87, 131 D.L.R. (3d) 723, 36 A.R. 76 (C.A), affirmed [1984] 4 W.W.R. 193, 31 Alta. L.R. (2d) 97 at 102-103, 104-105 and 107-110, 53 A.R. 175, 8 D.L.R. (4th) 321, [1984] 1 S.C.R. 337, 25 M.P.L.R. 245, 8 Admin. L.R. 231, 53 N.R. 149.

71 *Bridgeland-Riverside Community Assn. v. Calgary (City)* (1982), 19 Alta. L.R. (2d) 361 at 368, 20 Alta. L.R. 494, 135 D.L.R. (3d) 724, 37 A.R. 26 (C.A.).

72 *Planning Act*, s. 85(3)(c) [now *Municipal Government Act*, s. 687(3)(d)].

73 *Ibid.*, s. 85(3)(a) [now s. 687(3)(a)].

mandatory provisions of a municipal statutory plan are not necessarily binding on planning authorities.[75] More recently, relying on *Bridgeland-Riverside*, the Court of Appeal has given paramountcy to a land use bylaw over a conflicting provision in an area structure plan.[76]

Another judgment in Alberta dealing with the status of a statutory plan is found in *Churgin v. Calgary (City)*.[77] This case is of principal interest for its discussion of direct control districts as a planning and regulatory tool, but it also contains a far-reaching statement that a land use bylaw is "subject to [a general municipal plan] in the hierarchical scheme of plans mentioned in the *Planning Act*".[78] With respect, the approach of the court in that case is not consistent with that of the Supreme Court in *Hartel*, nor is it consistent with that of the courts in other provinces.

British Columbia planning legislation, for example, categorically provides that a municipal development plan (an "official community plan" in B.C.) is paramount to a zoning bylaw, and all bylaws passed after the adoption of an official community plan must be consistent with that plan.[79] Nevertheless, the courts of that province have consistently taken the view that community plans are simply efforts of planners to state long-term policy objectives and goals, and not regulatory instruments like zoning bylaws. Consequently, unless there is an "absolute and direct collision"[80] between a plan and a zoning bylaw, the former is to be read down to the latter.[81] Similar approaches have been taken in other jurisdictions.[82]

[Footnote 74 from prior page]

74 On the one hand, the court essentially said that a development appeal board was not bound by a provision of a statutory plan in exercising its variance power and, on the other, that a plan provision "limits the power of a development appeal board" (at pp. 366-67). It is altogether unclear to what extent the court believes a statutory plan limits the variance power. Perhaps the court was implying that, while an area structure plan could not operate to sterilize the variance power, such a plan was still a legitimate, non-binding factor for the board to take into account in exercising its variance power.

75 Certainly, that is the view that Wilson J. took of *Bridgeland* in *Hartel* at p. 109. See also, *2890828 Canada Ltd. v. Edmonton (City) Development Appeal Board*, (1994), 19 Alta. L.R.(3d) 137 (C.A.). For a detailed commentary on *Bridgeland* see Jones, (1982), 20 Alta. L. Rev. 494. Professor Jones puts forth the view that a land use bylaw must, without qualification, conform to a statutory plan and, to the extent that Bridgeland postulates otherwise, it is wrongly decided.

76 *McCauley Community League v. Edmonton (City)*, [2012] A.J. No. 732, 2012 ABCA 224 (¶ 39).

77 (1986), 73 A.R. 300.

78 *Ibid.*, at p. 217.

79 *Local Government Act*, R.S.B.C. 2015, c. 1, s. 478(2).

80 *Rogers v. Saanich (District)* (1983), 22 M.P.L.R. 1, 146 D.L.R. (3d) 475 at 491 (B.C.S.C.).

81 See e.g., *Eddington v. Surrey (District)* (1984), 26 M.P.L.R. 229 (B.C.S.C.) and *Brown v. Vancouver (City)* (1986,) 69 B.C.L.R. 308, 31 M.P.L.R. 197, 24 D.L.R. (4th) 434 (B.C.S.C.).

§5.6(4) Conclusion

In summary, while it is true that Pt. 17 of the *Municipal Government Act* contemplates a hierarchy of plans, it is not true that a lower instrument in the hierarchy must entirely conform with a higher instrument in order to be valid. In particular, a land use bylaw provision can co-exist with seemingly conflicting provisions of a statutory plan because of the different function that each plays in the statutory regime. The statutory plan is a policy, rather than a regulatory document, and thus is to be afforded a liberal construction that permits room to manoeuvre in the implementation and administration stages of the planning process. Moreover, a statutory plan is principally concerned with setting future goals, whereas a land use bylaw must deal with current realities. Their roles are substantially disparate - one sets policy proposals, the other implements them to the extent that it is feasible. It is not always feasible to immediately implement the goals of a plan, hence, a land use bylaw need not do so as a matter of law.[83] Where a plan unequivocally goes beyond being a mere proposal and sets forth mandatory prescriptions, assuming it is not by that fact invalid,[84] it might well be that a conflicting land use bylaw provision, or a planning decision that conflicts with the plan, calls for judicial intervention, but not otherwise. Where such intervention has occurred it has been stated that the land use bylaw overrides a conflicting area redevelopment plan.[85]

Also, it is appropriate to observe that s. 680(2)(a), which only requires a subdivision appeal tribunal to "have regard to" a statutory plan rather than to be bound by it, seriously undermines the purpose of a municipal development plan and an intermunicipal development plan, in particular.[86] This leads to the topic of intermunicipal planning.

§5.7 INTERMUNICIPAL PLANNING

§5.7(1) The Need For Intermunicipal Cooperation

For political and practical reasons, the majority of land use planning and regulation takes place at the municipal level. The first step is to set the stage for future land development by formulating long-range plans for how and

83 This is now expressly stated in *Municipal Government Act*, s. 637.

84 *Quaere*, to what extent may a plan usurp the function of a land use bylaw by prescribing regulations as distinct from setting forth policy?

85 *McCauley Community League v. Edmonton (City)*, [2012] A.J. No. 732, 2012 ABCA 224.

86 Section 680(2)(a) is illogical when compared to s. 687(3) which requires the same board to "comply with" a statutory plan when it hears development rather than subdivision appeals. This lack of consistency appears to be the product of an oversight. When the 1995 revisions were drafted for subdivision appeals, the wording in the previous legislation was adopted in large measure. But under that legislation all subdivision appeals were heard by the Alberta Planning Board. It made some sense to empower that board to override

Love v. Flagstaff (County of) Subdivision and Development Appeal Board, 2002 ABCA 292

Date: 20021209
Dockets: 0003-0393-AC
0003-0394-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE CHIEF JUSTICE FRASER
THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MADAM JUSTICE FRUMAN

IN THE MATTER OF SECTION 688 OF THE *MUNICIPAL GOVERNMENT ACT*, S.A. 1994, c. M-26.1, AS AMENDED; AND

IN THE MATTER OF THE DECISION OF THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD OF FLAGSTAFF COUNTY DATED AUGUST 8, 2000;

BETWEEN:

APPEAL NO: 0003-0393-AC

BARRY LOVE

Appellant

- and -

THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD OF FLAGSTAFF COUNTY and FLAGSTAFF COUNTY

Respondents

IN THE MATTER OF SECTION 688 OF THE *MUNICIPAL GOVERNMENT ACT*, S.A. 1994, c. M-26.1, AS AMENDED; AND

IN THE MATTER OF THE DECISION OF THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD OF FLAGSTAFF COUNTY DATED AUGUST 8, 2000;

APPEAL NO: 0003-0394-AC

PAUL ALDERDICE

Appellant

- and -

THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD
OF FLAGSTAFF COUNTY and FLAGSTAFF COUNTY

Respondents

Appeal from the Decision of the
SUBDIVISION AND DEVELOPMENT APPEAL BOARD OF FLAGSTAFF COUNTY
Dated the 8th day of August, 2000

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE
HONOURABLE CHIEF JUSTICE FRASER
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE FRUMAN

DISSENTING REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE RUSSELL

COUNSEL:

E. J. KINDRAKE
I. L. WACHOWICZ
For the Appellant, Barry Love

E. J. KINDRAKE
I. L. WACHOWICZ
For the Appellant, Paul Alderdice

W. W. BARCLAY
For the Respondent, The Subdivision and Development Appeal Board of Flagstaff County

T. D. MARRIOTT
For the Respondent, Flagstaff County

F. A. LAUX, Q.C.
W. W. SHORES
For the Respondent, Taiwan Sugar Corporation and DGH Engineering Ltd.

REASONS FOR JUDGMENT OF THE
HONOURABLE CHIEF JUSTICE FRASER

I. INTRODUCTION

[1] These two appeals arise out of the refusal by the Subdivision and Development Appeal Board of Flagstaff County (SDAB) to grant a residential development permit to the appellants, Barry Love (Love) and Paul Alderdice (Alderdice). These appeals were heard together with a related appeal, ***Goodrich* v. *Flagstaff (County of) Subdivision and Development Appeal Board***. Taiwan Sugar Corporation (Taiwan Sugar) and DGH Engineering were respondents in that appeal. While not added as parties to these appeals, they have participated as respondents throughout with the consent of the parties.

[2] All three appeals were heard together because they are effectively linked to each other, concerning as they do competing development applications for lands in the County of Flagstaff (County). On one side are Love and Alderdice. Love seeks to construct a single family home on a quarter section of land he owns (Love Lands) and Alderdice, as agent for Joseph Bebee, seeks to construct a single family home on a quarter section of land owned by Bebee (Alderdice Lands). On the other side of the development divide is Taiwan Sugar which seeks to develop an intensive animal operation (IAO) on five different quarter sections in the County (IAO Lands), two quarters of which are adjacent to the Love Lands and Alderdice Lands (IAO Lands).

II. BACKGROUND FACTS

[3] The Love Lands, Alderdice Lands and IAO Lands are all zoned Agricultural (A) District under the Land Use Bylaw of Flagstaff County, Bylaw No. 03/00 (22 March 2000) (*Bylaw*). Under s.6.2.1.1 of the *Bylaw*, "all forms of extensive agriculture and forestry, including a single family dwelling or a manufactured home" are permitted uses. By contrast, an IAO is a discretionary use only: s.6.2.1.2.

[4] Love and Alderdice each applied to the development authority (DA) designated by the County under s.624(1) of the *Municipal Government Act*, R.S.A. 2000, c. M-26 (*Act*) for a development permit to build a single family residential dwelling on their respective lands – a permitted use. When the Love and Alderdice applications were filed, Taiwan Sugar had not yet applied for an IAO development permit on the IAO. By the date on which the Love and Alderdice applications were denied, Taiwan Sugar had filed an incomplete IAO application. That application was not finally complete until more than 2 ½ months after the initial filing.

[5] The DA denied both the Love and Alderdice applications on the same basis, namely that the dwelling each wished to build would be too close to a "proposed" intensive animal operation, that is the Taiwan Sugar IAO, and thus in breach of s.6.1.7.3 of the *Bylaw*.

[6] These appeals turn therefore on the interpretation of the following critical provisions of s.6.1.7.3 of the *Bylaw* mandating a minimum setback for the siting of dwellings near an IAO:

> For the siting of a dwelling in close proximity to an intensive animal operation (whether existing or proposed), the dwelling, if a permitted use, must be located at least the minimum distance prescribed in the Code of Practice.

[7] The Code of Practice is defined in s.1.3.9 of the *Bylaw* as the Code of Practice for the Safe and Economic Handling of Animal Manures published by Alberta Agriculture, Food and Rural Development in 1995, together with the modifications to that Code, published by Alberta Agriculture, Food, and Rural Development in 1999 (collectively the *Code*). As stated in s.1 of the *Code*, it "outlines a two part approach to reduce rural conflicts through proper land use siting and animal manure management." The first method is to maintain a "minimum distance separation" (MDS) between an IAO and its neighbours as explained in s.3 of the *Code*:

> Separation between intensive livestock facilities and neighbours can compensate for normal odour production, thereby reducing potential nuisance conflicts. The MDS applies reciprocally for the siting of either the odour source (intensive livestock operation) and/or the neighbouring landowner (neighbour).

[8] The *Code* contains detailed tables prescribing the applicable MDS which varies depending on the size and type of IAO. The *Code* does not expressly address who is to be responsible for providing the required MDS buffer zone when there are competing applications for a residence and an IAO on adjacent lands. In this case, the sites Taiwan Sugar selected adjacent to the Love Lands and the Alderdice Lands are not large enough to absorb the buffer zone. In fact, given the size and type of Taiwan Sugar's IAO, were Love and Alderdice required to provide the buffer zone out of their lands, there would be nowhere on the Love Lands or the Alderdice Lands that a residence could be built.

[9] With respect to the *Bylaw* and the required MDS buffer zone, there is evidence that the County, unlike, for example, Ponoka County, elected not to impose the obligation for meeting the MDS solely on the IAO developer: Ponoka No. 3 (County) Bylaws, Land Use Bylaw No. 5-97-A, s.10.4.2 (1997). While the *Bylaw* does not expressly specify who is to provide this buffer zone – the IAO developer or neighbouring landowners – it is implicit in the *Bylaw* that an IAO developer may include the lands of adjacent landowners, in whole or in part, in determining whether it has met the required MDS. And this may be done even when it precludes adjacent landowners using the portion of their lands that falls in the MDS for future residential permitted uses. As the County's jurisdiction to enact this aspect of the *Bylaw* is not before us, this decision assumes the validity of s.6.1.7.3.

[10] A summary of the relevant sequence of events in 2000 follows.

January 21	Taiwan Sugar approached the County regarding its plans.
March 15	Taiwan Sugar advised the County of proposed sites for the IAO.
March 23	The public was advised of the IAO sites.
April 11	Taiwan Sugar held public consultations regarding the IAO.
April 20	Love submitted a residential development permit application to the DA.
April 25	Alderdice submitted a residential development permit application to the DA.
April 27	Taiwan Sugar submitted an incomplete IAO development permit application to the DA.
May 5	Taiwan Sugar submitted further information in support of its IAO application.
May 30	Love's application was refused.
June 5	Alderdice's application was refused.
June 9	Love filed a notice of appeal with the SDAB.
June 16	Alderdice filed a notice of appeal with the SDAB.
July 17	Taiwan Sugar's IAO application was finally complete.
July 25	SDAB heard the Love and Alderdice appeals together.
August 8	SDAB denied both appeals.
September 8	Taiwan Sugar was granted a development permit for the IAO.
September	Several County residents appealed the DA's grant of the IAO permit.
November 2	Love and Alderdice were granted leave to appeal the SDAB decision.
November 27	SDAB, with slight modifications, denied the appeals on the IAO permit.

[11] The SDAB denied the Love and Alderdice appeals on the basis that the homes they wanted to build would be too close to Taiwan Sugar's "proposed" IAO. In its view, a

"proposed" IAO under s.6.1.7.3 meant something less than an "approved" one. In deciding what that something less might be, the SDAB concluded that the steps taken by Taiwan Sugar prior to filing an IAO application coupled with the filing of a formal application made the IAO a "proposed" one on the date on which Taiwan Sugar first filed its IAO application.

[12] The SDAB then concluded that the relevant date for deciding whether a residential permitted use was sited the required distance from an IAO was not the date on which the permitted use application had been filed but the date on which the DA made its decision on the application. Accordingly, on this reasoning, since Taiwan Sugar's IAO was "proposed" on the date that the DA decided both the Love and Alderdice applications, and since neither home met the required MDS, the SDAB determined that both applications were properly refused.

III. STANDARD OF REVIEW AND ISSUES

[13] The standard of review for the interpretation of a land use bylaw by a subdivision and development appeal board is correctness: ***Harvie v. Province of Alberta*** (1981) 31 A.R. 612 (C.A.); ***Chrumka v. Calgary Development Appeal Board*** (1981) 33 A.R. 233 (C.A.); ***500630 Alberta Ltd. v. Sandy Beach (Summer Village)*** (1996), 181 A.R. 154 (C.A.).

[14] This Court granted leave to appeal the SDAB decision on the Love and Alderdice appeals on the following ground:

> Did the Subdivision and Development Appeal Board of Flagstaff County err in law in its interpretation of the word "proposed" as found in Section 6.1.7.3 of the Flagstaff County Land Use *Bylaw* No. 03/00?

[15] This question raises two distinct issues, both of which must be addressed in order to properly answer this question:

> 1. When does an IAO become "proposed" for purposes of s.6.1.7.3 of the *Bylaw*; and
>
> 2. What is the relevant date to determine whether a permitted use residential dwelling meets the MDS under the *Bylaw* – the date of filing the application or some later date?

IV. ANALYSIS

A. WHEN DOES AN IAO BECOME "PROPOSED" UNDER S.6.1.7.3?

[16] Once an IAO has been constructed, it can no longer be "proposed" for any purpose. The question which must be answered therefore is at what stage prior to completion of an IAO does it become "proposed" for purposes of s.6.1.7.3 of the *Bylaw*.

[17] Although the *Bylaw* does not define when this "proposed" status is achieved, a number of possibilities exist ranging from the date on which the IAO is only a "twinkle in the eye" of the developer – "proposed" only in its mind and to itself – to the date on which a development permit for the IAO becomes final and binding on all parties. No one suggested that a "proposed" IAO for purposes of s.6.1.7.3 included its conception stage and thus, the time spectrum range covers the following alternative options:

> 1. the date a developer publicly exhibits a serious intention to develop an IAO (option 1, sometimes called the "serious intention date");
>
> 2. the date a developer files an incomplete application for an IAO development permit (option 2, sometimes called the "incomplete application date");
>
> 3. the date a developer files a complete application, that is one containing all required information to allow the DA to determine if the IAO meets the *Bylaw* (option 3, sometimes called the "complete application date");
>
> 4. the date a development permit first issues for the IAO (option 4, sometimes called the "permit issue date"); and
>
> 5. the date a development permit becomes final and binding on the parties, including, if applicable, exhaustion of all appeals (option 5, sometimes called the "permit effective date").

[18] Love and Alderdice contend that an IAO becomes "proposed" for purposes of the *Bylaw* on the date it has been approved and a permit issued (either option 4 or 5 above) or alternatively, the date on which a complete development application has been submitted (option 3). Taiwan Sugar argues that it is the date on which a reasonable person would believe that a serious intention to develop an IAO has been demonstrated by the developer (option 1) or alternatively the date on which an IAO development permit application is first filed, no matter how incomplete (option 2).

[19] In interpreting the *Bylaw*, the purposive and contextual approach repeatedly endorsed by the Supreme Court of Canada and set out in E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87 applies:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[As cited with approval in ***Re Rizzo & Rizzo Shoes*** [1998] 1 S.C.R. 27; ***Bell ExpressVu Limited Partnership v. Rex*** (2002) 212 D.L.R. (4th) 1 (S.C.C.).]

[20] The purposive approach to statutory interpretation requires that a court assess legislation in light of its purpose since legislative intent, the object of the interpretive exercise, is directly linked to legislative purpose. As a result, as explained in R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 35:

> Other things being equal, interpretations that are consistent with or promote legislative purpose should be preferred and interpretations that defeat or undermine legislative purpose should be avoided.

[21] The contextual approach rests on a simple, but highly compelling, foundation. “The meaning of a word depends on the context in which it has been used”: *Ibid* at 193. Therefore, any attempt to deduce legislative intent behind a challenged word or phrase cannot be undertaken in a vacuum. The words chosen must be assessed in the entire context in which they have been used. Thus, it must be emphasized that the issue here is not what the solitary word “proposed” means in isolation but when an IAO becomes “proposed” for purposes of s.6.1.7.3.

[22] The starting point for the analysis must be the legislative scheme of which the *Bylaw* forms a part. The *Bylaw*, enacted by the County as required by ss.639 and 639.1 of the *Act*, constitutes one piece of the legislative planning puzzle governing the development and use of lands in the County. Other relevant pieces include Part 17 of the *Act* itself, the Land Use Policies established by the Lieutenant Governor in Council pursuant to ss.622(1) of the *Act* as O/C 522/96 (*Land Use Policies*), the County’s Municipal Development Plan established pursuant to s.632 of the *Act* [Flagstaff County, Bylaw No.02/00, Municipal Development Plan (12 April, 2000)] (*Plan*) and the *Code*. The presumption of coherence presumes that the legislative framework is rational, logical, coherent and internally consistent: ***Friends of Oldman River Society v. Canada (Minister of Transport)*** [1992] 1 S.C.R. 3.

[23] It is evident from a review of Part 17 of the *Act* that its purpose, or object, is to regulate the planning and development of land in Alberta in a manner as consistent as possible with community values. In so doing, it strikes an appropriate balance between the rights of property owners and the larger public interest inherent in the planned, orderly and safe development of lands. In this regard, s.617 contains an authoritative statement of legislative purpose and relevant community values:

> The purpose of this Part and the regulations and Bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted
>
> > (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
> >
> > (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,
>
> without infringing on the rights of individuals for any public interest except to the extent that it is necessary for the overall greater public interest.

[24] These objectives are carried forward into both the *Plan* and the *Bylaw*. The *Plan* identifies as its goal encouraging "environmentally sound, sustainable agricultural and other forms of economic development, while conserving and enhancing the County's rural character." The *Bylaw* provides in critical part in s.1.2 that its purpose is to "regulate and control the use and development of land and buildings within the municipality to achieve the orderly and economic development of land".

[25] While the *Land Use Policies* focus on matters of public policy, not law, and are by their nature therefore general in scope, they nevertheless provide a policy framework for land use bylaws and municipal plans. Indeed, both the *Plan* and the *Bylaw* must be consistent with the *Land Use Policies*: s.622(3) of the *Act*. The *Land Use Policies* provide in s.4.0.2 which is part of the general section dealing with land use patterns that:

> Municipalities are encouraged to establish land use patterns which embody the principles of sustainable development, thereby contributing to a healthy environment, a healthy economy and a high quality of life.

[26] These values – orderly and economic development, preservation of quality of life and the environment, respect for individual rights, and recognition of the limited extent to which the overall public interest may legitimately override individual rights – are critical components in planning law and practice in Alberta, and thus highly relevant to the interpretation of the *Bylaw*.

[27] Central to these values is the need for certainty and predictability in planning law. Although expropriation of private property is permitted for the public, not private, good in clearly defined and limited circumstances, private ownership of land remains one of the fundamental elements of our Parliamentary democracy. Without certainty, the economical development of land would be an unachievable objective. Who would invest in land with no clear indication as to the use to which it could be put? Hence the importance of land use bylaws which clearly define the specific uses for property and any limits on them.

[28] The need for predictability is equally imperative. The public must have confidence that the rules governing land use will be applied fairly and equally. This is as important to the individual landowner as it is to the corporate developer. Without this, few would wish to invest capital in an asset the value of which might tomorrow prove relatively worthless. This is not in the community's collective interest.

[29] The fundamental principle of consistency in the application of the law is a reflection of both these needs. The same factual situation should produce the same legal result. To do so requires that it be certain. The corollary of this is that if legislation is uncertain, it runs the risk of being declared void for uncertainty in whole or in part. As explained by Garrow, J.A. in ***Re Good and Jacob Y. Shantz Son and Company Ltd.*** (1911) 23 O.L.R. 544 (C.A.) at 552:

> It is a general principle of legislation, at which superior legislatures aim, and by which inferior bodies clothed with legislative powers, such as ... municipal councils ... are bound, that all laws shall be definite in form and equal and uniform in operation, in order that the subject may not fall into legislative traps or be made the subject of caprice or of favouritism – in other words, he must be able to look with reasonable effect before he leaps.

[30] There is another critical contextual feature to this interpretive exercise. The question of what constitutes a "proposed" IAO under s.6.1.7.3 arises in only one context – a conflict between an application for a residential development permit and an IAO not yet built. Typically, in the rural part of the County, potential problems would arise where a landowner seeks to develop a single family home on a quarter section since single family homes are permitted uses in every zoning category in the County but one. Thus, the conflict, if there is to

be one, will, in the majority of cases, be between a single family residential permitted use and a discretionary IAO use.

[31] Applying the purposive and contextual analysis, I have concluded that an IAO becomes "proposed" for purposes of s.6.1.7.3 on the permit issue date (option 4). There are several reasons for this.

[32] First, to adopt an interpretation permitting an IAO to achieve "proposed" status prior to the permit issue date would run afoul of a principle firmly entrenched in the legislative planning scheme in effect in Alberta – respect for individual property rights. The *Act* explicitly recognizes the preeminence of individual rights in planning law in Alberta. While these rights are subject to a clearly circumscribed overriding exception in favour of the greater public interest, nowhere is it suggested that individual rights should be overridden for a private interest.

[33] This respect for individual property rights is a statutory affirmation of a basic common law principle. As explained by Cote, P.A. in *The Interpretation of Legislation in Canada*, *supra*, at 482:

> "Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law." To this right corresponds a principle of interpretation: encroachments on the enjoyment of property should be interpreted rigorously and strictly.

[34] Here, the scheme and object of the *Act* reveal a legislative intention not only to expressly protect individual rights but to permit those rights to be eroded only in favour of a public interest and only to the extent necessary for the overall public interest. See s.617, *supra*. It follows therefore that encroachments on individual rights, especially by private parties, should be strictly construed.

[35] Concerns about encroachments on property rights are exacerbated where, as here, the *Bylaw* permits neighbouring landowners to bear all or part of the MDS requirement. If an IAO developer acquires a site too small to accommodate the required buffer zone, then the MDS setback requirements must instead be met out of the lands of neighbouring landowners. Given the respect accorded to individual rights under the *Act* and the potentially serious sterilizing effect that these MDS setback requirements would have on neighbouring lands, it would take much clearer statutory language to strip a landowner of residential development rights, especially permitted use residential rights, in favour of a discretionary use IAO project before its permit issue date.

[36] Further, strictly interpreting encroachments on the enjoyment of property minimizes conflict, whether that be conflict between the state (as represented by the County) and its citizens or amongst the citizens themselves. This is in keeping with one of the underlying rationales of planning law, namely to avoid pitting neighbour against neighbour by imposing on all parties clearly defined reciprocal rights and obligations. The legislative scheme here is designed to promote harmony, not create litigation. Accordingly, given the priority accorded to individual rights under Alberta planning law, where possible, planning laws should be interpreted in a manner consistent with what I would characterize as the "good neighbour policy". That includes respecting individual rights by interpreting encroachments on property rights rigorously and strictly especially where the encroachment is in favour of a private interest.

[37] Second, it must be remembered that an IAO is only a discretionary use. Thus, there is no assurance that an application for an IAO permit will ever be successful. If an IAO could become "proposed" for purposes of s.6.1.7.3 prior to its permit issue date, this would effectively freeze permitted use residential development on nearby lands falling within the MDS for what could be a lengthy period in favour of an IAO project that might never be approved. This too militates in favour of a restrictive interpretation as to when "proposed" IAO status for purposes of s.6.1.7.3 is achieved.

[38] Third, finding that an IAO achieves "proposed" status on the permit issue date also provides the required degree of certainty and predictability. This is an extremely weighty consideration since using any earlier date – the serious intention date, the incomplete application date or the complete application date – is replete with problems fatal to these possible interpretations.

[39] Taiwan Sugar contends that the serious intention date should apply. Under the test it suggests, an IAO would be "proposed" on the date by which circumstances were such that a reasonable person would believe that a developer had a serious intent to develop an IAO. In its view, a publicly announced project would meet this test. But the most critical failing of this approach would be the inability of a landowner intent on developing land nearby an announced IAO to predict whether a stated intention would ever lead to a development proposal, much less a filed application, never mind an approved one. In the meantime, the landowner's ability to develop land he or she owns for a permitted single family residential use in conjunction with their extensive farming operation would at best be compromised and at worst, prevented altogether. This cannot be.

[40] Moreover, the phrase "serious intention" is vague and subject to arbitrary application. A serious intention is not a proposal for anything unless and until steps are taken to proceed with the stated intention. To what extent would the suggested plan need to be developed? Would complete details on obvious issues such as size, site locations, and methods of resolving water and other environmental issues need to be disclosed? And to whom and at what time? And more fundamentally, how would one determine when and if the "serious

intention" ever crystallized into a concrete proposal? Finally, if one were to accept that an IAO could reach "proposed" status before the developer even filed an application, how would one determine whether the project had been abandoned? For these reasons alone, this interpretation cannot be sustained.

[41] Nor would using either the incomplete application date or the complete application date provide the required degree of certainty. Although the filing date for each would be ascertainable, there would be no way of knowing with certainty when the project was abandoned. Under the *Bylaw*, there is no requirement mandating the DA to make a decision on an application within a specific period of time. Under s.3.4.15, if the DA does not do so within 40 days, the application shall be deemed refused after the expiry of that time period. But this is at the option of the applicant and the applicant alone as the following key part of this section makes clear:

> An application for a development permit shall, at the option of the applicant, be deemed to be refused when a decision thereon is not made by the Development Authority within forty (40) days after receipt of the application by the Development Authority.

[42] Further, there does not appear to be any ability on the part of a nearby landowner to compel the DA to make a decision following the expiry of the 40 day period or to seek an order declaring that the IAO application has been refused simply because of the lapse of the 40 day period. Instead, it appears that the extension of the 40 day period is a matter requiring only the concurrence of the DA and the applicant. What this would mean therefore is that if the DA did not make a decision on an IAO within the 40 day period because it was, for example, waiting for additional required information – never to be provided – there would be no objective means of determining when the project had been abandoned.

[43] Thus, an IAO development permit application could simply languish for an indeterminate period into the future, long after the IAO developer had abandoned any intention of proceeding with the IAO. Since nearby landowners would be precluded from developing single family permitted use housing on their lands in the interim, an interpretation which led to this result (as either the use of the incomplete application date or the complete application date would do), ought to be rejected.

[44] It is no answer to say that these problems could be avoided by a landowner's seeking an order of mandamus compelling the County to make a decision on an IAO application. The County and IAO developer might well be engaged in prolonged and protracted negotiations over conditions, additional information, plans, etc. with no end in sight, thereby precluding the securing of any such order even though ultimately the project is abandoned. Even if this were not so, it would be unreasonable, given the statutory planning regime, to impose on a landowner otherwise entitled to a residential permitted use permit an obligation to try to establish that an IAO project had in fact been abandoned. The legislation does not contemplate forcing this heavy financial and legal obligation onto the party with the least information

relating to the IAO application and the least control over it and there can be no justification for judicially imposing it on neighbouring landowners.

[45] Fourth, the disputed words themselves and the context in which they are used in s.6.1.7.3 are consistent with the view that the required "proposed" status is achieved on the permit issue date. Under s.6.1.7.3, "proposed" is used in contradistinction to an "existing" IAO. The distinction relates to the physical state of the IAO, and not to its planning status on the relevant date. It must be remembered that even when a permit has been issued for an IAO, the IAO is "proposed" unless and until it is actually built. If the approved development is not commenced within 12 months from the date of the issue of the permit, and carried out with "reasonable diligence", the permit is deemed to be void, unless an extension is granted: s.3.6.6 of the *Bylaw*. This means that "proposed" and "approved" are not mutually exclusive terms. Accordingly, it does not follow that "proposed" must mean something less than "approved" for purposes of s.6.1.7.3.

[46] It is true that there are other sections of the *Bylaw* in which the word "proposed" refers to a development for which a development permit application has been received by the DA. But one cannot simply find the same word – proposed – in other sections of the *Bylaw* and conclude that it has the same meaning when used in s.6.1.7.3. While the word "proposed" is sprinkled throughout the *Bylaw*, it is used elsewhere in the context of a "proposed development", that is one in respect of which a development permit application has been filed. But in s.6.1.7.3, the words used are not the same, the reference instead being to an "intensive animal operation (whether existing or proposed)", and they are used in an entirely different context.

[47] Fifth, concluding that an IAO achieves "proposed" status under s.6.1.7.3 on the permit issue date best promotes one of the key objectives of the planning legislation, the orderly and economic development of land. The orderly development of land militates in favour of an interpretation of the *Bylaw* which avoids the repeated filing of unnecessary development applications, whether by an IAO developer or an adjacent landowner. Much is made of the fact that Love and Alderdice filed their permit applications shortly after the public meetings, but it is equally noteworthy that Taiwan Sugar filed its initial application, an incomplete one, shortly after the Love and Alderdice filings.

[48] If a "proposed" IAO meant one in respect of which an application had been filed, no matter how incomplete, then this would encourage the filing of inadequate IAO applications at an early stage – and possibly repeatedly – in an effort to defeat potentially competing permitted uses. In turn, this would lead to its own uncertainties and promote the same action by adjacent landowners. These landowners would be tempted to file repeated development applications to protect against the risk of an IAO being built nearby on a site inadequate to meet the MDS requirements and thereby freezing the use of their lands for residential purposes. This result cannot have been intended.

[49] Not only would this be unduly costly to the applicants (in terms of filing fees and lost time), and the County (in terms of processing of the permits), it runs counter to the philosophy

of recent amendments to planning legislation in Alberta designed to reduce “red tape” and costs and could not help but have a negative impact on overall productivity. This is not in the wider community interest.

[50] Using the permit issue date as the date on which “proposed” status is achieved for purposes of s.6.1.7.3 avoids the prospect of multiple filings. There would be no need on the part of individual landowners to apply for residential development permits early and repeatedly to protect their legitimate permitted use rights since a permit could be successfully applied for at any time prior to an IAO’s permit issue date. It would also avoid preemptive filings by an IAO developer intending to include part of its neighbours lands in the calculation of the required MDS since there would be nothing to be gained by these filings.

[51] Further, s.3.4.8 also militates against using the incomplete application date as the date on which the IAO achieves “proposed” status. Under this section, the DA may return the application to an applicant for further details and in such event, the application is “deemed to not have been submitted”. To treat an IAO project as “proposed” for purposes of s.6.1.7.3 even though in the end the IAO application might be returned and treated as not submitted would be illogical.

[52] Under s.3.4.4 of the *Bylaw*, an IAO developer is mandated to provide certain required information in an IAO application. However, under s.3.4.9:

> The Development Authority may make a decision on an application for a development permit notwithstanding that any information required or requested has not been submitted.

[53] This being so, it has been argued that the DA’s ability to issue a conditional IAO development approval means that “proposed” status can be achieved before the IAO developer has provided all information required under the *Bylaw*, that is on the incomplete application date. But this looks at matters the wrong way round. The point is not whether the permit issue date may occur before all required information is filed; it is whether the permit issue date has been achieved. Even assuming therefore that an IAO permit could be issued without all information required under this section (and quaere whether this is so), what would make the IAO project a “proposed” one for purposes of s.6.1.7.3 would not be the filing of an incomplete permit application, but rather the issuance of a development permit.

[54] It was suggested that the emphasis the County places on agriculture lends added weight to the argument that an IAO should be treated as “proposed” the moment a development application is filed, no matter how incomplete. However, this argument assumes that in a competition between a single family residential permitted use and an IAO that it is only the IAO which satisfies the emphasis on agriculture in the *Bylaw* and the *Plan*. This is clearly wrong. Section 6.2.1 of the *Bylaw* states that the purpose of the Agricultural District is to “provide land where all forms of agriculture can be carried on without interference by other, incompatible land uses.” The very first permitted use is “all forms of extensive agriculture and

forestry, including a single family dwelling or a manufactured home." [Emphasis added.] The second is "single family dwellings and manufactured homes, on a sole residential parcel subdivided out of a quarter section ...." [Emphasis added.]

[55] Why is this so? The answer lies in part in the history of Alberta. The quarter section of land with the family home has been one of the fundamental building blocks of farming life in rural Alberta. As such, it has been an integral component in the orderly and economic development of land in this province. Further, providing that a single family home is a permitted use on a farm quarter and on a parcel subdivided out of a farm quarter also recognizes the inter-generational needs of extended farm families. Had the County wanted to demolish this foundational structure, and grant IAO's preferential treatment, it was certainly free to do so. It has not. Instead, the County has expressly provided that use of land for a single family residence in conjunction with a farming operation or on a parcel subdivided out of agricultural land are permitted uses under the *Bylaw* while an IAO is merely a discretionary use.

[56] Consequently, one does not need evidence of the importance of a residence on any particular quarter section. The County's decision to make the construction of the single family home a permitted use is sufficient evidence of legislative intent whether or not this settlement pattern continues today. Thus, there is no merit to an argument premised on the assumption that an IAO on land zoned Agricultural (A) District trumps use of agricultural lands for single family homes in conjunction with an extensive farming operation. In fact, policy considerations explicitly tilt in favour of the residential permitted use.

[57] It follows that I do not agree with the proposition that an IAO is entitled to priority on the basis it benefits the community economically as a whole. So too do other forms of extensive agriculture, including the residences associated with them. This is not a case where the County has elected to exclude all forms of agriculture other than IAO's. Instead, the *Bylaw* specifically contemplates a variety of uses for land zoned Agricultural (A) District.

[58] Sixth, concluding that an IAO becomes "proposed" on the permit issue date best avoids inequitable results. The legality or merit of the County's decision to allow an IAO developer to include adjacent lands in the calculation of whether it meets the required MDS is not before us. However, Taiwan Sugar argues that if the serious intention test is not adopted, then when an IAO developer goes through the public consultation process encouraged by s.1.12 of the *Plan*, landowners near identified selected sites could easily defeat a project by filing an application for a development permit for a residence within the mandated setback area. It opposes the use of any date after the incomplete application date for the same reason, namely that this is not fair.

[59] However, there is nothing unfair or improper in neighbouring landowners filing residential permitted use applications on lands nearby a publicly disclosed IAO site. The County has set its priorities under the *Bylaw;* declared the permitted uses, including single family homes on agricultural lands; and encouraged anyone seeking a discretionary IAO permit to enter into a public consultation process. The very existence of that process reflects an

intention that neighbouring landowners have the opportunity to consider and exercise whatever rights attach to their lands prior to the issuance of an IAO permit. In essence, the legislative scheme requires them to choose a right or lose a right.

[60] It must be remembered that the conflict here has arisen because the sites acquired for the IAO near the Love Lands and the Alderdice Lands do not permit the IAO developer to fully meet the MDS requirements on its own lands. One method an IAO developer can use to ensure that its project goes forward is to acquire a sufficiently large block of land to fully meet the MDS requirements without relying on neighbouring property. Thus, an IAO developer can easily eliminate any risk of its plans being defeated by competing residential permitted use applications by the simple expedient of acquiring a large enough site to satisfy the MDS requirements out of its own lands.

[61] If this imposes too great an economic cost on an IAO developer, there is another method it can use to minimize the risk of its plans being defeated by competing residential permitted use applications. That is to consult with neighbouring landowners. One consequence of this judgment is that it will provide certainty and eliminate races to file competing development applications. IAO developers, who are required to consult before applying for a permit, are not in a position to conceal an IAO proposal. The IAO developers can now reasonably anticipate that adjacent property owners whose lands may be negatively affected by the MDS requirements may well file residential permitted use applications to protect their future development rights. These applications will have priority over competing IAO applications until the permit issue date. Thus, IAO developers who have not acquired sites large enough to absorb the entire MDS out of their lands may wish to engage in economic negotiations with adjacent property owners with a view to compensating them for the loss of their future right to construct a residence.

[62] As for the proposition that an IAO developer may be required to deal with a number of landowners, there is a simple answer to this. The *Bylaw* does not prevent an IAO from being constructed on a number of contiguous quarter sections of land. A developer can either choose a number of sites physically isolated from each other or select contiguous sections of land, and deal with the consequences that flow from that voluntary choice. Additionally, it is not in the public interest to sterilize large tracts of land for residential purposes when this could be avoided by an IAO developer's building on a larger, contiguous site.

[63] This raises another related point. In urban areas, planning bylaws typically contemplate an extensive and wide range of land uses with different rules for each. For example, land for residential use might be zoned in specific locations for particular uses, such as single family homes, townhouses, and high rise apartments. The same holds true for other zoning categories such as commercial and industrial uses. But to date in rural Alberta, there has been little attempt to distinguish amongst various kinds of agricultural uses. One possible way of reducing the potential for conflict arising from the competing demands of rural landowners and IAO developers would be to limit IAO's to specific designated areas. However, the question

whether such an approach would be beneficial falls squarely within the legislative, and not the judicial, role.

[64] Finally, I turn to why the permit issue date is to be preferred over the permit effective date. A permit does not come into effect until 14 days after its publication date (s.3.6.1), or if appealed, until expiry of all appeal periods (s.3.6.2). It could be argued that unless and until the permit comes into effect, a discretionary IAO ought not to defeat a permitted use application filed at any time before the permit becomes final. However, once an IAO permit has been issued, the equities change as between an IAO developer and adjacent landowners. At that point, a permit has been issued which is to come into full effect on expiry of certain statutory periods. Meanwhile, the neighbouring landowner has elected not to file any competing permitted use applications prior to that date. Thus, to allow a residential permitted use application filed after the permit issue date to defeat the IAO in these circumstances would not be reasonable. At this stage, the appeal process governs.

[65] Accordingly, for these reasons, I have concluded that an IAO becomes "proposed" for purposes of s.6.1.7.3 on the permit issue date. There must be a practical, fair, easily-administered and certain cut-off date and the permit issue date qualifies on all grounds. In the end, it is this interpretation which best conforms with the spirit and intent of the *Act*, the *Policies*, the *Plan* and the *Bylaw*.

B. RELEVANT DATE FOR ASSESSING PERMITTED USE APPLICATIONS

[66] I now turn to the second issue to be resolved. This concerns the date on which the Love and Alderdice applications ought to have been assessed for compliance with s.6.1.7.3 of the *Bylaw*. At issue here is the question of acquired rights: at the time an application for a single family residential permitted use is filed, are the rights of the applicant sufficiently concretized that those rights cannot be defeated by a later, competing discretionary use application? I have concluded that they are.

[67] Given my conclusion on this issue, it is in one sense unnecessary to have definitively decided the date by which an IAO becomes "proposed" for purposes of s.6.1.7.3. It would be enough to determine that as long as an IAO does not become "proposed" by the serious intention date (option 1), the DA is required to issue the residential permits to Love and Alderdice. However, to eliminate option 1 required an analysis of the first issue in detail. In addition, in any event, many of the interpretive factors affecting the first issue have equal application to the second.

[68] Taiwan Sugar maintains that filing an application for a permit does not crystallize any rights. It points to the line of cases concluding that permitted use applications may be defeated by changes in the law, arguing that this same principle should apply to what they characterize as a change in the facts. The argument reduces to this. If a change in the law can defeat an application for a permitted use, then it follows that a change in facts should be able to do so too.

[69] In my view, the appropriate date for determining whether a single family permitted use application meets the required MDS is the date on which the application is filed, regardless of when that assessment might occur and a decision follow. In the case of Love and Alderdice, their respective applications preceded even the incomplete application date. Thus, even were I wrong in concluding that an IAO becomes "proposed" for purpose of s.6.1.7.3 on the permit issue date, and it were determined that the applicable date should be the complete application date or the incomplete application date, Love and Alderdice would remain entitled to the issuance of the requested single family residential development permits.

[70] I begin with the context in which this particular issue arises. Permitted uses have been a central part of the legislative planning scheme in Alberta since 1929. In 1957, the concept of a conditional (now called "discretionary") use, as opposed to a permitted use, was first introduced in Alberta: See F. Laux, *Planning Law and Practice in Alberta*, 3rd ed. (Edmonton: Juriliber, 2002) at 1-35. That distinction remains in effect today. Permitted uses are those to which an applicant is entitled as of right providing that the proposed development otherwise meets the requirements of the *Bylaw*. The "as of right" entitlement is clear from s.642(1) of the *Act*:

> When a person applies for a development permit in respect of a development [for a permitted use], the development authority must, if the application otherwise conforms to the land use Bylaw, issue a development permit with or without conditions as provided for in the land use Bylaw. [Emphasis added.]

[71] The theory underlying permitted uses has been well-explained by Laux in *Planning Law and Practice in Alberta*, *supra*, at 6-3:

> ... as a matter of good planning, within a given district, one or more uses may be identified that are so clearly appropriate in that district, and so compatible with one another that they demand no special consideration. Therefore, such uses ought to be approved as a matter of course no matter where they are located in the district, provided that the development standards set out in the Bylaw are also met.

[72] As noted, under s.642(1) of the *Act*, the development authority "must" grant a permit when a person applies for a permitted use that conforms to the *Bylaw*. The operative word is must. In these appeals, there was no suggestion that the Love and Alderdice applications for residential housing permits were turned down on any basis other than an alleged non-compliance with s.6.1.7.3. But for the alleged non-compliance with the MDS, the residential permit applications complied with the *Bylaw*: see AB 87.

[73] It is true that any permitted use acquired rights are not absolute, notwithstanding s.642(1) of the *Act*. They may well be defeated by a change in the law occurring before a decision is made on the application. Since s.643(1) of the *Act* provides that a change in a land use Bylaw does not affect the validity of a permit granted on or before the change, this has been interpreted to mean that a permit application may be defeated by a change in the law that occurs between the date of filing of the application and the final decision on the application: ***698114 Alberta Ltd. v. Banff (Town)*** (2000) 190 D.L.R. (4th) 353 (Alta. C.A.); ***Parks West Mall Ltd. v. Hinton (Town)*** (1994) 148 A.R. 297 (Q.B.); ***Bouchard v. Subdivision and Development Appeal Board (Canmore(Town))*** (2000) 261 A.R. 342 (C.A.). Thus, the law in effect at the time that the decision is made is usually the operative law.

[74] But there are exceptions even to this rule: ***Ottawa (City) v. Boyd Builders Ltd.*** [1965] S.C.R. 408; ***Smith's Field Manor Development Ltd. v. Halifax (City)*** (1988) 48 D.L.R. (4th) 144 (N.S.C.A.). Hence, it does not follow that no rights are acquired under any circumstances on filing of a permitted use application. Indeed, this Court expressly left open the question of whether a Bylaw change post-dating an application for a permitted use will defeat that permitted use: ***Bouchard***, *supra*.

[75] In any event, even assuming for the moment that a change in the law made following the filing of an application for a permitted use defeated that application, I do not agree that this reasoning applies to a change in facts relating to lands other than those which are the subject of the permitted use application.

[76] The only alleged change of fact in these appeals is that Taiwan Sugar filed an application for an IAO discretionary use after Love and Alderdice had filed their permitted use applications. Indeed, it is debatable whether this is properly characterized as a change in facts or simply a competing development application. Even assuming the former, to focus on a change in facts which occurs on another site after the filing of a permitted use application would invert the entire permitted use planning process. When an application is filed for a permitted use, the focus is to be on the facts relating to that permitted use application, not on facts arising later in relation to competing discretionary use applications on other sites.

[77] Nor is there any evident policy reason for eroding permitted use rights in these circumstances. The statutory scheme itself recognizes not only the importance of individual rights but also the superior position granted to those applying for a permitted use, as opposed to a discretionary one. Therefore, to allow a permitted use right to be defeated by a later-filed competing discretionary use would be inconsistent with the present statutory planning regime.

[78] There is another reason for not accepting this argument. Because consistency in the application of the law is an underlying principle of the rule of law, an interpretation of the *Bylaw* that permits inconsistency should be rejected. If two land development applications that are identical on their merits result in different dispositions for no defensible reason, the orderly and economic development of land would be affected. Yet this could happen if a permitted use application could be defeated by a change in facts resulting from a later-filed development

permit application on adjacent lands. If the development authority deferred consideration of the permitted use application in one case, but not in the other, the results of the two applications would be different. A development authority ought not to be placed in the position in which the timing of its decision on an application affects the outcome or creates inconsistent rulings.

[79] Perhaps most important is that it would be inequitable for a permitted use application to be denied because of a discretionary use application filed subsequent to the permitted use application where the discretionary use application might never be approved. Where the IAO is not subsequently approved, one cannot simply unwind the past rejection of a permitted use application and restore the applicant to the position he or she was in. Indeed, if a permitted use applicant were unsuccessful on the basis of a pending, but subsequently unapproved IAO, the permitted use applicant could not make an application for another 6 months unless the DA, in the exercise of its sole discretion, agreed otherwise: s.3.4.12 of the *Bylaw*. Applicants could therefore find themselves in the position where the DA did not permit the filing of a new permitted use application prior to the expiry of the 6 month period because the DA was awaiting the filing of a new IAO application on nearby lands.

[80] These consequences, demonstrating the very real dangers of differential treatment, underscore why as between a residential permitted use applicant and a subsequent IAO discretionary use applicant, the rights of the permitted use applicant crystallize as of the date of the filing of the permitted use application. Put into the lexicon of planning law, on the date a residential permitted use application is filed in conformity with the *Bylaw*, the applicant's potential right becomes a sufficiently acquired right that it cannot be defeated by a later-filed IAO discretionary use application on the basis of the MDS requirement.

[81] Nor should there be any difficulty in ascertaining the relevant facts as of the date of filing of the residential permitted use application. After all, they must be disclosed in the application itself. In this regard, the Love and Alderdice applications were both complete on the day of filing and in compliance with the *Bylaw*. Since the subject IAO had not achieved "proposed" status under s.6.1.7.3 on the date of filing of the Love and Alderdice single family permitted use applications, the DA was required to issue the single family residential permitted use permits.

[82] Therefore, I allow the appeal, reverse the decision of the SDAB and direct the DA to issue to Love and Alderdice the permits to which they are entitled for the construction of the requested single family residential dwellings.

APPEAL HEARD on NOVEMBER 27th, 2001

REASONS FILED at EDMONTON, Alberta
this 9th day of DECEMBER, 2002

FRASER C.J.A.

I concur:
as authorized by: FRUMAN J.A.

DISSENTING REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE RUSSELL

[83] The relevant facts, the decision below, and the applicable standard of review are as set out in the Reasons for Judgment of Fraser, C.J.A.

GROUND OF APPEAL

[84] Leave to appeal was granted on the following ground:

> Did the Subdivision and Development Appeal Board of Flagstaff County err in law in its interpretation of the word "proposed" as found in Section 6.1.7.3 of the Flagstaff County Land Use Bylaw No. 03/00 (LUB)?

[85] The appellants assert that two issues are raised by this ground of appeal: (1) the meaning of the term "proposed" in s. 6.7.1.3 of the LUB, and (2) the relevant time for determining whether an intensive animal operation (IAO) has achieved that status. Although the ground of appeal does not expressly include the second issue, no one has objected to its consideration and all parties have provided argument on it. Accordingly, I will assume that it is an element of the ground of appeal for which leave was granted.

ANALYSIS

What does "proposed" mean?

[86] Section 6.1.7.3 of the LUB prohibits construction of a residence within the minimum distance separation distance from an IAO, "either existing or proposed".

[87] The appellants submit that a "proposed" IAO is either one which has been approved but not yet constructed, or one for which a complete development application has been submitted. They argue that these definitions provide the certainty to which an applicant for a permitted use permit is entitled. In their view, the SDAB erred in holding, in effect, that the developer need only submit an incomplete application to render the development "proposed".

[88] In response, the developer contends that an IAO is "proposed" when a reasonable person would believe that a serious intention to develop has been shown.

[89] Given the significance of this term for both landowners and IAO developers, it is unfortunate that the LUB does not provide a definition.

[90] The Supreme Court recently reiterated its preferred approach to statutory interpretation in ***Bell ExpressVu Limited Partnership* v. *Rex***, 2002 SCC 42 at para. 26, (2002) 212 D.L.R. (4th) 1, citing E.A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[91] Hence, the meaning of "proposed" must be determined in the context of s. 6.1.7.3 and the LUB as a whole, considering the scheme, object and purpose of the LUB. The object and purpose of the *Municipal Development Plan*, County of Flagstaff, Bylaw No. 02/00 (Plan) and aspects of the *Municipal Government Act*, R.S.A. 2000, c. M-26 (Act) are also relevant to this inquiry as they form part of the legislative scheme in which a development permit application will be assessed.

[92] The word "proposed" is used in s. 6.1.7.3 as an alternative to "existing". This suggests that a proposed operation is one for which construction has not yet begun.

[93] The word "proposed" is used elsewhere in the LUB in a context which indicates that it there refers to a development for which an application has been submitted, but no permit has yet been issued: s. 3.4.4, 3.4.8, 3.4.13, 3.4.14. This might suggest that the same interpretation should be given to s. 6.1.7.3. But it does not clarify the degree to which an application should be complete, for a development to be "proposed".

[94] One might expect other provisions of the LUB to assist in that regard. However, s. 3.4.4 requires an IAO application to include "all relevant information necessary to allow the Development Authority to determine if the proposed development will meet the guidelines of the Code of Practice". Section 3.4.8 provides that if the application does not contain sufficient information, the development authority may return it, in which case it is deemed not to have been received. Those provisions suggest a complete application is required. But s. 3.4.9 specifically authorizes the Development Authority to make decisions on such applications, suggesting that the development retains proposed status even though the application itself is deficient. That broad discretion permits an incomplete application to be rejected or approved. It follows that little weight can be placed on these provisions in interpreting the LUB.

[95] One of the purposes of the LUB, as set out in s. 1.2, is to regulate and control the use and development of the County's land, to ensure orderly and economic development. This objective is largely achieved by providing a system for balancing competing land uses. In striking that balance, the LUB emphasizes the import of agriculture in the Agricultural District in which IAOs may be located. The preamble to the relevant district regulations reads:

> The purpose of the Agricultural District is to provide land where all forms of agriculture can be carried on without interference by other, incompatible land

> uses. The Development Authority may, at his discretion, refuse to issue a development permit for any land use which may limit or restrict existing or proposed agricultural operations in the vicinity.
>
> LUB s. 6.2.1

[96] Arguably a narrow definition of the term“proposed” might undermine this purpose. Neighbouring landowners could defeat an IAO, which is planned but not yet “proposed”, by rushing to obtain residential permits for land within the prescribed minimum distance separation from the IAO at the first hint of such a development. This possibility is exacerbated by the Plan’s direction, in s. 1.12, that developers should seek local support for an IAO before submitting a development permit application, thus alerting neighbours to the proposal, and providing them the opportunity to take evasive action. In this case, both applications for residential development permits were filed within days following the public consultation conducted by the developer.

[97] The emphasis placed on agriculture in the LUB is consistent with the Plan, which states that:

> Agriculture and providing services to the agricultural community are regarded as the most important forms of development in Flagstaff County....
>
> [A]griculture is viewed as the priority use when affected by competing land uses in most of the County....
>
> In that agricultural activities have priority in most of the County, the intent of this Plan is that no legitimate activity related to the production of food which meets Provincial and/or municipal requirements should be curtailed solely because of the objections of nearby non-farming landowners or residents....
>
> s.1.0, Statement of Intent

The Plan also reflects the role intensive agriculture is to play in the Agricultural Use Area. It includes amongst its objectives “the rational diversification and intensification of agricultural activities”: s. 1.0, Objectives. It considers the primary uses of the Agricultural Use Area to be extensive agriculture and IAOs: s. 1.3.

[98] In her Reasons for Judgment, Fraser C.J.A. contends that residential land use, in conjunction with extensive agriculture, satisfies this emphasis on agriculture. However, the development of a residence in conjunction with a farming operation is only one of two forms of residential development which are permitted uses in the area; the other is a single family dwelling on a residential parcel subdivided from a quarter section and unrelated to farming activities. Further, while rural Alberta may have developed in a pattern of quarter sections of land, each equipped with a family home, there is no evidence before this court to suggest that

this settlement pattern remains today, in a time of ever increasing mechanization. Nor is there evidence that the ability to develop a home on each quarter section is necessary to accommodate inter-generational farm families. In any event, interpretation of a bylaw involves consideration of the object and intention of the legislative scheme, as inferred from the relevant legislation itself. I do not infer from that legislation that these policy considerations form part of its object or intention.

[99] The legislative scheme of the Act is also relevant to this inquiry. Section 617 states that one of the purposes of the Act, and bylaws thereunder, is to achieve orderly, economical and beneficial development without infringing on the rights of individuals except to the extent necessary in the overall public interest. This reflects an intention to protect the capacity of property owners to develop their land as they see fit, subject to compromise for the pubic good.

[100] While IAO developers will generally be private entities, the development of IAOs serves the public interest, as they provide an economic benefit to the community as a whole. The Plan's emphasis of the importance of agriculture is motivated, at least in part, by economics. The Plan seeks to "promote economic diversification so that all residents may enjoy optimum working and living standards" and sees "agriculture and agricultural services as continuing to be a major economic force in the community": Goal. The Plan refers to "providing an environment that will benefit the agricultural community and economy": s. 1.0, Statement of Intent. It seeks to ensure that "agriculture remains an integral and viable component of the regional economy": s. 1.0, Objectives. Indeed, given the obvious nuisance factors associated with IAOs, it is hard to imagine why an IAO would ever be tolerated by a community, if not for its potential for positive economic impact.

[101] If "proposed" status is not achieved until late in the application process, neighbouring landowners may easily defeat the project by obtaining residential development permits. However, Fraser C.J.A. suggests that potential IAO's may avoid this conflict by the simple expedient of purchasing the entire minimum distance separation (MDS) area or by negotiating rights over it. This approach suggests that incursion onto private rights is not necessary, as required in s. 617. However, MDS areas are sizable. In the current case, the IAO is spread over five quarter sections. The MDS area for each of those quarters runs onto at least the eight surrounding quarter sections. Adopting Fraser C.J.A.'s approach would require acquisition or negotiation with respect to either all or part of the 40 quarter sections which surround the parcels marked for development. The developer's ability to purchase only the specific portions of the neighbouring sections which comprise the MDS area would be dependent upon subdivision approval from the County. A larger IAO would involve an even larger MDS area. This approach would significantly impact the economic viability of any potential IAO operation, depriving the community of the economic benefits associated with the intensification of agriculture. This would be inconsistent with the Plan's emphasis on agriculture as a key economic force in the County. Accordingly, while s. 617 contemplates preservation of private interests, the greater public good weighs against an interpretation of "proposed" that would render the County economically unfriendly to IAOs.

[102] The distinction the Act draws between permitted and discretionary uses is also relevant. These concepts are defined in both the Act and the LUB. A permitted use is one for which a permit must be granted if bylaws are complied with. As the name suggests, a discretionary use is one for which there is no imperative to grant a permit. This distinction reflects the principle underlying permitted uses:

> that, as a matter of good planning, within a given district, one or more uses may be identified that are so clearly appropriate in that district, and so compatible with one another that they demand no special consideration. Therefore, such uses ought to be approved as a matter of course no matter where they are located in the district, provided that the development standards set out in the bylaw are also met.
>
> F.A. Laux, *Planning Law and Practice in Alberta*, 3rd ed., looseleaf (Edmonton: Juriliber, 2002) at 6-3, cited with approval in ***Burnco Rock Products Ltd.* v. *Rockyview No. 44 (Municipal District)*** (2000), 261 A.R. 148 at para. 13 (C.A.)

[103] Most dwellings in the relevant district, including those under consideration in this matter, will be permitted uses. Extensive agriculture is also a permitted use under s. 6.2.1.1.a. However, an IAO is merely a discretionary use. While agriculture is a priority in the County, an IAO is considered distinct from extensive agriculture, and subordinate in its suitability for the district. This militates against an overly broad interpretation of "proposed".

[104] While permitted uses are given planning priority, their approval is subject to compliance with the relevant bylaws. The question of statutory interpretation raised in this appeal will determine whether the applicants' prospective residences comply with the LUB. Given that compliance with the bylaw is the central issue here, and permitted use permits are available only when bylaws are complied with, I do not place significant weight on the permitted nature of a residence. The County is entitled, through its bylaws, to place restrictions on permitted uses. It follows that inclusion of a particular type of development, in a list of permitted uses, does not mandate an interpretive approach that minimizes any restrictions the County has chosen to impose on such developments.

[105] The permitted/discretionary dichotomy, and the imperative to approve permitted uses subject to compliance with bylaws, support an interpretation of "proposed" that will provide certainty as to when that status is achieved. The greater the uncertainty on this point, the more approval of a residential development permit application might depend on an exercise of discretion by the Development Authority. This would tend to blur the distinction between a permitted use and a discretionary use.

[106] The developer equates the word "proposed" with incompleteness. It contends that a project is "proposed" when a reasonable person would have no doubt that a serious intention to develop has been displayed even though no application is filed. But such a test promotes

uncertainty. Would public consultation constitute a proposal or a mere testing of the waters? If "proposed" status may arise prior to the filing of an application, to whom must the development be proposed? How and when would serious intent be crystallized? How would any abandonment of that intent be determined?

[107] On the other hand, the appellants' proposal, that a complete IAO development permit application must be submitted to be "proposed," cannot be rationalized with s. 3.4.9. That section provides the development authority with discretionary power to decide an application despite the absence of required or requested information. According to that section, approval may be given to an IAO development permit application, even if it is incomplete. So there is no point at which the application can be objectively determined to be complete. Hence the standard of completeness does not assist in the interpretation of the word "proposed".

[108] In contrast, the decision of the SDAB that a development becomes "proposed" once a development permit application is submitted to the County provides a more objective and tangible touchstone.

[109] In her Reasons for Judgment, Fraser C.J.A. raises the question of how one could know with certainty when a filed IAO development permit had been abandoned. Neither the LUB nor the Act provide a mechanism for neighbouring landowners to compel the Development Authority to either decide or return a development permit application. She reasons that an application might remain filed and incomplete indefinitely if the applicant does not exercise his or her option to deem the application denied. However, the Development Authority is obliged to "receive, consider and decide on all applications": LUB s. 3.4.7. While the LUB does not provide a specific time frame for carrying out this duty, the Development Authority could not fail to act indefinitely. A neighbouring landowner, wishing to obtain a residential development permit, could seek an order of mandamus compelling the Development Authority to discharge its duty to decide the application. Accordingly, if an IAO is proposed as of the date an application is filed, an unannounced abandonment of that application could not indefinitely prevent a residential development from proceeding.

[110] Fraser C.J.A. also considers the prospect of numerous, repeated, development permit applications if an IAO becomes "proposed" upon the filling of an incomplete application. In such circumstances, an IAO developer might be motivated to file an application at the earliest possible time. However, under s. 3.4.1. LUB, only owners, or agents of owners, can apply for development permits. Thus a developer must either already be a landowner, or must acquire ownership or agency status, before applying for a permit. This would deter speculative applications. Further, a developer who submits an incomplete application runs the risk that it will either be returned under s. 3.4.8 or simply refused. In the latter case, the Development Authority could decline to accept a further application for 6 months: 3.4.12. So while a developer might be motivated to move quickly to file even an incomplete application, there are limitations on the extent to which this can be done and the benefits to be achieved.

[111] Moreover, the prospect of repeated IAO applications would only arise if an IAO permit was issued, but no development commenced within a 12 month period, resulting in the permit becoming void under s. 3.6.6 LUB. Few commercial enterprises would intentionally indefinitely postpone commencement of operations on potential revenue generating property. Further, it is unlikely that a Development Authority, answerable to an elected municipal council, would repeatedly grant permits for an unpopular IAO, construction of which was unreasonably delayed.

[112] The prospect of repeated residential development permits exists irrespective of when an IAO becomes "proposed". If an IAO is deemed to be "proposed" early in the planning process, landowners may be inclined to obtain residential development permits to ensure that, in the event an IAO project is announced in their area, they will retain the ability to develop a residence on their land. If an IAO does not become "proposed" until later in the planning process, landowners could wait until an IAO project is announced before seeking a development permit. But, in any event, if an IAO does not become proposed until it is approved, landowners may nonetheless be motivated to apply for a residential permit to block the project.

[113] Fraser C.J.A. concludes that an interpretation of the term "proposed" that might foster multiple applications for permits cannot have been intended as it could give rise to undue costs to landowners and IAO developers, increase in the County's workload, and run contrary to an intention to reduce red tape and costs.

[114] But if landowners choose to file development applications for the sole purpose of defeating the intended operation of the LUB, it is not unreasonable to expect them to bear the financial cost and inconvenience involved. If the County does experience an increased workload, it could adopt a fee structure that would discourage repeat applications.

[115] The LUB was intended to provide a scheme to prioritize residential permits and IAO permits. Regardless of how that scheme is interpreted, landowners and IAO developers are motivated to file permit applications as early as possible. From a policy perspective, it may be desirable to choose the option that minimizes administrative costs. One may even find a statutory intention to maintain costs at a reasonable level. But in the absence of evidence of any increase in administrative costs inconsistent with the intention of the legislative scheme, or evidence as to which interpretation would create the greatest cost impact, I am unwilling to attribute any weight to this factor.

[116] Fraser C.J.A. also considers the inequities of a developer being permitted to set up an IAO on a parcel of land too small to encompass the entire prescribed MDS. However, the issue before us concerns the meaning of "proposed" in the context of the objects and intention of the legislative scheme. Section 6.1.7.3 of the LUB reflects a clear choice by the Council of Flagstaff County not to require an IAO developer to purchase the entire MDS area. The validity of that provision is not before us. Nor is the fairness of the Council's choice to enact it.

[117] Considering the context surrounding the use of “proposed” in s. 6.1.7.3, its use elsewhere in the LUB, the emphasis placed on agriculture in the District, and the significance of agriculture in area economy, as well as the need for certainty with respect to limitations on permitted uses, the appellants’ arguments cannot prevail. I conclude that “proposed” in s. 6.1.7.3 refers to an IAO for which a development permit application has been submitted to the County, whether or not it is complete.

[118] It follows that, in my view, the SDAB did not err in its interpretation of “proposed”.

What is the relevant time for determining whether an IAO has achieved “proposed” status?

[119] The appellants argue that the development authority should have made its decision on their residential development permit applications on the basis of facts that existed at the time those applications were filed. They submit that this approach provides the degree of certainty to which a permitted use applicant is entitled. Since the application for the IAO development permit had not been made at the time the residential applications were submitted, they maintain that should foreclose any entitlement to an IAO development permit.

[120] However, the SDAB and developer maintain that filing an application for a permit does not crystallize any rights. They suggest that a change in facts should invoke the same principle as a change in the applicable law. They rely on authorities interpreting section 643(1) of the Act. That section does not allow a change in the land use bylaw to affect the validity of a permit granted on or before the change. This has been interpreted to mean a permit application may be defeated by a change in law that occurs between the filing of the application and the final decision thereon: ***698114 Alberta Ltd.* v. *Banff (Town)*** (2000), 190 D.L.R. (4th) 353 (Alta. C.A.); ***Parks West Mall Ltd.* v. *Hinton (Town)*** (1994), 148 A.R. 297 (Q.B.); ***Bouchard* v. *Subdivision and Development Appeal Board (Canmore (Town))*** (2000), 261 A.R. 342 (C.A.); Laux, *supra*, at 9-14.

[121] Neither the Act nor the LUB expressly directs a development authority or SDAB to consider only those facts in existence at the time a development permit application is filed. Nor have the appellants pointed to any provisions from which this could be inferred. The legislative scheme is silent on the question and the appellants, in effect, ask this court to read into the scheme a right to have their applications decided as of the date of filing.

[122] In non-*Charter* cases, a court’s jurisdiction to read words into a statute is limited:

> It is one thing to put in or take out words to express more clearly what the legislature did say, or must from its own words be presumed to have said by implication; it is quite another matter to amend a statute to make it say something it does not say, or to make it say what is conjectured the legislature could have said or would have said if a particular situation had been before it.

Driedger, *supra*, at 101.

[123] In ***Western Bank Ltd.* v. *Schindler***, [1977] 1 Ch. 1 at 18 (C.A.), Scarman L.J. considered the relevant distinction in the following terms:

> ... our courts do have the duty of giving effect to the intention of Parliament, if it be possible, even though the process requires a strained construction of the language used or the insertion of some words in order to do so.... The line between judicial legislation, which our law does not permit, and judicial interpretation in a way best designed to give effect to the intention of Parliament is not an easy one to draw. Suffice it to say that before our courts can imply words into a statute the statutory intention must be plain and the insertion not too big, or too much at variance with the language in fact used by the legislature.

[124] The legislative scheme does not expressly provide that a permitted use application must be assessed on the basis of facts in existence at the time of filing. Nor can such a right be implied. There may be compelling policy considerations which suggest that, had the legislators turned their minds to this issue, they would have granted the right asserted by the appellants. However, in the absence of discernable legislative intent, the grant of such a right oversteps statutory interpretation and amounts to judicial legislation.

CONCLUSION

[125] I would dismiss the appeal.

APPEAL HEARD on NOVEMBER 27th, 2001

REASONS FILED at EDMONTON, Alberta,
this 9th day of DECEMBER, 2002

_____

RUSSELL J.A.

698114 Alberta Ltd. v. Banff (Town of), 2000 ABCA 237

Date: 20000829
Docket: 99-18210 and 99-018209

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE O'LEARY
THE HONOURABLE MR. JUSTICE BERGER
THE HONOURABLE MR. JUSTICE SULATYCKY

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT,*
S.A. 1984, c. M-26.1 AND AMENDMENTS THERETO;
AND IN THE MATTER OF BYLAW NO. 167-1 OF THE TOWN OF BANFF;
AND IN THE MATTER OF PART 56 OF THE RULES OF COURT;
AND IN THE MATTER OF DEVELOPMENT PERMIT 90DP08

BETWEEN:

698114 ALBERTA LTD.

Applicant (Appellant)

- and -

THE TOWN OF BANFF, RANDALL McKAY and the
MUNICIPAL PLANNING COMMISSION OF THE TOWN OF BANFF

Respondents (Respondents)

AND:

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT*,
S.A. 1994 c.M-26.1 AND AMENDMENTS THERETO;
AND IN THE MATTER OF BYLAW NO. 31-3 OF THE TOWN OF BANFF

BETWEEN:

698114 ALBERTA LTD.

Applicant (Appellant)

- and -

THE TOWN OF BANFF

Respondent (Respondent)

Appeal from the Order of the Honourable Mr. Justice Medhurst dated February 25, 1999

MEMORANDUM OF JUDGMENT

COUNSEL:

R. Kambeitz
For the Appellant

S. C. McNaughtan
For the Respondents

MEMORANDUM OF JUDGMENT

THE COURT:

INTRODUCTION

[1] The development authority of the respondent Town of Banff ("the Town") declined to consider and determine an application made by the appellant, 698114 Alberta Ltd., on June 29, 1998 for a permit to develop a hotel, a permitted use, on its 5.5 acre property which comprised all of the lands in the "Pinewoods" land use district.

[2] The appellant made two related applications in Queen's Bench. They were argued together and both were rejected: ***698114 Alberta Ltd. v. Banff (Town)*** (1999), 238 A.R. 391. The appellant appeals. The applications were as follows:

> (i) Appeal No. 99-09713 - for a declaration that Bylaw 167-1, which amended the land use bylaw and imposed a temporary moratorium on commercial development, was enacted without the required statutory notice of hearing and was therefore invalid, and for a consequent order in the nature of *mandamus* compelling the Town, the respondent McKay, its Manager of Planning and Development, and the respondent Municipal Planning Commission, to consider and approve the appellant's application in accordance with Bylaw 31-1, the land use bylaw in force on June 29, 1998 ("the mandamus motion"); and
>
> (ii) Appeal No. 99-15140 - for a declaration that the Town's current land use bylaw, Bylaw 31-3, which repealed Bylaw 31-1 and was in force when the motions were heard, is invalid on the ground that its material provisions are not authorized by the governing legislation, or, alternatively, are void for uncertainty or as being unlawfully discriminatory ("the declaratory motion").

[3] The chambers judge held that Bylaws 167-1 and 31-3 were valid. They precluded approval of the development under the law at the date of the permit application as well as under the law at the date of the hearing. *Mandamus* was therefore not available to compel the Town to issue the permit. He went on to find that the status of Bylaw 167-1 was of no consequence as the relevant law was the Town's planning bylaws at the time the application was heard and not, as the appellant urged, the planning bylaws at the date the permit application was made. Finally, the chambers judge felt that it would be futile to compel the respondents to consider and determine an application that could not be approved

BACKGROUND

The Town of Banff

[4] The Town of Banff is in a national park geographically located within the Province of Alberta. It is a creature of federal and provincial legislation: ***National Parks Act,*** R.S.C. 1980, c. N-14, and the ***Parks Towns Act***, S.A. 1989, c. P-1.5. Pursuant to those statutes, the Federal and Alberta governments entered into an agreement ("the Incorporation Agreement") creating the Town of Banff effective January 1, 1990.

[5] Article 4.1 of the Incorporation Agreement provides that all planning laws of the Province of Alberta apply to the Town, subject to the terms of the legislation and the Incorporation Agreement. Article 5.1 requires all statutory plans and planning bylaws adopted pursuant to the Incorporation Agreement or the planning provisions of the ***Municipal Government Act,*** S.A. 1994, c. M-26.1, as amended by S.A. 1995, c. 24 (the "MGA"), to conform with the Banff National Park Management Plan approved by the "Federal Minister", defined as the Minister responsible for the ***National Parks Act*** or his delegate. By Article 5.5, every planning bylaw and statutory plan passed by the Town must be approved by the Federal Minister and is not effective until so approved.

Relevant Bylaws and Their History

[6] Bylaw 31-1 was passed in 1992 as the Town's land use bylaw. It was in force until it was repealed and replaced by Bylaw 31-3 on December 3, 1998, a few days before the appellant's applications were heard in Queen's Bench. Bylaw 31-1 designated the Pinewoods district as a distinct land use district with hotel development as the only permitted use. Concern over the rate of commercial development prompted the Town to initiate a comprehensive review of its development plan and land use bylaw. Commencing in March, 1997 a series of temporary amendments were made to Bylaw 31-1 designed to restrict commercial development pending completion of the review and revision of the Municipal Development Plan and the land use bylaw. The amendments imposed a virtual moratorium on new commercial development in districts where it was a permitted or discretionary use, including Pinewoods.

[7] Between March 12, 1997 and December 31, 1997, Bylaw 146 prohibited the approval and issuance of permits for commercial developments, with the exception of those that continued an existing use and resulted in a minimum increase in density.

[8] Bylaw 167 extended the freeze from December 31, 1997 to May 30, 1998. Bylaw 167-1, passed in late May, 1998 but not approved by the Minister and therefore not in force until June 24, 1998, purported to further extend the freeze from May 30 to June 30, 1998. On June 30, 1998, Bylaw 167-2 was passed for the purpose of extending the moratorium from June 30, 1998 to December 31, 1998. In the process of enacting Bylaw 167-1, the Town mistakenly gave only four days' notice of the required public hearing, one day less than the notice required by s. 606(2)

of the MGA. The parties dispute the effect of this error on the validity of Bylaw 167-1. The validity of Bylaw 167-2 is not questioned.

[9] Effective December 3, 1998 the Town adopted a new Municipal Development Plan and passed land use Bylaw 31-3 implementing the new Plan and repealing Bylaws 31-1 and 167-2.

[10] Coincidently the Banff Park Management Plan was also amended to require that the Municipal Development Plan and the land use bylaw include a growth management strategy permitting a maximum annual growth rate of 1.5% for commercial development. To implement this policy, Bylaw 31-3 instituted a method of annual commercial development allotment. Except for small commercial developments, where the aggregate demand for commercial development permits in a given year exceeds the target growth rate, commercial development rights are allocated among applicants by a lottery scheme. No permit for a commercial use may be issued unless a valid commercial development allotment exists for the parcel and the permit cannot authorize a project in excess of the gross floor area allocated.

Development History of Pinewoods District

[11] On May 31, 1991 the Town issued Development Permit 90-DP-08 to the appellant's predecessor in title pursuant to the then current land use bylaw. It permitted the construction of a major hotel and imposed a number of conditions. At the same time, subdivision of the parcel was approved to accommodate roadways and other features of the project. The permit was extended from time to time to May, 1996. It was not extended further, and at all material times had expired. On May 1, 1997 the appellant acquired title to the land by purchasing and then foreclosing a mortgage.

[12] On June 29, 1998 the appellant submitted an application to the Town for a development permit and for any necessary subdivision approvals for the same project approved in expired Development Permit 90-DP-8. It was expressed to be "an extension" of the expired permit and ancillary subdivision approval. It was properly characterized by the Town and the chambers judge as a new application for the same project approved in the expired permit. The appellant believed Bylaw 167-1 was invalid and thus its restriction on commercial development did not apply when the application was filed. In its view, the proposed hotel development had to be dealt with as a permitted use under Bylaw 31-1. It was prepared to abide by the conditions stipulated in the expired permit and any others properly imposed by the development authority.

[13] The application was rejected on the ground that it was incomplete. On July 7, 1998 the respondent McKay wrote the appellant and attached a copy of Bylaw 167-2. The letter said in part:

> The materials and information as submitted are not complete applications and cannot be accepted as such without all necessary aspects of the application requirements being complete. In addition, if you choose to

> submit applications to this office, while they will be accepted and processed, no Development Permit or Subdivision approval could be issued except in compliance with Bylaw 167-2 (attached).
>
> In these circumstances, an application that did not meet the requirements of Bylaw 167-2 would have paid application fees without a real prospect of obtaining a permit or approval.
>
> We therefore return to you the documents and cheques provided to us on June 29, 1998.

DECISION OF CHAMBERS JUDGE

[14] With respect to the mandamus motion, the chambers judge held that the procedural defect in the enactment of Bylaw 167-1 did not affect the appellant's land, and its right to the permit, as the defect did not prejudice the appellant. The Bylaw effectively prohibited approval of the development even if the relevant law was that in existence on the date the permit application was received by the Town. The chambers judge held that, in any event, the appellant's right to a permit, and hence to *mandamus*, did not crystallize on June 29, 1998, but was, rather, governed by the planning laws in effect at the date of the hearing of the motion. The respondents had no duty to issue a development permit on that date. It could not be issued under Bylaw 31-3. If Bylaw 31-3 was invalid, as the appellant claimed, Bylaw 167-2 extended the commercial development freeze from June 30, 1998 and was not repealed. He held it would be futile to compel the respondents to consider an application that was bound to be rejected. In any event, if Bylaw 31-1 applied, unaffected by the restriction imposed by Bylaw 167-1 or its extension by Bylaw 167-2, *mandamus* was not an appropriate remedy because of the need for a coincidental subdivision approval and given the variances and other discretionary elements inherent in the process of considering and determining a development permit application.

[15] With respect to the declaratory motion, the chambers judge ruled that the Town possessed legislative authority to enact bylaws regulating land use by virtue of the ***National Parks Act***, the ***Parks Towns Act***, the Incorporation Agreement, the Banff Park Management Plan and the MGA. The authority to limit future commercial growth and the method adopted to allocate commercial development permits were found to be within the authority delegated to the Town. The chambers judge found that the distinctions made in Bylaw 31-3 between various districts and uses, and the process adopted for implementing the commercial growth limitations prescribed by the Banff Park Management Plan were not discriminatory. Finally, the chambers judge held that the scheme for allocating permits for commercial development was not fatally vague and uncertain.

ISSUES

[16] The appellant submits the chambers judge erred:

> ***mandamus motion***
> (i) in holding that Bylaw 167-1 was effective notwithstanding non-compliance with the notice requirement of the MGA;
>
> (ii) in holding that entitlement to *mandamus* was governed by the planning bylaws at the tine the application was heard rather than at June 29, 1998;
>
> ***declaratory motion***
> (iii) in finding that the Town had legislative authority to pass Bylaw 31-3;
>
> (iv) in failing to find that Bylaw 31-3 was void in whole or in its material part as being vague and uncertain or unlawfully discriminatory.

SUMMARY OF DECISION

[17] We dismiss the appeals. In our view the chambers judge correctly held that the planning laws in force when the motions were heard determined the appellant's entitlement to *mandamus*. We agree with his conclusion that land use Bylaw 31-3 is valid and that *mandamus* is not available to compel the Town to approve the development under that bylaw.

[18] If Bylaw 31-3, or its relevant provisions, were found to be invalid for any reason, the appellant would nevertheless not be entitled to *mandamus*. A declaration of invalidity would reinstate Bylaw 31-1 and the moratorium on commercial development contained in Bylaw 167-2. Neither bylaw was attacked by the appellant.

[19] In view of our conclusion that the law at the date of the hearing of the motions governs the appellant's entitlement to *mandamus*, it is not necessary for us to consider the finding that the appellant's permit application was subject to Bylaw 167-1.

It would be senseless to compel the respondents to consider and determine the appellant's permit application in light of its certain rejection.

ANALYSIS

Mandamus - Relevant Law

[20] The chambers judge held that “the law relevant to the consideration of the *mandamus* application is that in force at the time of the court application." (para. 14) In support of his

conclusion, he referred to ***Monarch Holdings Ltd. v. Oak Bay*** (1977), 79 D.L.R. (3d) 59, 4 M.P.L.R. 147 (B.C.C.A.), ***Toronto v. R.C. Sep. S. Trustees***, [1926] A.C. 81, [1925] 3 D.L.R. 880 (P.C.), ***Re Upper Canada Estates Ltd. and MacNicol***, [1931] O.R. 465, 4 D.L.R. 459, aff'd. 41 O.W.N. 92, [1932] 2 D.L.R. 528 (C.A.), ***Spiers v. Toronto***, [1956] O.W.N. 427, 4 D.L.R. (2d) 330 (H.C.), and ***Can. Petrofina Ltd. v. Martin***, [1959] S.C.R. 453 (S.C.C.). He noted that the rule had recently been applied in Alberta in ***Parks West Mall Ltd. v. Hinton (Town)*** (1994), 15 Alta. L.R. (3d) 400 (Q.B.). These authorities fully support the conclusion reached by the chambers judge.

[21] Had the appellant's application been rejected, or deemed to have been rejected, by the development authority, and had an appeal been taken to the subdivision and development appeal board, the result would have been the same. In Planning Law and Practice in Alberta (2nd ed., 1998), Professor Laux says at para. 9.5(1) "[t]hat the filing of an application for a permit vests no rights in the applicant", that is rights do not crystallize at the date the application is filed with the municipality. He continues:

> Thus, if a use amendment rendering the proposed development non-complying is made to the land use bylaw between the date the application is filed and the date that the decision is made, the development authority should apply the amendment and reject the application. The general rule is that the law in force at the time the decision is made is the operative law.

[22] That proposition is supported by the case cited by Professor Laux, ***Taskey v. Edmonton (City)*** (Alta. C.A., Edmonton Appeal No. 15051, 1982), an appeal from the decision of a development appeal board.

[23] The mechanism established by Bylaw 31-3 for approval of commercial development permits precluded approval of the proposed development as the appellant did not have the required allotment. If Bylaw 31-3 were found invalid, or if the *mandamus* motion or an appeal from rejection or deemed rejection of the permit application, were heard prior to the effective date of Bylaw 31-3, *mandamus* would nevertheless have been properly refused or an appeal rightly dismissed. In either event Bylaw 31-1, as amended by Bylaw 167-2, would have applied. The commercial development moratorium imposed by Bylaw 167-2 compelled rejection of the application.

[24] The chambers judge was correct in declining to compel the respondents to consider and determine the permit application. The respondent McKay advised the appellant that the permit could not be issued and, rather than accepting the application and the accompanying fee, returned the documents and the money to the appellant with an explanation. Since the permit application had no prospect of success, it would have been pointless for the chambers judge to require the respondents to consider and formally reject it.

[25] In view of our conclusion that the law in effect at the time the *mandamus* hearing took place determined the availability of the remedy, it is not necessary for us to consider the conclusion of the chambers judge that Bylaw 167-1, although passed by the Town without the required statutory notice, was nevertheless binding on the appellant in the absence of prejudice to it.

Validity of Bylaw 31-3

(i) Lack of Legal Authority

[26] Section 639 of the MGA requires the Town to enact a land use bylaw. Section 640(1) says that "[a] land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality." Subsection (2) specifies certain mandatory and discretionary contents of a land use bylaw. The relevant parts provide that a bylaw:

> (a) must divide the municipality into districts of the number and area the council considers appropriate;
>
> (b) must . . . prescribe with respect to each district,
>
> > (i) the one or more uses of land or buildings that are permitted in the district, with or without conditions, or
> >
> > (ii) the one or more uses of land or buildings that may be permitted in the district at the discretion of the development authority, with or without conditions,
>
> or both;
>
> (c) must establish a method of making decisions on applications for development permits and issuing development permits for any development, including provision for
>
> > . . .
> > (ii) applying for a development permit,
> >
> > (iii) processing an application for, or issuing, cancelling, suspending or refusing to issue, a development permit,
> > . . .
> > (vi) the discretion that the development authority may exercise with respect to development permits, and
> >
> > (vii) any other matters necessary to regulate and control the issue of development permits that to the council appear necessary;
>
> . . .

> (4) Without restricting the generality of subsection (1), a land use bylaw may provide for one or more of the following matters, either generally or with respect to any district or part of a district established pursuant to subsection (2)(a):
>
> . . .
>
> (b) the ground area, floor area, height, size and location of buildings;
>
> (c) the amount of land to be provided around or between buildings;
>
> . . .
>
> (o) the density of population in any district or part of it;

[27] The chambers judge referred to s.640 and concluded that the allotment process for commercial development permits contained in Bylaw 31-3 was within the authority delegated to the Town by that section. We agree with his conclusion and with the following passage from his judgment, at para. 26:

> The allotment system provided under Bylaw 31-3 is quite logically the regulation and control of the development of the land within the Town pursuant to a new philosophy of commercial development control. Section 640(1) is distinct from s.640(2) and the s.640(2) requirements relating to development permits. Bylaw 31-3 still meets the requirements under s.640(2): it divides the municipality into districts, prescribes the permitted or discretionary uses, and establishes the means by which decisions will be made regarding development permits. However, in addition to this, the Town has decided to further regulate land development by instituting a random allotment system. While this is not specifically authorized by the *Municipal Government Act*, the broad powers of regulation and control outlined in s.640(1) provide the Town with legal authority to create such a system.

(ii) Vagueness and Uncertainty

[28] The appellant argues that the allotment scheme for allocation of commercial development permits contained in s.9 of Bylaw 31-3 is so uncertain of meaning or application that it is void, is not severable from the remainder of the bylaw, and the bylaw is wholly void.

[29] We agree with the chambers judge's conclusion that s.9 of Bylaw 31-3 is not so vague and uncertain in its meaning or application as to render it void. In ***Montreal v. Arcade Amusements Inc. et al*** (1985), 18 D.L.R. (4th) 161, 29 M.P.L.R. 220, Beetz, J., speaking for the Supreme Court of Canada, reviewed a number of authorities and summarized the general

principles applicable when a bylaw is attacked on the ground of vagueness and uncertainty. He said at (M.P.L.R.) 252:

> Respondents and the city cited several judgments in support of their respective arguments: in each of them the Courts had to determine whether some provision or certain words in a by-law were so vague as to make the by-law void. Each case is practically unique, and the Courts have to determine each time whether the true meaning of the by-law in question can be understood by the persons to whom it applies.

[30] He distinguished fatal vagueness and uncertainty from difficulty of interpretation, citing with approval a passage from the judgment of Rae J. in ***Re London Drugs Ltd. and North Vancouver***, [1972] 2 W.W.R. 625, 24 D.L.R. (3rd) 305, aff'd. [1973] 1 W.W.R. 192, 30 D.L.R. (3rd) 768n (B.C.C.A.), at [1972] 2 W.W.R. p. 628:

> In my view the wording objected to in the bylaw before me does not have that quality of vagueness and uncertainty which is such as to render the bylaw invalid in part or in whole. It may be that the bylaw here will occasion some difficulty of interpretation. But difficulty of interpretation is not to be confused with vagueness and uncertainty to the point of invalidity.

[31] The appellant complains that under the allotment scheme a person in the position of the appellant cannot know when, if ever, it will be in a position to apply for a commercial development permit for a proposed development that is a permitted use and otherwise complies with the bylaw. There is no certainty that any allotment or a sufficient allotment will be received in any particular year or over any particular period of time. A landowner is unable to predict with any degree of certainty when a proposed commercial development that is a permitted use may proceed, creating a kind of uncertainty equally important to an affected citizen as the uncertainty created by imprecise wording.

[32] The chambers judge conceded that Bylaw 31-3 may present some difficulties of interpretation and construction, but its provisions are not vague or uncertain to the degree necessary to render the bylaw invalid. We agree with his view.

(iii) Unlawfully Discriminatory

[33] The principle was stated by Beetz, J. in ***Montreal v. Arcade Amusements Inc.***, ***supra***, at (M.P.L.R.) 254:

> The rule that the power to make by-laws does not include that of enacting discriminatory provisions unless the enabling legislation provides the

> contrary has been observed from time immemorial in British and Canadian public law. It has been and still is applied in municipal law.

[34] The appellant argued that Bylaw 31-3 unlawfully discriminates against it and its property in two respects. First, it is said that the bylaw reduces the floor area ratio or density requirement in the Pinewoods district more than in other districts where hotels are permitted uses. Second, the appellant says the random draw allotment system prescribed by the bylaw discriminates between small commercial developments, on the one hand, and medium and large-scale developments, on the other hand, since small commercial developments are excluded from the allotment scheme.

[35] We concur with the view of the chambers judge that s. 640(4)(b) is direct legislative authority entitling the Town to create land use districts differing in respect of building density requirements. Bylaw 31-3 limits the size of buildings and the floor area ratio in the Pinewoods district. These standards may differ in other districts where hotel developments are permitted uses. However, that is precisely the kind of distinction that is a necessary and fundamental aspect of municipal planning law and is within the scope of what is contemplated by the provisions of the MGA.

[36] The system of random allocation of commercial development permits established by Bylaw 31-3 does not include “small developments” as defined in the bylaw. The appellant alleges that this distinction unlawfully discriminates against proposed medium and large developments.

[37] If this distinction creates a form of discrimination against the appellant, it is in our view a form of discrimination permitted and in fact contemplated by the planning provisions of the MGA. In any event, the provisions of the Banff Park Management Plan prohibit the Town from approving commercial developments which cumulatively exceed a certain annual growth level and, in that context, subjecting proposed large-scale developments to the allotment process while allowing smaller-scale developments to proceed in the normal fashion cannot be characterized as impermissible discrimination. Planning laws are by their nature discriminatory in respect of the type and scale of developments permitted.

[38] The appellant does not suggest that the Town acted in bad faith or for an improper motive in reducing the density permitted for the Pinewoods district. And there is no suggestion that the Town specifically targeted the appellant and its lands for any reason.

[39] The chambers judge correctly rejected this ground of attack on the validity of Bylaw 31-3.

CONCLUSION

[40] The appeals are dismissed.

APPEAL HEARD on December 8, 1999

MEMORANDUM FILED at Calgary, Alberta,
this 29th day of August, 2000.

_____
O'LEARY J.A.

_____
BERGER J.A.

_____
SULATYCKY J.A.

In the Court of Appeal of Alberta

Citation: Pattison Outdoor Advertising Ltd v Calgary (Subdivision and Development Appeal Board), 2015 ABCA 317

Date: 20151019
Docket: 1401-0223-AC
Registry: Calgary

Between:

Pattison Outdoor Advertising Ltd

Appellant
(Appellant)

- and -

The City of Calgary and The Subdivision and Development Appeal Board of the City of Calgary

Respondents
(Respondents)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Thomas Wakeling

Memorandum of Judgment
Delivered from the Bench

Appeal from the Decisions by
The Subdivision and Development Appeal Board of the City of Calgary
Filed on the 15th day of August, 2014
(SDAB 2014-0024; SDAB 2014-0025)

Memorandum of Judgment
Delivered from the Bench

Rowbotham J.A. (for the Court):

[1] Appeal No 1401-0223-AC is from two Subdivision Development and Appeal Board ("SDAB") decisions (Decisions 2014-0024 and 2014-0025) that upheld the City of Calgary development authority's refusal to issue development permits ("permits") for two existing Class F third-party advertising signs located on the Anderson Station LRT park-and-ride site. The appellant obtained permission to appeal the SDAB decisions on two grounds:

> (i) Did SDAB Decision 2008-0113 and Decision 2008-0114, wherein the SDAB granted two five-year temporary development permits to the applicant, create an issue estoppel that bound the SDAB when considering the subsequent appeals from the applications for the two new five-year temporary development permits for the same use?
>
> (ii) In the event that this court were to find that an issue estoppel is created, should this court decline to enforce it for any reason, including but not limited to the position advanced on behalf of the applicant before the SDAB?

[2] The appeal turns on whether issue estoppel prevented the development authority from refusing to issue two replacement permits in 2014 because temporary permits for these two signs were granted in 2008.

[3] The appellant's grounds of appeal before the SDAB were its disagreement with the development authority that the billboards' size was not appropriate to the site, that their advertising did not contribute to the community, and that the billboards did not "exist" for the purposes of the governing legislation. (The SDAB agreed with the appellant's arguments on the latter point.) In oral submissions to the SDAB, the appellant also focused on the fact that, in any event, the permits would again be temporary.

[4] The SDAB upheld the development authority's refusal to grant the permits. After considering the required aspects of the governing legislation, it concluded there was insufficient planning rationale to support the applications. More specifically, the SDAB agreed with the development authority's conclusion that, from a planning perspective, the signs were inappropriate for the site. The SDAB considered the following factors: (a) the City's plan to replace the park-and-ride facility with a mixed-use development including condominiums and retail; (b) the signs are not compliant with the *Municipal Development Plan* because they do not contribute aesthetically to the site and advertise services unrelated to the site; (c) the billboards are auto-oriented whereas the area has become more pedestrian-focussed; and (d) pursuant to the

Transit Oriented Development Policy Guideline (which governs the site), the scale of the signs is no longer appropriate.

[5] The appellant did not raise issue estoppel so the SDAB said nothing about it. This means the usual standard of review analysis does not apply, and we are (exceptionally) considering the estoppel argument for the first time.

Decision

[6] Issue estoppel can apply to development permits because they can be judicial decisions: *Sihota v Edmonton (City)*, 2013 ABCA 43, 542 AR 229. Issue estoppel requires that: (i) the first judicial decision was final; (ii) the same issue is engaged for the second time; (iii) the same parties or their privies are involved; and (iv) it is fair and just to apply the doctrine: *Sihota* at para 8. (The third element is satisfied.)

[7] Issue estoppel does not apply on these facts.

[8] First, the decision that led to the 2008 permits was not final; the permits stated they were "valid for a period of five (5) years and expire on May 30, 2013". The appellant suggests that although the approval was temporary, the decision to issue the permit is final. However, in our view, the notion of finality expired with the permit. The appellant knew it would have to apply for new permits and obtain approval if it wanted to maintain the signs. This alone makes *Sihota* distinguishable.

[9] Second, the issue is not the same as it was in 2008. Development is a process that is context sensitive. Further, the ability of a municipality to pass bylaws includes responding to "future issues in their municipalities": *Municipal Government Act*, RSA 2000, c M-26, ss 8-9.

[10] Plainly, the Legislature contemplated, and expressly authorized, situations where the municipality "responds" to changes in the social dynamic and the evolving needs and objectives of the electors and the community. In our view, the language in section 9 of the *MGA* reinforces the principle that as they exercise their powers as a form of democratic governance, municipalities should not be casually taken to have fettered their discretion to change land use bylaws.

[11] The appellant argues that the temporary nature of the 2008 permits is a red herring because the true issue is the 2008 conclusion that the signs were site-compatible. It submits no substantive changes have occurred since. However, the facts militate otherwise. The appellant relies on this court's decision in *Yellowhead Engine Rebuilders Ltd v Edmonton (City)*, 2005 ABCA 429, 376 AR 253 in support of the application of issue estoppel to specific prior fact findings by a development authority respecting an existing development on a parcel. But in *Yellowhead*, the development was a lawful non-conforming use, not a temporary form of use temporarily allowed by the development authority. That is nothing like the situation here.

[12] To translate the reasoning in *Yellowhead* to the present situation would amount to saying that the municipality has, in effect, by a temporary agreement with the appellant, fettered its ability

to change the land use bylaw on which that temporary agreement was based. As pointed out in *ARW Development Corporation v Beaumont (Town)*, 2011 ABCA 382 at paras 34-35, 52 Alta LR 5th 219:

> [34] Generally speaking, a municipal bylaw cannot abrogate a contract entered into by a municipality. Successor municipal councils are bound by the contracts of previous councils. In The *Law of Canadian Municipal Corporations*, looseleaf, 2nd ed (Toronto: Thomson Reuters, 2009) Ian MacF. Rogers states at page 1063 "[a] municipality cannot lawfully make use of its legislative authority for the purpose of annulling a valid and subsisting agreement to which it is a party to deprive the other party of his vested rights ...".
>
> [35] There is a competing principle, however. The same author states at page 1051 that a municipal contract that effectively fetters a municipality's legislative discretion is ultra vires unless the enabling legislation expressly authorizes the fettering:
>
> > Unless expressly authorized to do so local authorities have no power to enter into an agreement the effect of which will be to restrict or divest the legislative powers of succeeding councils in respect of any matter affecting the public at large. ... It is not an offence against this rule for a council to bind its successors in office by a contract for a term of years where such a contract is made in the exercise of its proprietary or business powers.

[13] Context, as usual, is crucial here. The City approves permits within the planning framework in force at the relevant time. The planning framework has changed significantly since 2008. Different land use bylaws governed: in 2008 it was *Calgary Land Use Bylaw 2P80* and in 2014, *Land Use Bylaw 1P2007*. There was also a change in use; in 2008 the parcel was designated "urban reserve" whereas in 2014 it was designated "Special Purpose – City and Regional Infrastructure (S-CRI) District".

[14] Other governing policies changed, too. The *Municipal Development Plan* (Bylaw 24P2009) was significantly revised in 2010 to focus on "multi-modal" streets that increase the focus on walking, cycling and transit and a "walkable pedestrian environment". The *Third Party Advertising Sign Guidelines*, adopted in July 2012, replaced the *Billboard Development Policy Guidelines*, and discourage third party advertising signs visible from regional pathways in order to preserve the pathways' character. The *Transit Oriented Development Guidelines* existed in 2008 but was not mentioned in the 2008 decision granting the permits. Section 6.5 encourages "'human scaled architecture' ... to ensure that pedestrian comfort is of primary importance" whereas these billboards are auto-oriented. In conclusion, this planning framework promotes a much more pedestrian friendly environment than existed in 2008.

[15] Beyond this, there is also a proposal to redevelop part of the area into a mixed-use (residential and commercial) area, which further supports the refusal to grant the permits on the basis that the signs are not site-compatible. In conclusion, the planning framework has changed, the bylaw and associated guidelines have changed and there is no basis for any reasonable expectation by the appellant dating from 2008 or any time since that the temporary permission had become carved in stone. There is no settled issue to which the doctrine of issue estoppel would apply, let alone a final decision on the same issue.

[16] Finally, it would not be fair and just to apply issue estoppel to discretionary use, temporary permits. A municipality's decision-making would be fettered if the doctrine of issue estoppel required it to grant a replacement permit once a temporary permit expired.

Appeal heard on October 15, 2015

Memorandum filed at Calgary, Alberta
this 19th day of October, 2015

Rowbotham J.A.

Appearances:

D. Both and H. Roskey
for the Appellant

B.P. McLain
for the Respondent The City of Calgary

J. Sykes
for the Respondent The Subdivision and Development Appeal Board

Date: 08302007
Docket: BK 06-02-79899
Indexed as: Bankruptcy of Rodney Allen Gardham
Cited as: 2007 MBQB 223
(Brandon Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF THE BANKRUPTCY OF: RODNEY ALLEN GARDHAM	)	
BETWEEN:	)	
BDO Dunwoody LLP (as trustee in bankruptcy for The estate of Rodney Allen Gardham, bankrupt) Applicant	)	Mr. David E. Swayze For the Applicant
and	)	
Twin Valley Co-Op Ltd. Respondent	)	Mr. John A. Jones For the Respondent
	)	**REASONS DELIVERED: August 30 , 2007**

REGISTRAR HARRISON

[1] Can a trustee in bankruptcy demand and receive forthwith from a cooperative the proceeds of the bankrupt's patronage account? This case is about whether the bankrupt's membership equity, in the respondent, is exigible

by the trustee. *Black's Law Dictionary* (Eighth Edition) defines the term "exigible" as follows:

> "exigible – Requirable; demandable (as a debt)"

[2] The applicant trustee seeks an order that the bankruptcy's said equity is an asset of the bankrupt's estate and that it is due and owing (Tab #2). The issue comes before this court pursuant to the "exercise of original, auxiliary and ancillary jurisdiction" found within s. 183(1) of the ***Bankruptcy and Insolvency Act*** 1992 S.C. c. 27 and also pursuant to s. 192(1)(j) thereof. Plagiarizing the learned authors Houlden & Morawetz, in the 2007 ***Annotated Bankruptcy and Insolvency Act*** (page 800); this matter is a claim in which the trustee has placed a monetary value on property that it asserts belongs to the bankrupt. There is therefore vested in the bankruptcy court the necessary power and jurisdiction to authorize and sanction acts required to be done by the trustee for the due administration and protection of the bankrupt's estate.

[3] The facts are simplistic:

1. BDO Dunwoody LLP was appointed Trustee of the Estate of Rodney Allen Gardham on the 24th day of January 2006.

2. As at the date of bankruptcy, the Bankrupt had assets which included $13,254.42 equity in the respondent Twin Valley Co-Op Ltd. (Tab 3 ex. "C").

3. The respondent refuses to honour the trustee's request or demand for immediate redemption of Mr. Gardham's equity in that institution stating that the equity will only be paid out pursuant to the conditions set forth within the co-op's Policy Binder (Tab #5 Ex "B" last page) as follows:

> "5. Other Reasons – The Co-operative may at times be requested to pay out equities for other reasons than noted above. Some of these reasons would include Bankruptcy, Marriage Breakdown, Compassionate reasons. All of these will require Board approval and will be paid as decided. The following conditions will apply.
>
> a) Bankruptcy: Upon receipt by the Co-Op of a notice of Bankruptcy from the trustee and Board approval, the Co-Op will treat this as an application for withdrawal, will approve the withdrawal from membership, and issue a cheque to the trustee for the $10.00 membership. The balance of the equity account will be paid to the trustee once the member qualifies under the overage, moved away or estate guidelines. It should be noted that the membership terminates, the member is no longer allowed to use the membership number and will not receive any patronage allocation ..."

[4] The trustee obviously wants the claimed equity as soon as possible to fulfill and hopefully complete its statutory duties. As noted by the learned authors Houlden & Morawetz (supra) at page 72:

> "The BIA contemplates that assets will be disposed of as quickly as possible. The court will, therefore, do all in its power to assist in the expeditious sale of the assets and to discourage litigation that will prevent this from happening: Re Ashcroft Steel Co. (1962), 5 C.B.R. (N.S.) 239 (Que. S.C.) ..."

[5] The trustee's duties include the distribution of available funds to the unsecured creditors of Mr. Gardham. The issue before this court is whether under the circumstances, an order can, or indeed should go requiring the respondent cooperative to pay out forthwith the monies in question. If so, what conditions under the circumstances are appropriate?

[6] The respondent is adhering to its position that no monies are due and payable to the trustee until the bankrupt reaches the age of 65 years. The trustee has been advised by the bankrupt that he is presently 46 years of age. As a result, under the above cooperative policy, it could be almost 20 years before the bankrupt's equity in that institution would be paid out to the trustee and thereafter to the unsecured creditors. There is no evidence before the court that the bankrupt is moving or has moved away from the respondent's trading area, whatever the latter term may mean. Paragraph 4 of Mr. Dreger's affidavit (Tab #5), as the General Manager of the respondent, sworn January 24, 2007 establishes the financial basis for the problem at hand:

> "4. Because Twin Valley Co-Op Ltd. had a difficult year financially in 2006, I do not anticipate that there will be any re-purchase and redemption of membership shares this year pursuant to paragraph 9.07 (e) of the By-laws attached as Exhibit A."

THE METAPHORICAL SHOES

[7] It is common bankruptcy parlance to refer to the trustee as stepping into the "shoes" of the bankrupt. When considering the various avenues open to

the trustee to realize upon the assets of the bankrupt, the metaphor is of some practical application. Both counsel agree that the trustee has indeed legally stepped into the bankrupt's shoes and thus is able to enforce the bankrupt's rights and remedies against his assets for the benefit of the unsecured creditors. The above defined issue, paragraph [2], is reflected in the type of shoes that the trustee steps into. Mr. Jones submits that they are not more expensive nor of a better quality than those originally worn by the bankrupt. In other words, Mr. Jones is stating that the rights available to the trustee are identical to those possessed by the bankrupt. The occurrence of the bankruptcy cannot place the trustee in a better position to realize upon the subject asset than the bankrupt possessed himself. In response, Mr. Swayze on behalf of the trustee, states that this does not permit the cooperative to diminish the value of the membership equity asset by prohibiting the allocation of further patronage benefits. This would have the obvious effect of "freezing" the acknowledged value of the asset in current monetary terms. To do so would, in the trustee's opinion, be unfair to the unsecured creditors who are relying upon an equal and fair distribution of the assets of the bankrupt.

[8] Inherent to the above arguments is the acknowledgement by both sides that the subject membership equity is property within the bankrupt's estate as defined within section 2 of the BIA. The trustee's obligation is set forth on

page 56 of The 2007 Annotated ***Bankruptcy and Insolvency Act*** (supra) as follows:

> "As an officer of the court, the trustee has a duty to realize as much as possible from the estate for the benefit of the creditors."

[9] Consequently at law the trustee bears an obligation to deal with this asset in a fair and reasonable manner.

THE NATURE OF THE ASSET

[10] The proper disposition by this court of the issue at hand is predicated upon the correct characterization of the asset. In other words, what precisely is the nature of the asset being sought by the trustee to be liquidated and distributed? It is only after the subject asset has been properly identified and its characteristics clarified that this court can determine what remedies, if any, are available to the trustee. Given the provincial statutory creation of the asset, it is essential that reference be made to the governing legislation.

[11] Within the Province of Manitoba cooperatives are created and governed by ***The Co-operatives Act*** CCSM c. C223. The jurisdiction of this province to create cooperatives has the same genesis as its authority to legislate ***The Corporations Act***. Said jurisdiction is found within s. 92 (13) of ***The Constitution Act*** 1867 (U.K. 30 & 31 Victoria, c. 3) under "property and civil rights". Section 1 of the provincial legislation, under "cooperative" and

"cooperative entity" simply defines a cooperative as a body corporate (to which the Act applies) organized and operated on "cooperative principles". These principles are not specifically defined within the said legislation. Pursuant to section 23 and 24 of ***The Cooperatives Act***, the respondent cooperative has all the powers and capabilities of a "natural person". At this point in the legislation, it would appear that there is not a real difference between a "body corporate" created under ***The Corporations Act*** or one under ***The Cooperatives Act***. This conceptual similarity is ended by the provisions of s. 52 and s. 53:

> "53 Except as in this Act otherwise expressly provided, each cooperative shall allocate among, and credit to its members its surplus for each financial year of the cooperative, and each of its members shall be entitled to a share thereof proportionate to the business done by that member with or through the cooperative in that financial year as computed by its directors at a rate approved by a resolution of its directors."

[12] The legislation then, in reverse numerical order, provides for the establishment of a surplus "half-way house" or reserve fund:

> "52 Every cooperative
> (a) shall, by its by-laws, provide that, before any distribution of its surplus for a financial year is made, such part thereof as may be necessary for those purposes shall be appropriate for, and transferred to, reserve funds duly established by by-laws or by resolution passed by the members at a general meeting, and shall be used to retire all or a part of any accumulated deficits;
>
> (b) ...

> (c) may, by its by-laws, provide for payment, out of surplus, of interest or dividends on its member loans, its membership shares or its patronage loans at rates not exceeding the maximum rates specified in its articles."

[13] The above legislation thus appears to govern the distribution of any surplus to cooperative members by a two step process. Under s. 53 any cooperatively earned surplus is to be credited to its individual members based on the volume of their particular business transactions as computed, or this court assumes multiplied, at a specific uniform rate, for that fiscal period or year, established by the Board of Directors. Prior however to any payment out to any of its members, the designated surplus is transferred to a reserve fund, the contents thereof becoming subject to the specific constraints set forth within s. 52. Of particular note to this court is the offsetting of prior deficits against the newly deposited surplus under s. 52(a).

[14] This procedure is statutorily "written in stone". Section 212 (3) compels any director or officer of a cooperative to "act in accordance with this Act and the regulations" regardless of any contract, bylaw or cooperative resolution. From the above, it appears that the statutory wording is paramount and consequently no bylaw, resolution or policy can modify the impact of the statute. The latter comment however begs the question as to whether the statute does in fact provide the necessary guidance to this court in terms of the characterization of the subject equity. As noted above, section 52 requires every

cooperative, in mandatory terms under sub (a), to transfer the annual operational surplus to a reserve fund where it become subject to the binding and offsetting obligations of previous deficits. Sub-section (c) of s. 52 appears to allow discretion in terms of the actual payment out of the said reserve fund as long as its particular by-laws are complied with and the maximum payment rates do not exceed those specified in its articles. Sections 58 and 59 of the legislation provide for the ability of any cooperative to require, by way of by-law, for "any patronage return" to be allocated to shares with repurchase obligations on the part of the cooperative or, the compulsory loan of any patronage returns to the cooperative on terms set by under the by-laws. Again it is to be noted that the legislation appears to change its terminology and may be interpreted to mean that a surplus, once calculated pursuant to the definition section, becomes a "patronage return" allocated to any individual member. This interpretation is borne out in the opinion of this court by the following statutory definition used for:

> "'patronage return' means an amount that under this Act is allocated among and credited or paid by a cooperative to its members, or to its members and non-member patrons, based upon the business done by each of them with or through the cooperative;"

[15] A review of the affidavit evidence provided to this court and in particular Ex "C" to the deposition of Mr. DeVliegere affirmed November 21st, 2006 (Tab #3) shows the bankrupt's "equity" as $13,254.42. The same exhibit contains the percentage refund calculated at 3.3% of the bankrupt's purchases

in that year of goods and services of $23,833.18. As a result, the sum of $118.11 was added to his previous equity. A 15% withholding tax was deducted. This court's assumption is that the latter 15% would have been duly remitted by the respondent cooperative to the Canadian taxation authorities. No authority was provided by either side supporting the proposition that the payment of income tax would render the patronage account an exigible asset.

CONCLUSION

[16] It appears that regardless of the remittance of tax, the application of trade volume factors, the designation and transfer of resulting amounts to a "patronage" account, there is nothing in the governing legislation compelling a cooperative to pay out any amount in any particular reserve fund to anyone and certainly not on demand. This would obviously include those funds allocated to the bankrupt.

[17] The by-laws and policies of the respondent are somewhat of a red herring. If the trustee was able to demonstrate a statutory obligation to pay out the funds, a contrary by-law, resolution or policy would, according to section 212 (3) of the Act, be irrelevant. It is to be remembered that there is no evidence before this court to demonstrate that the bankrupt or his patronage account is being treated in a discriminatory fashion by the cooperative respondent. Certainly the trustee has the option and perhaps the duty to monitor the financial

performance of the respondent and if necessary commenced an action on that ground as required. No evidence of any such oppression, from the respondent, is before this court.

[18] This court is therefore not in agreement with Mr. Swayze's position that the respondent's by-laws are contrary to public policy. Co-operatives have a rather unique statutory status. Unfortunately none of the co-operative statutes in Canada attempt to exhaustively define the meaning of "co-operative" (Daniel Ish, B.A., LL.B., LL.M, "*The Law of Canadian Co-operatives*", 1981 Carswell, page 3). The noted learned author (page 75), while acknowledging the provision in all co-operative legislation (federal and provincial) to pay out surplus, makes the following general statement:

> "It will be noted that the above section does not require the patronage dividend to be actually paid to the members; it may be 'allocated, credited or paid' to them. This sets the stage to enable the co-operative to retain the patronage dividend as a compulsory loan from the members. The Ontario Act, again not uncommon in this respect, goes on to provide that a co-operative may enact a by-law enabling it to retain any or all of the patronage dividend...
> Virtually all co-operatives have such a by-law."

[19] Below the learned author summarizes the practical and, in my opinion, legal impact of the unique democratic characteristics of co-operatives (page 76):

> "The provisions outlined above enable a co-operative to raise capital by means of a revolving loan fund. Annual patronage dividends are credited to members,

> but are regularly retained by the co-operative as compulsory loans until the desired fund has been accumulated by the co-operative. Future patronage dividends continue to be withheld by the co-operative either in whole or in part, and earlier loans are retired in chronological order. The result is that the members receive by way of a patronage dividend from the co-operative, an amount, retained by the co-operative, in an earlier year under the compulsory loan by-law, which has been retired. The retirement of such loans, similar to a declaration of a dividend is a matter for the discretion of the directors, unless specific provisions exist in the by-laws."

[20] Unfortunately for the applicant trustee, he is caught in the statutory characteristics of the respondent. No provision exists compelling the payment of these funds in the absence of discriminatory or oppressive conduct on the part of the respondent. In addition, the respondent is statutory bound to not pay out funds which would breach the liquidity requirements of the enterprise (section 86). In the present circumstances, the asset claimed by the trustee, while valid property under the definition of such within the ***BIA***, is simply not exigible.

[21] While in my opinion costs are not assessable against either the applicant or the respondent, the court is certainly prepared to hear argument in this area if requested by counsel.

_____

In the Court of Appeal of Alberta

Citation: Koebisch v Rocky View (County), 2021 ABCA 265

Date: 20210720
Docket: 1901-0311-AC
Registry: Calgary

Between:

Keith Koebisch and Harry Hodgson

Respondents
(Applicants)

- and -

Rocky View County, also known as the Municipal District of Rocky View No. 44

Appellant
(Respondent)

- and -

Summit Aggregates Limited, 14102066 Alberta Ltd., McNair Sand and Gravel Ltd., Buckley Ranch Aggregate Development Ltd., LaFarge Canada Inc.

Not Parties to the Appeal
(Intervenors)

The Court:

The Honourable Justice Frederica Schutz
The Honourable Justice Elizabeth Hughes
The Honourable Justice Kevin Feehan

Reasons for Judgment Reserved

Appeal from the Order by
The Honourable Justice J.T. Eamon
Dated the 16th day of September, 2019
Filed on the 11th day of October, 2019

(2019 ABQB 508, Docket: 1701 12053)

Reasons for Judgment Reserved

The Court:

I. Overview

[1] Rocky View County appeals the order of a chambers judge dated September 16, 2019 setting aside four County bylaws:

(a) Bylaw C-7585-2016 (Summit bylaw), passed July 11, 2017;
(b) Bylaw C-7588-2016 (McNair bylaw), passed July 25, 2017;
(c) Bylaw C-7583-2016 (LaFarge bylaw), passed July 25, 2017; and
(d) Bylaw C-7739-2017 (Summit Expansion bylaw), passed April 24, 2018.

[2] Each of those bylaws amended the County's Land Use Bylaw, C-4841-97.

[3] Keith Koebisch and Harry Hodgson are residents of the County who own land located on the same highway, Highway 567 near Range Road 40, and in the same areas as the lands affected by the bylaws. They opposed the bylaws and sought judicial review.

[4] Each bylaw redesignated lands from "Ranch and Farm District" to "Natural Resource Industrial District" to facilitate the development of gravel extraction. Each application for redesignation was accompanied by a Master Site Development Plan, as required by ss 15.6 and 29.8, and Appendix C, s 4 of the Rocky View County Plan, a municipal development plan under s 632(1) of the *Municipal Government Act*, RSA 2000, c M-26 (*MGA*).

[5] In setting aside the bylaws, the chambers judge concluded (2019 ABQB 508, para 10):

> Council had jurisdiction to decide whether to pass the bylaws. In respect of the July 2017 bylaws, it proceeded on seriously and obviously deficient MSDPs and failed to consider cumulative aspects of extraction in the area. In doing so, Council undermined the purposes of the County Plan and acted contrary to the objectives of good government under the *Act*. The outcome was patently unreasonable. Section 539 does not bar review of that matter. The April 2018 bylaw amends the July 2017 Summit bylaw. It is so closely connected to the earlier bylaw that it must be set aside. The Applicants did not demonstrate that the bylaws should be set aside for lack of procedural fairness.

[6] For the reasons below, the appeal is allowed.

II. Facts

[7] In 2014 the County began receiving redesignation and Master Site Development Plan applications from developers proposing land use redesignations from "Ranch and Farm District" to "Natural Resource Industrial District" to facilitate the development of gravel (aggregate) extraction.

[8] The developers in this case, Mountain Ash Limited Partnership and Summit Aggregates Ltd, McNair Sand and Gravel Ltd, and Lafarge Canada Inc, made such applications in 2016, 2017 and 2018. The original Summit redesignation and Master Site Development Plan applications before council on June 14, 2016 were "tabled sine die pending the completion of the aggregate resource management plan and any supplementary supporting information as deemed necessary by the County"[1].

[9] In March 2017, Summit requested that its application be decided by council despite non-completion of a delayed County aggregate resource management plan. The application continued on June 27, 2017, at which time the bylaw received first and second readings, the third and final reading being held July 11, 2017. On July 11, 2017, the McNair and Lafarge bylaws received first and second readings, the third and final readings being held July 25, 2017. Mountain Ash and Summit submitted further applications on August 25 and November 21, 2017 to expand their gravel operations as permitted by the Summit bylaw; first, second, and third readings were held April 24, 2018.

[10] On July 11, 2017, council did not approve the Master Site Development Plans submitted with the Summit, McNair or Lafarge applications. It instead passed five motions directing Administration to work collaboratively with the developers to revise the plans to identify consistent minimum standards to which all three sites would adhere, to identify joint measures to minimize and monitor cumulative impacts on the local area, including identifying mitigation strategies for affected properties within a mile and a half of the gravel pits, to review and adapt transportation access and egress to Highway 567, and to bring revised plans back for consideration prior to the municipal election of October 16, 2017.

[11] Council approved revised Master Site Development Plans with amendments, for the Summit, McNair, and LaFarge bylaws on September 26, 2017, and approved the Master Site Development Plan for the Summit Expansion bylaw on April 24, 2018, at the same time it approved that bylaw.

[12] Mr Koebisch and Mr Hodgson brought four separate Originating Applications challenging these bylaws on September 8 and December 19, 2017, and June 21, 2018. Those applications were

---

[1] Despite the wording of that motion, it constituted a motion to postpone definitely: Henry M Robert III et al, *Robert's Rules of Order, Newly Revised*, 11th ed (Philadelphia: Da Capo Press, 2011), pp 179-190; or a motion to defer (Geoffrey H Stanford, ed, *Bourinot's Rules of Order*, 4th ed (Toronto: McClelland & Stewart, 1995), pp 51-52.

consolidated into this action by orders of April 24 and July 5, 2018. The judicial review application was held May 23 and 24, 2019, and reasons for judgment were delivered September 16, 2019.

III. Legislative and Municipal Provisions

[13] The relevant provisions of the *Act* are:

> 3 The purposes of a municipality are
> (a) to provide good government,
> (a.1) to foster the well-being of the environment,
> (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality,
> (c) to develop and maintain safe and viable communities ... .
>
> …
>
> 536(1) A person may apply to the Court of Queen's Bench for
> (a) a declaration that a bylaw ... is invalid ... .
>
> …
>
> 539 No bylaw or resolution may be challenged on the ground that it is unreasonable.
>
> …
>
> 617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted
> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
> (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,
>
> without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.
>
> …
>
> 632(1) Every council of a municipality must by bylaw adopt a municipal development plan.

[14] The relevant provisions of the County Plan are:

> 3.0 **PLAN ORGANIZATION AND PROJECT OVERVIEW**
>
> …
>
> *GOALS* are specific objectives and/or targets for individual policy sections that achieve the County's vision and principles.
>
> *POLICY* provides guidance to decision makers and the public throughout the life of the Plan. Policy provides direction and/or evaluation criteria that allow the County to achieve specific goals.
>
> …

SHALL: a directive term that indicates that the actions outlined are mandatory and therefore must be complied with, without discretion, by administration, the developer, the Development Authority and the Subdivision Authority.
SHOULD: a directive term that indicates or directs a strongly preferred course of action by Council, administration and/or the developer, but one that is not mandatory.
…
4.0 **THE PLANNING FRAMEWORK**
…
COUNTY PLAN: The County's principal statutory plan. It is the County's Municipal Development Plan prepared in accordance with the Municipal Government Act. The County Plan is adopted by bylaw and provides strategic growth direction, overall guidance for land use planning, and service delivery policy.
…
MASTER SITE DEVELOPMENT PLAN: A non-statutory plan that is adopted by Council resolution. A master site development plan accompanies a land use redesignation application and provides design guidance for the development of a large area of land with little or no anticipated subdivision ....
A master site development plan addresses … site design with the intent to provide Council and the public with a clear idea of the final appearance of the development.
…
15.0 **NATURAL RESOURCES**
Natural resource extraction is an important land use in the County that satisfies local, regional, and provincial resource needs. However, these activities may have significant impact on adjacent land uses and the environment. Aggregate (sand and gravel) ... extraction often cause community concern.
… A number of significant gravel resources are located in the county. Potential natural resource extraction impacts include: noise, air quality, truck traffic, aesthetics, and reclamation.
The County is responsible for approving land use and issuing development permits for all aggregate extractions … .

GOAL

- Support the extraction of natural resources in a manner that balances the needs of residents, industry, and society.

- Support the environmentally responsible management and extraction of natural resources.

POLICY

Aggregate Extraction

15.1 Minimize the adverse impact of aggregate resource extraction on existing residents, adjacent land uses, and the environment.

15.2 Encourage collaboration between the County, the aggregate extraction industry, and affected residents to develop mutually agreeable solutions to mitigate impacts of extraction activities.

…

15.6 Until such time as a County aggregate extraction policy is prepared, applications for aggregate extraction shall prepare a master site development plan that addresses the development review criteria identified in section 29.

…

Master Site Development Plans

…

29.8 A master site development plan for aggregate development shall address all matters identified in Appendix C, sections … 4.

…

Appendix C

4. **AGGREGATE MASTER SITE DEVELOPMENT PLAN SUBMISSIONS**

Applications for aggregate extraction shall include a master site development plan that addresses the following:

…

9. Identification of impacts to surrounding lands and mitigation strategies … .
10. Assessment of cumulative aspects of extraction activities in the area.

…

13. A technical summary of the proposal with supporting documentation that addresses:
    (a) transportation and access management (submission of a traffic impact assessment);
    …
    (e) noise and dust mitigation strategies and reports ….

IV. Grounds of Appeal

[15] The appellant County appeals on four grounds, contending the chambers judge erred:

1. in interpreting the *MGA* and the County Plan;

2. when applying the patent unreasonableness standard of review;

3. in proceeding to review the reasonability (or patent unreasonability) of the bylaws despite s 539 of the MGA; and

4. in failing to properly consider, in law, the Master Site Development Plans approved by resolution.

Further, the County submits this Court has the opportunity in this appeal to clarify conflicting case law with respect to s 539 of the *MGA*.

V. Appellate Standard of Review

[16] An appellate court must determine whether the chambers judge properly chose the correct standard of review and applied it correctly, a decision on which the appellate court affords no deference: ***Dr Q v College of Physicians and Surgeons of British Columbia***, 2003 SCC 19, para 43, [2003] 1 SCR 226; ***Agraira v Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 36, para 45, [2013] 2 SCR 559; ***ARW Development Corporation v Beaumont (Town)***, 2011 ABCA 382, paras 25-27, 52 Alta LR (5th) 219.

[17] On appeal from judicial review, the appellate court in effect "steps into the shoes" of the chambers judge in reviewing the determination made by the decision-maker, such that the "appellate court's focus is, in effect, on the *administrative* decision" (emphasis in original): ***Merck Frosst Canada Ltd v Canada (Health)***, 2012 SCC 3, para 247, [2012] 1 SCR 23; ***Zenner v Prince Edward Island College of Optometrists***, 2005 SCC 77, paras 29-45, [2005] 3 SCC 645; ***Buterman v Greater St Albert Roman Catholic Separate School District No 734***, 2017 ABCA 196, paras 23-24, 54 Alta LR (6th) 256; ***Wheatland County v Federated Co-Operatives Limited***, 2019 ABCA 513, para 22.

VI. Analysis

[18] Although the chambers judge rendered his decision prior to the Supreme Court's decision in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65, 441 DLR (4th) 1, ***Vavilov*** re-affirmed the court's earlier decisions in ***Catalyst Paper Corp v North Cowichan (District)***, 2012 SCC 2, [2012] 1 SCR 5; ***Green v Law Society of Manitoba***, 2017 SCC 20, [2017] 1 SCR 360; and ***West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)***, 2018 SCC 22, [2018] 1 SCR 635 **[*West Fraser Mills*]**: see ***Vavilov***, paras 82, 89, 99, 105, 108, 137, 273, 292 and 312.

[19] In ***Catalyst***, the court affirmed that in the context of municipal bylaws, "reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" and that courts will not "overturn municipal bylaws unless they are found to be 'aberrant', 'overwhelming', or if 'no reasonable body' could have adopted them", paras 19, 20.

[20] McLachlin CJ writing for the Court said, para 24:

> It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.

[21] In ***West Fraser Mills***, at paras 8, 9, the Supreme Court affirmed it had adopted "a flexible standard of reasonableness in situations where the enabling statute grants a large discretion to the subordinate body to craft appropriate regulations"; further, reasonableness review "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime".

[22] ***Vavilov*** did not change the applicable judicial review standard; if anything, ***Vavilov*** reinforced the proper application of the reasonableness standard of review: see also ***1120732 BC Ltd v Whistler (Resort Municipality)***, 2020 BCCA 101, para 51; ***1193652 BC Ltd v New Westminster (City)***, 2021 BCCA 176, para 60.

[23] Section 539 of the *MGA* applied to County Council's decisions to enact the impugned bylaws. This section is part of the statutory context, and wider margin of appreciation, that must be taken into account by a reviewing judge when there is a challenge to a bylaw. Section 539 prevents challenges to a bylaw on the *ground* of unreasonableness. It does not articulate the *standard* of review: ***Bergman v Innisfree (Village)***, 2020 ABQB 661, paras 108-114. Whether a bylaw is wise is for a municipal council to decide, not the courts: Frederick A Laux & Gwendolyn Stewart-Palmer, *Planning Law and Practice in Alberta*, 4th ed (Edmonton: Juriliber, 2019) (loose-leaf), 16-38.

[24] As Professor Paul Daly, in "*Patent Unreasonableness* after *Vavilov*" (January 13, 2021), Ottawa Faculty of Law Working Paper No 2021-04, p 7, and Professor John Mark Keyes, "*Judicial Review of Delegated Legislation: The Long and Winding Road to Vavilov*" (June 18, 2020), Ottawa Faculty of Law Working Paper No 2020-14, p 6, n 41 provide, "[r]eviewing courts in Alberta could simply take s. 539 as forming part of the applicable governing statutory scheme and indicating that municipalities have a wider margin of appreciation when making decisions to which s. 539 applies": Daly, 7-8.

[25] More generally, the purposes of a municipality are to provide good government, foster the well-being of the environment, provide services, facilities or other things that are necessary or desirable, and develop and maintain safe and viable communities: *MGA, s* 3. These are accomplished through the preparation and adoption of plans to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and to maintain and improve the quality of the physical environment: *MGA*, s 617.

[26] Municipal development plans provide broad direction and as statutory plans pursuant to s 616(dd) of the *MGA*, are policy documents which state goals but may not regulate in a prescriptive manner: Laux & Stewart-Palmer, 5-6 – 5-18. It is open to a reviewing court, therefore, to conclude that a certain development project is not illegal merely because it is at variance with a municipal development plan. However, this approach must "not be taken too far lest statutory plans be ineffectualized": Laux & Stewart-Palmer, 5-20 – 5-21.

[27] A Master Site Development Plan, on the other hand, is a non-statutory plan which contains relevant planning considerations, while not having the status and legal effect of a statutory plan: see ***Dalhousie Station Ltd v Calgary (City)*** (1991), 83 Alta LR (2d) 228, para 27, 123 AR 203 (QB).

[28] At all stages of its planning function, a municipal council continues to exercise discretion and to be bound by its overarching obligation to balance private rights and the long-term public interest within the municipality: ***Hosford v Strathcona County***, 2019 ABQB 871, para 121, 95 MPLR (5th) 194.

[29] However, the County's contention that its development plan does not require *any* mandatory action on its part because s 637 of the *MGA* provides, "[t]he adoption by a council of a statutory plan does not require the municipality to undertake any of the projects referred to in it", is misplaced. This appeal does not relate to any proposed project the County failed to undertake.

[30] The County also argued that ***Prairie Crocus Ranching Coalition Society v Cardston (County of)***, 2002 ABCA 189, 6 Alta LR (4th) 216 stands for the broad proposition that despite containing mandatory provisions, a development plan is merely aspirational and non-binding. Rather, ***Prairie Crocus*** held only that s 633 makes the *adoption* of an area structure plan optional; nothing more can be drawn from the case.

[31] Here, the County's development plan includes a section entitled, "Organization and Project Overview, s 3.0" which expressly provides that whenever the Plan uses the word "shall", the mentioned actions "are mandatory and therefore must be complied with, without discretion."

[32] The County's development plan further recognizes that natural resource development, and in particular aggregate (sand and gravel) extraction, "may have significant impact on adjacent land uses and the environment." With respect to aggregate extraction, the County's development plan imposes a mandatory requirement that applicants for aggregate extractions "shall include" a Master Site Development Plan. It also provides, in the mandatory language of s 29.8, that a Master Site Development Plan "shall address" the matters identified in Appendix C, ss 1 and 4.

[33] Section 4 of Appendix C, in turn, requires a Master Site Development Plan to address 17 distinct topics, including "technical requirements and supporting information", and, *inter alia*, an "assessment of cumulative aspects of extraction activities in the area"; "impacts to surrounding lands and mitigation strategies"; and a technical summary of the proposal "with supporting documentation that addresses: a) transportation and access management (submission of traffic

impact assessment); b) stormwater management; (c) ground and surface water hydrological analysis; d) environmental overview (submission of a biophysical overview); (e) noise and dust mitigation strategies and reports; and (f) erosion and weed management control.

[34] While a municipal development plan generally is to be interpreted in a flexible, broad, and aspirational manner, where, as here, the County chose to impose certain mandatory requirements in its overarching municipal development plan, those requirements "must be complied with, without discretion." Given the County's self-imposed mandatory requirements in its development plan, in the context of approving a redesignation application relating to aggregate extraction, as was cautioned by Laux & Stewart-Palmer, 5-20 –5-21, applying an unduly flexible approach to interpreting it would make it ineffectual.

[35] While s 15.6 of the County Plan falls under the subtitle "Policy", and s 29.8 and Appendix C both fall under the title "Technical Requirements and Submissions", in our view, the explicit language must properly be interpreted in the entire context of the *MGA*, in its grammatical and ordinary sense, harmoniously with its scheme, the object of the *MGA*, and the intention of the Legislature: ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27, para 21, 154 DLR (4th) 193; ***Montréal (City) c 2952-1366 Québec Inc***, 2005 SCC 62, para 10, [2005] 3 SCR 141; thus, "shall" means what the County Plan says it means: "must be complied with, without discretion".

[36] We conclude it was a mandatory requirement that a redesignation application for aggregate extraction in the County include a Master Site Development Plan, to address the impact on surrounding lands and mitigation strategies, assess the cumulative aspect of extraction activities, and address transportation, access management, and noise and dust mitigation strategies.

[37] However, the municipality reasonably followed the mandatory requirements of the County Plan. The next question, whether its decisions to enact the bylaws were aberrant, overwhelming, or decisions that no reasonable municipality would have taken, must be answered "no".

[38] The Master Site Development Plan for the Summit application was before County Council June 14, 2016; July 11 and September 26, 2017. The Master Site Development Plans for the McNair and Lafarge applications were before County Council July 11 and September 26, 2017. The Master Site Development Plan for the Summit Expansion application was before County Council April 24, 2018. All of this occurred at the redesignation stage of the process, which could not conclude until passage of the redesignation bylaws and approval of the required Master Site Development Plans.

[39] On July 11, 2017, County Council passed five motions with respect to the Master Site Development Plans to ensure all complied with the requirements of the County development plan. Eventually, having satisfied itself by the respective approval dates that each Master Site Development Plan was then in compliance with the County development plan, County Council approved each of them. Further, on the dates the Master Site Development Plans were approved, it does not appear anyone was of the view the Master Site Developments Plans remained deficient.

[40] While the participatory interests of the respondents may have been better served had County Council withheld passage of the bylaws until approval of the related Master Site Development Plans, and arguably it was inappropriate sequencing for the Summit, McNair and Lafarge bylaws to pass before their Master Site Development Plans were approved, the requirements of the County Plan were met.

[41] The respondents were aware the Master Site Development Plans needed to be addressed collaboratively with the County's administration for multiple improvements; this occurred. The sequence of events did not prejudice the respondents. We decline to quash the bylaws on this basis, leaving open for another day the question whether similar sequencing in a different factual matrix might underpin prejudice.

[42] It is not the role of this Court to weigh the policy choices or social, economic, or political factors that were before council.

[43] We conclude the decisions of the Rocky View County Council were transparent, intelligible and justified. Despite what a given judge or court may envision as being in the best interests of the County, the bylaws cannot be challenged on the ground of unreasonableness.

VII. Disposition

[44] The appeal is allowed, the chambers judge's decision is set aside, and the following bylaws are declared valid:

(a) Bylaw C-7585-2016 (Summit bylaw), passed July 11, 2017;
(b) Bylaw C-7588-2016 (McNair bylaw), passed July 25, 2017;
(c) Bylaw C-7583-2016 (LaFarge bylaw), passed July 25, 2017; and
(d) Bylaw C-7739-2017 (Summit Expansion bylaw), passed April 24, 2018.

Appeal heard February 10, 2021

Memorandum filed at Calgary, Alberta
this 20th day of July, 2021

Authorized to sign for: Schutz J.A.

Authorized to sign for: Hughes J.A.

Feehan J.A.

Appearances:

M.B. Niven, Q.C./M.A. Custer
for the Respondents

J.H.J. Gescher/ B.A. Dzioba
for the Appellant