

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.

DOCUMENT **REPLY BRIEF OF RECEIVER (ADVICE AND
DIRECTION APPLICATION)**

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I. INTRODUCTION

1. This reply brief (the “**Reply Brief**”) is submitted on behalf of FTI Consulting Canada Inc., in its capacity as the court-appointed receiver (the “**Receiver**”) of Alberta Foothills Properties Ltd. (“**AFPL**” or the “**Debtor**”), in support of its application (the “**Application**”) seeking advice and direction from the Court on whether a municipality can enact certain bylaws affecting only the Debtor and its secured property, or whether such actions contravene the terms of the receivership order (the “**Receivership Order**”) granted on May 17, 2021 by the Honourable Justice K.M. Eidsvik.¹
2. This Reply Brief is filed in response to the brief of argument (the “**Town’s Brief**”) of the Town of Okotoks (the “**Town**”), filed on September 7, 2021, and is supplemental to the Receiver’s brief filed on August 31, 2021 (the “**Receiver’s Initial Brief**”). Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Receiver’s Initial Brief.
3. In response to the Town’s Brief, the Receiver submits the following:
 - a. enacting the Proposed Bylaws does not maintain the status quo, as they remove the ability for a purchaser to even apply for development permits and develop the Property in accordance with the Land Use Bylaw and ASP Bylaw; and
 - b. the appraisals attached as Appendix “A” to the Confidential Supplement (the “**Appraisals**”) are a reliable prediction of the Property’s value.

II. ISSUES

4. The sole issue to be determined in the within Application is whether the Receivership Order stays the Town from enacting the Proposed Bylaws.

III. LAW AND ARGUMENT

A. Proposed Bylaws Alter Status Quo

5. In the Town’s Brief, it takes the position that the Proposed Bylaws maintain the status quo, but only as it relates to subdivision and development rights.² This ignores that the ASP

¹ The May 17, 2021 Receivership Order of Justice K.M. Eidsvik (the “**Receivership Order**”).

² Response Brief of the Town of Okotoks, filed September 7, 2021 (the “**Town’s Brief**”), at para 43.

Bylaw and the Land Use Bylaw were in place as of the date of the Receivership Order, which is significant because their combined effect designates the Property for mixed residential and commercial development and gives developers the ability to apply for further development permits in accordance with the *Municipal Government Act* (the “*MGA*”).³ Without the ability to even apply for development permits, the development process is walked back to square one, adding significant unnecessary expenses to the future owner of the Property, and chilling the Receiver’s sales process.

6. In response to the Town’s Brief, the Receiver maintains that enacting the Proposed Bylaws significantly alters the status quo. First, the Receiver can no longer market the Property as development property if the Town changes the Property’s designated land use from Traditional Neighbourhood, Recreation and Open Space, and Neighbourhood Core to Agricultural and Land Holdings. This could significantly alter both the purchase price and the pool of interested purchasers.
7. Second, if the Town is permitted to enact the Proposed Bylaws, the eventual purchaser would be required to either: (a) start the development process from the beginning; or (b) hold the Property as Agricultural and Land Holdings, rather than mixed commercial and residential lands.
8. As set out in the Town’s Brief, subdivision applications must be considered in light of the area structure plan, such that no development can occur without an area structure plan.⁴ Therefore, if the purchaser re-engages with the development process, it would be required to retain civil planning experts to develop a brand new area structure plan, and go to the additional time and expense of submitting it for the Town’s approval.
9. When it submitted the Wind Walk ASP for approval, AFPL commissioned several valuable reports for the development: a historical resources overview to identify any archeological or historical sites of significance, a biophysical inventory of the Property, a geotechnical analysis of the Property that included a 6-month water table monitoring program, a Phase I Environmental Site Assessment and a stormwater master drainage plan.

³ *Municipal Government Act*, RSA 2000, c M-26 (the “*MGA*”), at **TAB 1** of the Book of Authorities (the “**Authorities**”).

⁴ Town’s Brief, at para 26.

10. The Receiver has further advised that AFPL incurred the following specific soft costs associated with preparing the Property for development:
 - a. capitalized interest, a portion of which was incurred due to the delays caused by the Town's litigation surrounding the annexation of the Property;
 - b. acquisition of a water licence: approximately \$2.1 million;
 - c. planning and engineering costs: approximately \$1.3 million;
 - d. legal and professional fees: approximately \$3.5 million;
 - e. internal and external consultants' fees to prepare the Property for development: approximately \$3.9 million; and
 - f. miscellaneous fees, including municipal fees, property tax, and construction: approximately \$1 million.⁵
11. The costs incurred by AFPL have gone directly towards administrative costs associated with preparing lands for development, and it is expected that a prospective purchaser would be unable to access a substantial portion of the value of these incurred costs if the Town is permitted to enact the Proposed Bylaws. The Receiver does not believe it is accurate to say that because no hard development has occurred on the Property that enacting the Proposed Bylaws has no effect on the amounts expended on the Property to date by AFPL in preparing the Property for development.
12. The additional time and expense for the eventual purchaser to re-do this work is especially unnecessary when considering the Wind Walk ASP already contemplates being a living document subject to ongoing changes to meet the Town's needs.
13. The eventual purchaser would also be required to apply to the Town to pass a new land use bylaw re-designating the land uses of the Property back to mixed residential and commercial. Pursuant to section 640(2)(c) of the *MGA*, a land use bylaw must, among other things, establish a method of making decisions on applications for development permits, include provisions for the type of development permit that can be issued, provide

⁵ First Report of the Receiver, filed September 7, 2021, at para 22.

the conditions attached to a permit, and indicate how long a development permit remains in effect.⁶

14. As reiterated by the Town, any further development on the Property is subject to the Town's approval, and no development will occur without its oversight and consent. With the ASP Bylaw and Land Use Bylaw currently in place, the Town still holds the final say in whether and how a development will occur on the Property.
15. While the Receiver acknowledges the Subdivision Plan expired by the time of its appointment, the status quo is not limited to AFPL's subdivision and development rights at that time; it also includes the land use designations under the Land Use Bylaw and the development framework in place under the ASP Bylaw, both of which are required before a developer can even bring an application for development permits.
16. If the Town enacts the Proposed Bylaws, the eventual purchaser will lose the ability to apply for development permits, and will be required to start the development process from scratch, with all the associated costs, resources and uncertainties.

B. The Appraisals are Reliable Evidence of the Property's Value

17. The Receiver disputes the Town's position that the Appraisals are not an accurate reflection of the Property's value. First, the Town has not provided any evidence in support of its assertion that the Property is overvalued, and there are valid commercial reasons to list a property below its appraised value.
18. Nor has the Town pointed to any evidence to support its claim that purchasers devalue the Property because of its unsubdivided status, rather than the uncertainty injected by the Proposed Bylaws. The Property was appraised three times before the Town introduced the Proposed Bylaws, and was equally as unsubdivided then as it is now. Each of those three earlier appraisals are very close in value to the other, but it is only after the Town introduced the Proposed Bylaws that the appraised value drops significantly.
19. It is reasonable to infer, then, that the cause of the reduced value is not due to the unsubdivided nature of the Property, but rather, the uncertainty injected by the Proposed Bylaws.

⁶ MGA, at s. 640(2)(c), at **TAB 1** of the Authorities.

20. Further, the assumptions contained in the Appraisal are useful for the Receiver to understand any offers that might be made by prospective purchasers and how any change in the designation is going to impact the potential value of the Property. In addition, it is only the first appraisal that assumes certain developments have already occurred; this assumption is not repeated in the second appraisal, which is within \$700.00 of the first.
21. The Receiver therefore maintains that the Appraisals are reliable evidence of (a) the value of the Property; and (b) the impact of the Proposed Bylaws on the Property's value.

C. Conclusion

22. The Proposed Bylaws alter the status quo of the Property as they remove the ability for the eventual purchaser to apply for further developments without expending significant time and resources on a new area structure plan and new land use bylaw.
23. Further, the Appraisals offer a reliable indication of how the Proposed Bylaws have negatively impacted the value of the Property.

IV. RELIEF SOUGHT

24. The Receiver seeks from this Honourable Court direction on:
 - a. whether the terms of the Receivership Order prevent the Town from enacting the Proposed Bylaws until the conclusion of a sales process; and
 - b. such further and other relief as this Honourable Court deems just and appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED September 20, 2021:

MLT AIKINS LLP



Ryan Zahara/Kaitlin Ward
Counsel for the Receiver, FTI Consulting Canada
Inc.

LIST OF AUTHORITIES

Municipal Government Act, RSA 2000, c M-26 **TAB 1**