MGB FILE NUMBERS 16/IMD-03
16/IMD-04

**IN THE MATTER OF INTERMUNICIPAL DISPUTES**

**APPEALS FILED UNDER S. 690 OF THE MUNICIPAL GOVERNMENT ACT, RSA 2000, c.M-26 BY THE TOWN OF DRAYTON VALLEY AGAINST BRAZEAU COUNTY BYLAW 892-15 AND BYLAW 905-16**

**Bylaw 892-15, An Amendment to Brazeau County Land Use Bylaw to change the designation from Agriculture to Direct Control District on portions of the E 1/2 of 3-49-7-W5M**

**Bylaw 905-16, Brazeau County Land Use Bylaw**

BETWEEN:

INITIATING MUNICIPALITY: TOWN OF DRAYTON VALLEY

RESPONDENT MUNICIPALITY BRAZEAU COUNTY

DOCUMENT **BRIEF AND AUTHORITIES OF LANDOWNER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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Attention: Kevin A. Haldane
File No. 62773.2

**Application**
**Scheduled for May 2-4, 2017**

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## I. INTRODUCTION AND FACTS

1. Throughout, Dennis McGinn and Avalie Peck are referred to as the "Landowner", Brazeau County as the "County", the Town of Drayton Valley as the "Town", and the Municipal Government Board and the *Municipal Government Act* as the "Board" and the "Act" respectively.

2. The Landowner agrees with the facts as stated in the County's Brief filed February 21, 2017.

## II. ISSUES

3. The issues in this hearing are as stated in DL 004/17, namely:

   i. Does s. 690(4) of the MGA prevent a municipality from amending or repealing the provision of the statutory plan or amendment or land use bylaw or amendment that is the subject of the appeal from the date the Board receives the notice of appeal and statutory declaration under subsection 1(a) until the date it makes its decision?; and

   ii. If s. 690(4) of the MGA did not prevent Brazeau County from repealing the bylaws in dispute, did Brazeau County in fact repeal bylaws 892-15 and 905-16?

## III. LAW AND ARGUMENT

### A. DOES SECTION 690(4) PREVENT THE COUNTY FROM REPEALING THE BYLAWS UNDER APPEAL?

4. Having reviewed the County's analysis of this issue and the authorities cited by the County in support of its position, the Landowner agrees with the County's conclusion that section 690(4) does not restrict a municipality's ability to amend or repeal a bylaw that has been appealed to the Board. Notably:

   i. The question before the Board is one of statutory interpretation, and the correct approach is set out in *Rizzo & Rizzo Shoes Ltd. (Re)*[1].

   ii. There is no sign in s. 690 of any intention to limit a municipality's otherwise broad authority and responsibility to legislate with respect to land use while an appeal is underway.

   iii. The inclusion of a mandatory mediation process in s. 690 signals an intention that the parties to an intermunicipal dispute be encouraged to create their own solution, without requiring a decision from the Board on the merits of the appeal.

   iv. A finding that once a bylaw were appealed to the Board it could not be amended or repealed except by the Board pursuant to s. 690(5) would have absurd consequences.

   v. There is no practical benefit to holding a hearing to determine whether a (purportedly) repealed bylaw is detrimental to a neighbouring municipality.

5. In support of and in addition to the foregoing points of agreement with the County, the Landowner makes the following additional submissions.

#### *1. The Mediation Requirement*

6. It is a condition precedent to filing a notice of appeal under s. 690 that the appellant municipality is attempting or has attempted mediation to "resolve

[1] [1998] 1 SCR 27, County's Authorities, Tab 11

the matter"[2]. The MGA further requires a statutory declaration from the appellant municipality addressing the state of such mediation.

7. "Mediation" is defined in Part 17 as:

> a process involving a neutral person as a mediator who assists the parties to a matter that may be appealed under this Part and any other person brought in with the agreement of the parties to reach their own mutually acceptable settlement of the matter by structuring negotiations, facilitating communication and identifying the issues and interests of the parties[3].

8. The term "mediation" appears in Part 17 only in the context of amendments to a statutory plan or land use bylaw or amendment required by a resource or energy regulator in section 619, and in the context of a section 690 intermunicipal dispute. A finding that the parties cannot independently resolve the matters raised in a s. 619 or s. 690 appeal and that such matters must be determined by the Board would render meaningless the inclusion of a definition for mediation, and the requirement that municipalities attempt mediation.

9. That the parties to a s. 690 dispute could resolve the matter under appeal without the Board making a decision is implicit in the conduct of 16/IMD-03 to date. Notably, DL 034/16 dated June 15, 2016 states that allowing more time for mediation "allows the municipalities to advise if any of the matters under appeal are being withdrawn"[4], while Board Order MGB 072/16 dated November 29, 2016, contemplates a deadline for the Town to advise whether it intends to proceed with the appeal[5].

10. This Board has found in the past that an amendment to a disputed bylaw can resolve a dispute under s. 690[6]. While the Board is not bound by prior decisions, it should strive for consistency in its interpretation of the Act, and, if it is to depart from a past interpretation, that departure should be addressed in the Board's reasons[7].

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[2] MGA s. 690(1), Tab 1
[3] MGA s. 616(m.1), Tab 2
[4] County's Authorities, Tab 3 at para 11
[5] Tab 3
[6] See MGB 065/03, which noted that by ordering the parties to amend an ASP in accordance with an agreement, they saved the respondent municipality from conducting the public hearing process otherwise required by s. 691. Presumably, therefore, it was not beyond the respondent municipality's jurisdiction to amend the ASP through the normal process. Tab 4
[7] Altus Group Limited v Calgary (City), 2015 ABCA 86 at para 31, Tab 5

11. If it is not possible for the respondent municipality to amend or repeal the offending bylaw, such mediation cannot offer any relief to the appellant municipality. The requirement that parties take part in mediation that cannot resolve the dispute or obviate the need for the Board to decide the matter in dispute would be absurd.

### *2. Consequences of a Municipality Being Unable to Repeal or Amend a Bylaw that has been Appealed to the Board*

12. Section 639 of the Act requires a municipality to pass a land use bylaw. Amongst the requirements of a land use bylaw are that it must divide the municipality into districts, and, with respect to all districts except those designated for direct control, must prescribe one or more uses of land or buildings that are or may be permitted within each district. A land use bylaw must also establish a method of making decisions on development permit applications and issuing development permits. All of these requirements are important to meet the purpose of Part 17, which includes achieving orderly, economical and beneficial development, use of land, and patterns of human settlement.

13. The effect of s. 690 is not to render the impugned bylaw void ab initio; rather, the impugned bylaw is effectively suspended from the time the Board receives the notice of appeal until it makes its decision. With respect to IMD16/04 and Bylaw 905-16, the effect of this is to leave the County without a land use bylaw, as the prior land use bylaw was repealed on August 16, 2016. The County rightly identifies this result as contrary to the purpose of Part 17[8].

14. Faced with the Board's letter stating that its land use bylaw was of no effect, the County acted quickly to replace the suspended land use bylaw, bringing itself into compliance with s. 639 and providing certainty to landowners in the County as to what uses could lawfully be made of land. If the County is unable to repeal its impugned land use bylaw, then Bylaw 905-16 could once again be effective upon the Board's finding that the bylaw is not detrimental to the Town. This would leave the County with two different land use bylaws, again undermining Part 17's purpose.

[8] County's Brief at paras 50-51

## B. DID THE COUNTY REPEAL BYLAWS 905-16 AND 892-15?

15. Having determined that the County was capable of repealing the impugned bylaws, the next question that arises is whether they did so.

### *1. Bylaw 905-16*

16. Bylaw 923-16 was passed on October 18, 2016, and states that it repeals the former land use bylaw (782-12) as well as Bylaw 905-16[9]. Bylaw 905-16 was repealed by the County upon third reading of Bylaw 923-16. As noted by the County, there has been no challenge to Bylaw 923-16.[10]

17. If the Town succeeds in this application, there will be a merit hearing in respect of the impugned bylaws. Should the Town succeed in the merit hearing on Bylaw 905-16, the Board will order the County to amend or repeal Bylaw 905-16. However, Bylaw 905-16 is no longer the County's Land Use Bylaw. The Board's decision on this issue is meaningless.

18. The Landowner agrees with the County that the Board can provide only the relief contemplated in s. 690(6). The Board cannot give the Town any further relief than the County has already provided by repealing Bylaw 905-16.

### *2. Bylaw 892-15*

19. Both Bylaw 905-16 and Bylaw 923-16 state that "the former Bylaw No. 782-12, and its amendments, shall cease to apply to new subdivision and development in Brazeau County"[11]. Both Bylaw 905-16 and 923-16 also state, under the heading "Previous Bylaws":

> 1.5.1 Brazeau County Land Use Bylaw 782-12 is hereby repealed and this Bylaw shall apply to all lands within Brazeau County.
> 1.5.2 Brazeau County shall continue to recognize Direct Control Bylaws listed and attached under Appendix 17.

20. Despite the fact that the land use maps in both bylaws show the Landowner's lands as a direct control district, neither of Bylaw 905-16 nor Bylaw 923-16 list Bylaw 892-15 in the Appendix.

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[9] Excerpt from Bylaw 923-16, County's Authorities, Tab 15
[10] County's Brief at para 54.
[11] Bylaw 905-16, s. 1.3.1, Tab 4, and Bylaw 923-16, s. 1.3.1, Tab 6

21. The County's explanation for the omission of Bylaw 892-15 from the Appendix appears to be, in short, that the Board had already advised the County Bylaw 892-15 was of no effect and deemed not to form part of the land use bylaw. The County therefore left the text of Bylaw 892-15 out of replacement land use bylaws, on the understanding the missing text would be restored if the Town's appeal of Bylaw 892-15 was unsuccessful. If the County's decision to leave the text of Bylaw 892-15 out of the replacement land use bylaws had the effect of repealing Bylaw 892-15, it was not an intended effect.

22. The Landowner is not aware of any authority that deals with the result of a municipal council passing or repealing a bylaw in error, and is unable to provide any assistance in dealing with the issue of whether Bylaw 892-15 was, in fact, repealed, or whether it remains valid but suspended until the Board's decision on the merits in 16/IMD-03. However, the Landowner has relied on the County's position that Bylaw 892-15 would form part of Bylaw 923-16 if the appeal in 16/IMD-03 was dismissed.

23. If Bylaw 892-15 was repealed by the County and cannot be restored by the Board's decision on the merits of 16/IMD-03, it seems likely that the County, given its position on the validity of Bylaw 892-15 as expressed in the County's Brief, would pass a new bylaw amending Bylaw 923-16 to include the text of Bylaw 892-15. This would, in all likelihood, put the parties to this dispute in the position they were in the day Bylaw 892-15 was passed.

## IV. RELIEF CLAIMED

24. The Landowners request an order dismissing 16/IMD-04 as moot, and directing dates for the merit hearing in 16/IMD-03.

25. The argument that s. 690(4) prevents repeal or amendment of a bylaw that is under appeal was raised by the Town, and, if correct, requires that the parties proceed to a hearing on the merits of matters that are otherwise already resolved, at least with respect to 16/IMD-04. Rather than accepting that the County has resolved the issues raised in 16/IMD-04 and withdrawing its appeal, or taking advantage of the opportunity to reach an agreement with the County in respect of 16/IMD-04 (both of which solutions are available pursuant to Part G of the Board's Procedure Rules), the Town wishes to have an adversarial hearing of a non-issue.

26. The Town's success on this preliminary matter can have no practical impact on the rights of the parties. In short, this preliminary hearing is an attempt by the Town to drag the County and the Landowner down a long, circular road that leads to the very spot the parties are standing on today. It is unfortunate that the Landowners (who, as ratepayers of both the Town and the County, are in the unenviable position of funding all three sides of this dispute) have been forced to come along on this journey. The Landowners request their costs of this preliminary hearing on a solicitor and client indemnity basis against the Town.

All of which is respectfully submitted this 24th day March, 2017.

OGILVIE LLP,

Per:

Kevin A. Haldane
Counsel for the Landowner,
Avalie Peck and Dennis McGinn

## APPENDIX I – TABLE OF AUTHORITIES

**TAB #**

TAB 1

**(4)** If the Court finds that the only ground for appeal established is a defect in form or technical irregularity and that no substantial wrong or miscarriage of justice has occurred, the Court may deny the appeal, confirm the decision of the Municipal Government Board or a subdivision and development appeal board despite the defect and order that the decision takes effect from the time and on the terms that the Court considers proper.

RSA 2000 cM-26 s689;2014 c13 s35

## Division 11
## Intermunicipal Disputes

### Intermunicipal disputes

**690(1)** If a municipality is of the opinion that a statutory plan or amendment or a land use bylaw or amendment adopted by an adjacent municipality has or may have a detrimental effect on it and if it has given written notice of its concerns to the adjacent municipality prior to second reading of the bylaw, it may, if it is attempting or has attempted to use mediation to resolve the matter, appeal the matter to the Municipal Government Board by

(a) filing a notice of appeal and statutory declaration described in subsection (2) with the Board, and

(b) giving a copy of the notice of appeal and statutory declaration described in subsection (2) to the adjacent municipality

within 30 days after the passing of the bylaw to adopt or amend a statutory plan or land use bylaw.

**(2)** When appealing a matter to the Municipal Government Board, the municipality must state the reasons in the notice of appeal why a provision of the statutory plan or amendment or land use bylaw or amendment has a detrimental effect and provide a statutory declaration stating

(a) the reasons why mediation was not possible,

(b) that mediation was undertaken and the reasons why it was not successful, or

(c) that mediation is ongoing and that the appeal is being filed to preserve the right of appeal.

**(3)** A municipality, on receipt of a notice of appeal and statutory declaration under subsection (1)(b), must, within 30 days, submit to the Municipal Government Board and the municipality that filed the notice of appeal a statutory declaration stating

(a) the reasons why mediation was not possible, or

(b) that mediation was undertaken and the reasons why it was not successful.

**(4)** When the Municipal Government Board receives a notice of appeal and statutory declaration under subsection (1)(a), the provision of the statutory plan or amendment or land use bylaw or amendment that is the subject of the appeal is deemed to be of no effect and not to form part of the statutory plan or land use bylaw from the date the Board receives the notice of appeal and statutory declaration under subsection (1)(a) until the date it makes a decision under subsection (5).

**(5)** If the Municipal Government Board receives a notice of appeal and statutory declaration under subsection (1)(a), it must, subject to any applicable ALSA regional plan, decide whether the provision of the statutory plan or amendment or land use bylaw or amendment is detrimental to the municipality that made the appeal and may

(a) dismiss the appeal if it decides that the provision is not detrimental, or

(b) order the adjacent municipality to amend or repeal the provision if it is of the opinion that the provision is detrimental.

**(6)** A provision with respect to which the Municipal Government Board has made a decision under subsection (5) is,

(a) if the Board has decided that the provision is to be amended, deemed to be of no effect and not to form part of the statutory plan or land use bylaw from the date of the decision until the date on which the plan or bylaw is amended in accordance with the decision, and

(b) if the Board has decided that the provision is to be repealed, deemed to be of no effect and not to form part of the statutory plan or land use bylaw from and after the date of the decision.

**(6.1)** Any decision made by the Municipal Government Board under this section in respect of a statutory plan or amendment or a land use bylaw or amendment adopted by a municipality must be consistent with any growth plan approved under Part 17.1 pertaining to that municipality.

**(7)** Section 692 does not apply when a statutory plan or a land use bylaw is amended or repealed according to a decision of the Board under this section.

**(8)** The Municipal Government Board's decision under this section is binding, subject to the rights of either municipality to appeal under section 688.

RSA 2000 cM-26 s690;2009 cA-26.8 s83;2013 c17 s5

**Board hearing**

**691(1)** The Municipal Government Board, on receiving a notice of appeal and statutory declaration under section 690(1)(a), must

(a) commence a hearing within 60 days after receiving the notice of appeal or a later time to which all parties agree, and

(b) give a written decision within 30 days after concluding the hearing.

**(2)** The Municipal Government Board is not required to give notice to or hear from any person other than the municipality making the appeal, the municipality against whom the appeal is launched and the owner of the land that is the subject of the appeal.

1995 c24 s95;1999 c11 s45

## 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.

TAB 2

(f) "environmental reserve easement" means an easement created under Division 8;

(g) "former Act" means the *Planning Act*, RSA 1980 cP-9, *The Planning Act, 1977*, SA 1977 c89, *The Planning Act*, RSA 1970 c276 or *The Planning Act*, SA 1963 c43;

(h) "highway" means a provincial highway under the *Highways Development and Protection Act*;

(i) "instrument" means a plan of subdivision and an instrument as defined in the *Land Titles Act*;

(j) "intermunicipal service agency" means an intermunicipal service agency established under Division 3;

(k) "land use bylaw" means a bylaw made under Division 5 and a bylaw made under section 27 of the *Historical Resources Act*;

(l) "land use policies" means policies established by the Lieutenant Governor in Council under Division 2;

(m) "lot" means

(i) a quarter section,

(ii) a river lot shown on an official plan, as defined in the *Surveys Act,* that is filed or lodged in a land titles office,

(iii) a settlement lot shown on an official plan, as defined in the *Surveys Act*, that is filed or lodged in a land titles office,

(iv) a part of a parcel of land described in a certificate of title if the boundaries of the part are described in the certificate of title other than by reference to a legal subdivision, or

(v) a part of a parcel of land described in a certificate of title if the boundaries of the part are described in a certificate of title by reference to a plan of subdivision;

(m.1) "mediation" means a process involving a neutral person as a mediator who assists the parties to a matter that may be appealed under this Part and any other person brought in with the agreement of the parties to reach their own mutually acceptable settlement of the matter by structuring negotiations, facilitating communication and identifying the issues and interests of the parties;

TAB 3

**BOARD ORDER: MGB 072/16**

**FILE: 16/IMD-04 RH**

**IN THE MATTER OF THE** *Municipal Government Act* being Chapter M-26 of the Revised Statutes of Alberta 2000 (*Act*).

**AND IN THE MATTER OF AN APPLICATION FOR REVIEW** of a decision of the Municipal Government Board (MGB) filed by Brazeau County.

**CITATION**: Town of Drayton Valley v Brazeau County (*Re: Bylaw 905-16*), 2016 ABMGB 72

**BEFORE**:

H. Kim, Presiding Officer
M. Axworthy, Member
S. Boyer, Member

K. Lau, Case Manager
C. Miller Reade, Case Manager
A. Drost, Assistant Case Manager

## OVERVIEW

[1] The MGB was asked to review their decision in DL 070/16 respecting an intermunicipal dispute between the Town of Drayton Valley (Town) and Brazeau County (County). Section 504 of the *Act* directs that the MGB can review, rescind or vary any decision it makes. This decision is to be read in conjunction with MGB Decision Letter 070/16 (DL).

## REQUEST

[2] On November 29, 2016, in the City of Edmonton, an MGB panel considered written submissions in response to the County's request to review MGB DL 070/16. The DL established dates for submissions and a hearing date for the intermunicipal dispute. The County requested a review of the DL pursuant to section 504 of the *Act*. The request focused on the dates the MGB set for the hearing and disclosure and whether the hearing should be a preliminary hearing or merit hearing. The Town concurred with the request for review.

## ISSUES

1. Should the MGB grant the County's request for review of MGB DL 070/16?
2. If so, what is the appropriate remedy?

**BOARD ORDER: MGB 072/16**

**FILE: 16/IMD-04 RH**

## SUMMARY OF THE COUNTY'S POSITION

[3] The County submitted the MGB has authority to review or rehear a decision under section 504 of the *Act* and in accordance with the MGB Intermunicipal Dispute Rules (Rules). The reasons for the rehearing were provided by the County as:

a. there was a procedural defect during the hearing which caused prejudice to one or more of the parties (Rule 24.5(b)); or
b. there were other material errors that could reasonably have changed the outcome of the decision (Rule 24.5(c)); or
c. any other circumstance the Board considers reasonable (Rule 24.5(d)).

[4] The County submitted that the MGB misunderstood the joint request of the parties at the November 9, 2016 hearing. The MGB scheduled the merit hearing while the parties were requesting a date for a preliminary hearing on jurisdiction. Further, the MGB did not give the parties opportunity to address merit hearing dates and disclosure on merit. The parties only addressed disclosure and hearing dates with respect to the preliminary issue. Finally, the dates set out in the DL do not provide the opportunity for the parties to respond to the others submissions.

[5] Instead, the County stated that the joint request from the Town and County was for a date between November 30th and December 2nd for the Town to advise the MGB and the County if the Town is withdrawing its appeal or proceeding with the appeal.

[6] The County provided the following dates for the MGB to consider for relief of the issues:

| Step | Date |
|---|---|
| Town advise Board and County whether it is withdrawing or proceeding | December 2, 2016 |
| Town submissions regarding the jurisdiction of the Board to hear its appeal | January 6, 2017 |
| County Response<br>Landowner Response | February 3, 2017 |
| Town rebuttal (if any) | February 17, 2017 |
| Hearing date on jurisdictional hearing to consider the question of jurisdiction of the MGB | March 7, 2017 |

**BOARD ORDER: MGB 072/16**

**FILE: 16/IMD-04 RH**

## SUMMARY OF THE TOWN OF DRAYTON VALLEY'S POSITION

[7] The Town agreed with the County's application and the substance of the submissions with the exception of the proposed scheduling. The Town requests that the hearing be held after March 15, 2017 and submission dates as follows:

| Step | Date |
|---|---|
| Town advise Board and County whether it is withdrawing or proceeding | December 2, 2016 |
| Town submissions regarding the jurisdiction of the Board to hear its appeal | January 20 or 27, 2017 |
| County Response<br>Landowner Response | February 17 or 24, 2017 |
| Town rebuttal (if any) | March 3 or 10, 2017 |
| Hearing date on jurisdictional hearing to consider the question of jurisdiction of the MGB | After March 17, 2017 |

## COUNTY RESPONSE TO TOWN'S POSITION

[8] The County, after receiving the Town's position, responded that the dates proposed by the County was to accommodate the MGB's March 7, 2017 hearing date set in DL 070/16. The County requests that given counsel's schedule that the hearing be set during the weeks of March 13th or 20th and that the earlier dates proposed by the Town (January 20, February 17 and March 3) be directed.

## DECISION

[9] The MGB varies its decision in DL 070/16 and sets the dates and submissions to be as follows:

1. Written submission by the Town due on or before December 2, 2016 to advise if the Town is proceeding with the appeal.

2. Written submissions by the Town due on or before noon on January 20, 2017 to address the jurisdiction of the MGB to proceed with this dispute and advise what actions have or will be undertaken by the parties should the dispute proceed.

3. If the parties intend to proceed with this dispute, all documents and all bylaws related to this appeal and MGB file 16/IMD/003 (Including Bylaw 782-12), are to be either published on municipal websites or hard copies made available for review at municipal

offices for any landowner, member of the public or affected party. If copies of all or part of the documents are requested, these may be provided at the cost established by the municipality.

4. The MGB will place a notice in the local newspaper, the Drayton Valley Western Review, in January requesting that any landowner or affected party wishing to make a submission or speak to this appeal to advise the MGB in writing of their intention no later than February 17, 2017 at 12 noon.

5. The preliminary hearing, if required, is set to commence on March 21st in a location determined by the MGB. The MGB orders that the following actions occur on or before the following dates:

| *Action* | *Date* |
|---|---|
| Town's submission as to status of appeal | December 2, 2016 |
| Town's submission on jurisdiction | January 20, 2017 |
| County and Landowner submission on jurisdiction | February 17, 2017 |
| Town rebuttal, if required | March 3, 2017 |
| Hearing | March 21 – 23, 2017, if needed |

[10] All submissions are due at 12 pm (noon) on the dates above and are to be submitted electronically to mgbmail@gov.ab.ca. Five hard copies (one unbound) are to be sent to the MGB within three business days of the dates listed. A hard copy is also to be sent to both counsel and the CAO of the other municipality.

**REASONS**

[11] As pointed out by the County, Rule 24.5 of the MGB Intermunicipal Dispute Rules sets out the circumstances that the MGB can exercise its power under section 504 to allow a rehearing or review of a decision. In this case, the MGB thanks the parties for clarifying their positions; the MGB has a better understanding of what the parties have agreed upon and their requests.

[12] Based on the schedules provided by the parties, the MGB has set dates for submissions and a preliminary hearing to determine the issue of jurisdiction – should the appeal proceed. The MGB preferred to hear the preliminary matter at the beginning of the merit hearing; however, recognizes and accepts the parties' preference to hold a hearing to deal only with the preliminary matter. In this case, the MGB grants this request and the notice of the preliminary hearing will follow, if required, and will contain the time and location of the hearing.

**BOARD ORDER: MGB 072/16**

**FILE: 16/IMD-04 RH**

[13] This panel is not seized.

Dated at the City of Edmonton, in the Province of Alberta, this 29th day of November 2016.

MUNICIPAL GOVERNMENT BOARD

S. Boyer, Member

**BOARD ORDER: MGB 072/16**

**FILE: 16/IMD-04 RH**

**APPENDIX "A"**

DOCUMENTS RECEIVED:

| NO. | ITEM |
|---|---|
| 1R | County's Request for Review |
| 2A | Town's Response |
| 3R | County's Rebuttal |

**APPENDIX "B"**

LEGISLATION

***Municipal Government Act***

The *Act* provides for the MGB to reconsider its decisions.

*504 The Board may rehear any matter before making its decision, and may review, rescind or vary any decision made by it.*

**MGB Intermunicipal Dispute Procedure Rules**

These rules provide situations where the MGB may exercise its powers to review an order under section 504 of the *Act*.

24.1 A request may be submitted to the Board in writing to rehear, review, vary or rescind any matter or decision under the discretionary power granted by section 504 of the *Act*.

24.2 A request under this Rule must include
- (a) A detailed statement explaining how the request meets the grounds for a rehearing or review listed under this Rule; and
- (b) The following background information:
  - (i) Name of the applicant.
  - (ii) Board decision number.
  - (iii) Address, phone number and contact persons for the appellant and respondent municipalities.

24.3 Requests must be made no later than 30 days following the date of the decision.

24.4 After a request is filed pursuant to the Rule, the Chair may
(a) Refer the matter to a case manager for case management,
(b) Refer the request to the panel that originally heard the matter for further directions, final determination, or both, or
(c) Refer the request to a new panel for further directions, final determination, or both.

24.5 The Board may exercise its power under section 504 of the *Act* in the following circumstances:

(a) New facts, evidence or case-law that was not reasonably available at the time of the hearing, and that could reasonably have affected the decision's outcome had it been available,
(b) A procedural defect during the hearing which caused prejudice to one or more of the parties,
(c) Other material errors that could reasonably have changed the outcome of the decision, or
(d) Any other circumstance the Board considers reasonable.

24.6 The following are generally not sufficient grounds to grant a rehearing or review:
(a) Disagreement with a decision.
(b) A party's failure to provide evidence or related authorities that were reasonably available at the time of the hearing.

TAB 4

**BOARD ORDER: MGB 065/03**

**FILE: 02/IMD/01**

**IN THE MATTER OF THE** *Municipal Government Act* being Chapter M-26 of the Revised Statutes of Alberta 2000 (Act).

**AND IN THE MATTER OF A INTERMUNICIPAL DISPUTE APPEAL** lodged by the Summer Village of Sundance Beach (Summer Village).

**BEFORE:**

Members

H. Kim, Presiding Officer
D. Scotnicki, Member
D. Thomas, Member

Secretariat Advisor

D. Hawthorne

This is an appeal to the Municipal Government Board (MGB) regarding a dispute lodged by the Summer Village pursuant to Section 690 of the Act, respecting the adoption of Area Structure Plan Bylaw 26-02 by Leduc County (County).

Upon notice being given to the interested parties, a hearing commenced in the City of Edmonton on December 9, 2002, and was adjourned pending the outcome of attempts at mediation between the two municipalities. As a result of a mediated settlement, the hearing was closed on May 12, 2003, without the parties in attendance.

## BACKGROUND

On October 10, 2002, the Summer Village appealed to the MGB claiming that the County had approved an Area Structure Plan Bylaw that has or may have a detrimental effect on the Summer Village. The Bylaw refers to part of the SW 28-47-1-5 in the Moonlight Bay/Kerr Cape vicinity on lands proposed for development by Gregg Properties Ltd.

Prior to the filing of the dispute by the Summer Village, the County conducted a public hearing respecting the Area Structure Plan Bylaw. The hearing commenced on August 13, 2002, and continued on September 10, 2002. The Summer Village gave written notice of its concerns to the County prior to 2nd reading of the Bylaw and prior to the public hearing. After the public hearing and despite the

concerns expressed by the Summer Village, the County decided to adopt Bylaw 26-02 on September 10, 2002.

The Summer Village decided to appeal the decision of the County to pass the Bylaw because it was of the opinion there was potential for detriment in accordance with the following concerns.

"1. The development provided for by the Area Structure Plan will put additional and undue stress on lake access points within Sundance Beach, which are already being fully utilized by the existing residents.

2. The potential Range Road #14 access point is too steep and narrow for practical lake access, with the result that lake access within Sundance Beach will become the practical default lake access.

3. Two potential access points will disturb shore vegetation, and have the potential to impact fish and fish habitat, to the general detriment of Sundance Beach.

4. Increased traffic on Range Road #14 will exacerbate the already-existing dust control problem in Sundance Beach.

5. The Area Structure Plan does not provide parking facilities to accommodate the increased traffic flow, and over-flow parking will foreseeably spill into Sundance Beach.

6. In general, the privacy and enjoyment of Sundance Beach residents, and their general recreational experience will be disrupted and detrimentally affected by the development.

7. The proposed Area Structure Plan does not adequately address sewage disposal issues, to the general detriment of Sundance Beach.

8. The proposed Area Structure Plan does not adequately address storm drainage, to the general detriment of Sundance Beach."

On December 9, 2002, the MGB opened the hearing. The County advised that it wished to raise a jurisdictional argument respecting the validity of the appeal since mediation had not been attempted prior to the lodging of the appeal. However, the County indicated it was prepared to enter into the mediation process provided it did not prejudice its jurisdictional argument to the MGB.

The MGB advised the parties that it was willing to hear expanded arguments on the MGB's jurisdiction at a hearing to be conducted on April 7, 2003. The MGB also ordered that a document exchange process occur prior to the hearing. The document exchange process would then form all the submissions of each party including submissions on jurisdiction and merit. In the meantime, the MGB encouraged the parties to use the mediation process to resolve all the issues.

In March 2003, the municipalities advised the MGB that mediation was scheduled but more time was needed. With the agreement of the landowner, the MGB agreed to delay the hearing to May 15, 2003 and adjusted the document exchange process accordingly.

On April 30, 2003, the municipalities advised the MGB that mediation had been successful and an agreement had satisfactorily resolved the issues between the municipalities. The County, the Summer Village, and the landowner requested the MGB order the County to amend the Area Structure Plan in accordance with the agreement, without reconvening the hearing and without requiring further submissions from the parties. The solicitors for all three parties noted the County would be required to conduct a lengthy public hearing process for the agreed amendments to the Area Structure Plan unless the MGB issued an Order. Section 690(7) of the Act relieves the County from conducting a public hearing if the MGB directs the Area Structure Plan be amended.

**FINDINGS**

1. Leduc County Bylaw 26/02, as adopted, is detrimental to the Summer Village of Sundance Beach.

2. Amendments to the Bylaw as a result of mediation have resolved the detriment.

In consideration of the mediated agreement and having regard to the provisions of the Act, the MGB makes the following decision for the reasons set out below.

**DECISION**

Pursuant to Section 690(5) of the Act, the MGB hereby orders Leduc County to amend Area Structure Plan Bylaw 26-02 in accordance with the mediated agreement reached between the Summer Village of Sundance Beach and Leduc County as shown in its entirety in Appendix "C" of this Board Order.

**REASONS**

By agreeing to amendments to the Area Structure Plan Bylaw, the County and the Summer Village have found a way to resolve their differences and find solutions to the question of detriment through

mediation. This fact proves to the MGB that parts of Bylaw 26-02 as originally adopted were detrimental to the Summer Village. The MGB accepts the recommendation of all three parties, including the landowner, that the proposed amendments resolve the detriment and do not materially interfere with the plans of the landowner for a proposed development on the subject land.

Section 691(2) of the Act only requires that the MGB notify and hear from the two municipalities and the affected landowner. As a result, the MGB is satisfied that required parties have had sufficient opportunity for input to resolve the disputed matters.

The municipalities represent the best interests of their respective citizens, therefore, the opportunity for general public input was satisfied by the public hearing held by the County on August 13 and September 10, 2002. There are no outstanding issues from the affected landowner, therefore, the MGB is satisfied that further public hearings by the County are not required respecting the amendments proposed in the mediated agreement. Accordingly, the MGB is directing the County to amend Bylaw 26-02 in accordance with the agreement.

DATED at the City of Edmonton, in the Province of Alberta, this 16th day of May 2003.

MUNICIPAL GOVERNMENT BOARD

(SGD.) D. Thomas, Member

**APPENDIX "A"**

PERSONS WHO MADE SUBMISSIONS TO THE MGB

| NAME | CAPACITY |
|---|---|
| Grace Garcia Cooke | Leduc County Solicitor |
| Barry Sjolie | Leduc County Solicitor |
| Sheila McNaughton | Summer Village of Sundance Beach Solicitor |
| Anita Blais | Summer Village of Sundance Beach Administrator |
| Bob Riddett | Summer Village of Sundance Beach Planner |
| Brian J. Evans | Solicitor for Gregg Properties, Landowner |

**APPENDIX "B"**

DOCUMENTS RECEIVED DURING THE HEARING ADJOURNMENT AND CONSIDERED BY THE MGB.

| NO. | ITEM |
|---|---|
| 1 | Letter dated April 30, 2003 from B.J. Evans |
| 2 | Letter dated April 30, 2003 from S. McNaughton |
| 3 | Letter dated April 30, 2003 from B. Sjolie |

**APPENDIX "C"**

THE MEDIATED AGREEMENT BETWEEN THE SUMMER VILLAGE OF SUNDANCE BEACH AND LEDUC COUNTY

**LEDUC COUNTY**

**and the**

**SUMMER VILLAGE OF SUNDANCE BEACH**

The parties to this agreement are the Summer Village of Sundance Beach and Leduc County.

This document sets out the recommendations of the Mediation Committee. It is understood that these recommendations will only be binding if ratified by both Councils.

The members of the Mediation Committee are confident that these recommendations meet the needs of both municipalities in resolving the concerns of the Summer Village of Sundance Beach in relation to their appeal to the Municipal Government Board of Leduc County's S.W. 28-47-1-W5M Area Structure Plan, as adopted by Bylaw No. 26-02.

THE PARTIES AGREE AS FOLLOWS:

The Summer Village of Sundance Beach agrees, immediately upon ratification by both Councils of these recommendations, to withdraw its appeal to the Municipal Government Board of Leduc County's S.W. 28-47-1-W5M Area Structure Plan.

The recommended amendments to the Area Structure Plan are:

**Sewage**

~~Leduc County will~~ replace the wording on Page 11, paragraph 5.3, "In the interim, however, it is recommended that holding tanks be utilized by all lots." with the following wording:

In the interim, however, Leduc County has indicated that holding tanks will be mandatory.

**Parking**

Leduc County will note in the ASP that there is limited parking in the area and that purchasers should plan accordingly to meet their parking needs on their respective lots.

Leduc County may explore the option of including a requirement for a minimum number of parking spaces for each of the proposed lots in the ASP.

**Storm Water Management**

Leduc County will require in the ASP that discharge rates of storm water from the ASP area into the Summer Village of Sundance Beach will be limited to pre-development rates.

**Roads**

In relation to that portion of Range Roads 14 and 15 south of Highway 616X, the parties agree to jointly review the standards for maintenance and upgrades and the basis of cost sharing between the parties.

**Lake Access**

Leduc County will amend Figure 4.3 by removing the area west of Range Road 14 from the map.

"The Summer Village of Sundance Beach" will be added to the parties to be consulted with respect to any construction within Range Road 14 right of way south of Lakeshore Drive, at the end of paragraph 5 in Section 4.3 of the ASP.

**Future Discussions**

The parties agree to hold further discussions with respect to planning and the environment as noted in the document, Topics for Discussion.

*April 24, 2003*

4

TOPICS FOR DISCUSSION

This list was prepared by the members of the Mediation Committee. Some topics have already been addressed; others are still to be discussed and new topics may be added by the parties by mutual agreement.

Storm Water Management
- Storm water management within proposed subdivision and management of runoff through summer village drainage system

Lake Access
- Lake access through Sundance Beach
- Limited lake access specified within asp along lakeshore east/south of Sundance Beach – not an open-ended possibility for more currently referenced in asp
- Future development of RR14 as a lake access, lake access terrain, control RR14
- Public advertising of Sundance easements

Sewage and Environment
- Environmental concerns re: too much development around the lake
- Pollution
- Mandatory use of holding tanks for domestic waste water (sewage and grey water) prior to hook up to sewer line if, as and when constructed
- Oceans and Fisheries should test every system around lake for leakage
- Trees
- Public services (police, fire, ambulance)

Planning
- Jurisdiction
- Limit effects of county development on people of Sundance Beach
- Infrastructure plans
- Lake management plans
- Planning for today and tomorrow
- What aspects of the proposed development will adversely affect the village
- Full impact of ASP on Moonlight Bay

Road and Parking
- Dust control
- Parking restrictions within summer village and assurances of quiet, enjoyment of property by Sundance Beach property owners
- Parking in subdivision
- On-site parking within proposed subdivision

TAB 5

**Most Negative Treatment:** Application/Notice of Appeal
**Most Recent Application/Notice of Appeal:** Calgary (City) v. Altus Group Ltd. | 2015 CarswellAlta 878 | (S.C.C., Apr 28, 2015)

2015 ABCA 86
Alberta Court of Appeal

Altus Group Ltd. v. Calgary (City)

2015 CarswellAlta 303, 2015 ABCA 86, [2015] 6 W.W.R. 109, [2015] A.W.L.D. 1489, [2015] A.W.L.D. 1491, [2015] A.W.L.D. 1555, 12 Alta. L.R. (6th) 217, 250 A.C.W.S. (3d) 4, 33 M.P.L.R. (5th) 183, 382 D.L.R. (4th) 455, 599 A.R. 223, 643 W.A.C. 223, 80 Admin. L.R. (5th) 221

# Altus Group Limited on behalf of Various Owners, Cross-Appellant on Cross-Appeal (Respondent on Appeal) (Applicant) and The City of Calgary, Cross-Respondent on Cross-Appeal (Appellant on Appeal) (Respondent) and The Assessment Review Board for City of Calgary, Cross-Respondent on Cross-Appeal (Not a Party to the Appeal on Appeal) (Respondent) and The Minister of Justice, Attorney General for Alberta, Not a Party to the Appeal (Respondent)

Peter Martin, Patricia Rowbotham, Barbara Lea Veldhuis JJ.A.

Heard: May 8, 2014
Judgment: February 27, 2015
Docket: Calgary Appeal 1301-0356-AC

Proceedings: affirming *Altus Group Ltd. v. Calgary (City)* (2013), 573 A.R. 68, 61 Admin. L.R. (5th) 131, 87 Alta. L.R. (5th) 215, [2014] 2 W.W.R. 146, 16 M.P.L.R. (5th) 67, 2013 ABQB 617, 2013 CarswellAlta 1999, K.M. Eidsvik J. (Alta. Q.B.)

Counsel: G.L. Ludwig, Q.C., J.B. Laycraft, Q.C., for Cross-Appellant / Respondent
M.J. Donaldson, P.G. Chiswell, for Cross-Respondent / Appellant, The City of Calgary
P.J. Knoll, Q.C., for Cross-Respondent, The Assessment Review Board for the City of Calgary

Subject: Civil Practice and Procedure; Property; Public; Tax — Miscellaneous; Human Rights; Municipal

 

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*BTC Properties II Ltd. v. Calgary (City)* (2012), 2012 ABCA 13, 2012 CarswellAlta 16, 92 M.P.L.R. (4th) 15, 53 Alta. L.R. (5th) 223, 32 Admin. L.R. (5th) 95, (sub nom. *Calgary (City) v. Municipal Government Board)* 519 A.R. 259, (sub nom. *Calgary (City) v. Municipal Government Board)* 539 W.A.C. 259 (Alta. C.A.) — considered

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*Canada (Attorney General) v. Mowat* (2011), 93 C.C.E.L. (3d) 1, D.T.E. 2011T-708, 337 D.L.R. (4th) 385, 26 Admin. L.R. (5th) 1, (sub nom. *Canada (Human Rights Comm.) v. Canada (Attorney General))* 73 C.H.R.R. D/30, 2011 CarswellNat 4190, 2011 CarswellNat 4191, 2011 SCC 53, 422 N.R. 248, (sub nom. *C.H.R.C. v. Canada (A.G.))* 2011 C.L.L.C. 230-043, (sub nom. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General))* [2011] 3 S.C.R. 471 (S.C.C.) — considered

*Canada Trustco Mortgage Co. v. R.* (2005), (sub nom. *Canada Trustco Mortgage Co. v. Canada)* 2005 D.T.C. 5523 (Eng.), (sub nom. *Hypothèques Trustco Canada v. Canada)* 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, 2005 SCC 54, (sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.)* 340 N.R. 1, 2005 CarswellNat 3212, 2005 CarswellNat 3213, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

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*Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)* (1993), 15 Admin. L.R. (2d) 1, 49 C.C.E.L. 1, 154 N.R. 104, (sub nom. *Domtar*

  

*Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)* [1993] 2 S.C.R. 756, (sub nom. *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*) 55 Q.A.C. 241, (sub nom. *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*) 105 D.L.R. (4th) 385, 1993 CarswellQue 145, 1993 CarswellQue 159, [1993] C.A.L.P. 613 (S.C.C.) — considered

*Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)* (2015), 2015 ABCA 85, 2015 CarswellAlta 324 (Alta. C.A.) — considered

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1878, (sub nom. *Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)*) 155 B.C.A.C. 193, (sub nom. *Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)*) 254 W.A.C. 193, [2001] 10 W.W.R. 1, 34 Admin. L.R. (3d) 1, 204 D.L.R. (4th) 33, 274 N.R. 116, 93 B.C.L.R. (3d) 1, [2001] 2 S.C.R. 781 (S.C.C.) — followed

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**Statutes considered:**

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Generally — referred to

*Municipal Government Act*, R.S.A. 2000, c. M-26
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s. 454.1 [en. 2009, c. 29, s. 15] — referred to

s. 454.2 [en. 2009, c. 29, s. 15] — referred to

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APPEAL by city from judgment reported at *Altus Group Ltd. v. Calgary (City)* (2013), 2013 ABQB 617, 2013 CarswellAlta 1999, 16 M.P.L.R. (5th) 67, [2014] 2 W.W.R. 146, 87 Alta. L.R. (5th) 215, 61 Admin. L.R. (5th) 131, 573 A.R. 68 (Alta. Q.B.), allowing landlords' appeal from tax assessment; CROSS-APPEAL by landlords.

***Per curiam*:**

**I. Introduction**

1 This appeal and cross-appeal arise from a review of a Local Assessment Review Board (the "ARB decision"), which interpreted a municipal taxation bylaw and assessed business tax against the respondent, a group comprising landlords of commercial office space in the City of Calgary, for the lease of parking spaces to their tenants for the 2010 taxation year. The ARB held that the landlords were liable for business tax, as lease of the parking spaces constituted the use or operation of a "business in premises" within the meaning of s.4 of the City of Calgary Bylaw 1M2010 (the "Bylaw").

2 An appeal to the Court of Queen's Bench of Alberta was allowed, and the ARB's decision to assess business tax liability against the respondent landlords was cancelled and referred back to the ARB for rehearing.

3 The question of tax liability at issue in this case is not novel. This court addressed that same issue only two years ago in *BTC Properties II Ltd. v. Calgary (City)*, 2012 ABCA 13, 519 A.R. 259 (Alta. C.A.) (the "BTC Decision"). In that case, the Municipal Government Board interpreted the same Bylaw and found that the landlords of commercial space were *not* liable for business tax in connection with the lease of parking spaces to their tenants. On judicial review to the Court of Queen's Bench, a chambers judge found that the Board's decision was reasonable. An appeal to this court was dismissed. The court held that in the context of leased parking facilities, it was reasonable to require that the landlord be "operating a parking business" in the premises in order to assess tax under the Bylaw.

4 The respondent landlords rely on the BTC Decision and say that the ARB unjustifiably refused to follow that reasoning. The appellant City argues that the BTC Decision is not binding and is inapplicable to assessing the reasonableness of the ARB's decision.

5 The Bylaw in question provides:

> 4(1) Every person who operates a Business in Premises within the City shall be assessed by the Assessor for the purposes of imposing a Business tax.

**II. Judicial History - *Altus Group Ltd. v. Calgary (City)*, 2013 ABQB 617 (Alta. Q.B.)**

  

6 On the appeal before the chambers judge, both parties agreed that the applicable standard of review was reasonableness — requiring review of the ARB's interpretation of the Bylaw for justifiability, transparency and intelligibility, and whether the result fell within a range of reasonable outcomes defensible on the facts and law: (*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para 47; *Canadian Natural Resources Ltd. v. Wood Buffalo (Regional Municipality)*, 2013 ABQB 91, 230 A.C.W.S. (3d) 353 (Alta. Q.B.) at paras 40-41).

7 Following a detailed review of the legislation and case law, the chambers judge held that the ARB had erred, in part, by failing to distinguish the BTC Decision and reaching an opposite interpretation of the law without reasonable justification. In so doing, she rejected the City's assertion that the ARB decision was reasonable even though it came to a conclusion opposite to prior authority on point. She explained at paragraphs 83-85 of her reasons:

> The City however suggests that the analysis and opposite result found by the ARB here is defensible as an alternate reasonable decision on the law even though it is opposite to what our Court of Appeal has found to be a reasonable interpretation of the law.
>
> I agree that there is case law that may support such a bold statement in certain situations which I will discuss. However, in my view, this does not apply when you are dealing with a question of law and the interpretation of a section of legislation. The City's position would result in taxation chaos. For example, how can the City or taxpayers budget from year to year if the City's assessment on landlord/tenant parking may change from year to year depending on how an assessment board may chose and apply a test for assessiblity. Surely some clarity in the law would be better for all concerned. In my view, the legislature allowed for an appeal on the law to the Court of Queen's Bench from an ARB Decision in order to guard against such a result.
>
> In my view, the cases cited do not allow administrative boards to come to opposite results when they have failed to identify and misapplied the tests as is the case here — where there is an error of law.

8 As a result, the chambers judge held that the ARB's decision to impose business tax on the landlords was unreasonable and not within the range of possible acceptable outcomes. The ARB decision was cancelled and the matter returned for rehearing to determine whether the respondent landlords were operating a business in premises, i.e. a business in the parking spaces in question.

9 The City appeals.

## III. Grounds of Appeal

  

i) *Did the chambers judge properly apply the reasonableness standard of review and was she correct in concluding that the BTC Decision should have been followed by the ARB?*

ii) *Did the fact that the Chambers judge heard both the application for leave to appeal and the appeal itself, and some statements made by her at both hearings, give rise to a reasonable apprehension of bias?*

iii) *Issue on Cross-Appeal - Whether the chambers judge erred in finding the Bylaw establishing the Calgary Assessment Review Board satisfied the requirement of institutional independence.*

**Standard of Review**

10 The appeal before us proceeded on the basis that the correct standard of review for the chambers judge to apply to her review of the ARB decision was reasonableness. The chambers judge also agreed that that was the applicable standard of review. That is entirely understandable as that was also the standard of review endorsed by this court in the BTC Decision. The complaint now is that notwithstanding that acknowledgement the chambers judge failed to apply that standard of review.

11 The concern is this. Since this appeal was argued and these reasons prepared, another panel of the court has heard a case which directly challenged the appropriateness of that standard of review where an assessment review board is interpreting provisions of the *Municipal Government Act*; *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)*, 2015 ABCA 85 (Alta. C.A.), released contemporaneously with this judgment. Following a thorough analysis and after noting that determination of the appropriate standard of review is in a state of flux and evolution, the court concluded that the appropriate standard of review in such cases is correctness. (para 30). The case before us involves the interpretation of a municipal bylaw, not a provincial statute, but we will leave any debate that may arise from that distinction for another day. Rather than invite further submissions from the parties we will decide this appeal on the basis it was presented, mindful that that standard of review is the most favourable to the appellant. As will be seen the outcome would be the same in any event.

***i) Did the chambers judge properly apply the reasonableness standard of review and was she correct in concluding that the BTC Decision should have been followed by the ARB?***

*(a) Position of the Appellant*

12 The appellant submits that although the chambers judge said she would apply the reasonableness standard, she in fact applied a "disguised correctness" standard in her

  

review of the ARB's decision and by applying the BTC Decision as binding precedent on interpretation of the Bylaw. With respect to the BTC Decision in particular, the appellant submits that it was open to the ARB to accept an alternative interpretation of the Bylaw in determining whether the landlords were operating a business in premises in the parking spaces, as one of a range of reasonable outcomes. Further, the appellant argues that the BTC Decision does not represent the current consensus on the proper interpretation of the Bylaw.

13 To the extent that there is conflict between the ARB's Decision in this case and the reasoning in the BTC Decision, the appellant maintains that judicial deference requires this court to allow the ARB to resolve that conflict without interference.

*(b) Position of the Respondent*

14 The respondent argues that the chambers judge properly identified and applied the reasonableness standard of review in assessing the ARB's decision. In particular, the respondent explains that in referring to the governing law, the chambers judge was required to consider the divergence from the BTC Decision and whether the ARB's interpretation of the Bylaw was reasonable in that context. In this respect, according to the respondent, the reasonableness standard requires a review of both the ARB's decision-making process and the merits of its decision.

15 The respondent concedes that an administrative tribunal is entitled to deference and may choose from any reasonable interpretation that its home legislation may bear. However, in the face of jurisprudence that has supported an alternative interpretation of the law, the respondent argues that it was incumbent on the ARB to explain why, on the same facts and legislative provisions, its opposite conclusion was also reasonable. In failing to complete this path of reasoning or otherwise supporting their conflicting interpretation of the law, the respondent submits that the ARB decision is unreasonable and cannot stand.

*c) Analysis*

**_Stare Decisis_ and the Standard of Reasonableness**

16 Strictly speaking, an administrative tribunal is not bound by its previous decisions or the decisions of its predecessor: *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34, [2013] 2 S.C.R. 458 (S.C.C.) at para 6; *Halifax Employers Assn. v. I.L.A., Local 269*, 2004 NSCA 101, 243 D.L.R. (4th) 101 (N.S. C.A.) at para 82, leave to appeal to SCC refused, 334 N.R. 197 (note) (S.C.C.). Where numerous reasonable interpretations exist, the administrative tribunal may change its consensus or policy with respect to which one it will adopt. There is no rule of law that an administrative tribunal can never change its policies, nor change its interpretation of a particular policy, nor change the way that the policy will be applied to particular fact

  

situations: *Thompson Brothers (Construction) Ltd. v. Alberta (Workers' Compensation Board Appeals Commission)*, 2012 ABCA 78, [2012] A.W.L.D. 2212 (Alta. C.A.) at para 39.

17 Similarly, even where an appellate court has found one interpretation to be reasonable, that decision will not necessarily bind a future administrative tribunal considering the legislation afresh. Sara Blake summarizes this point in her text, *Administrative Law in Canada*, 5d ed (Markham: LexisNexis Canada Inc, 2011) at pages 140 - 141.

> If, in another case, a court determined the correct interpretation of a statutory provision, the tribunal must apply the court's interpretation. However, if a court has merely upheld an earlier tribunal interpretation of the provision as reasonable, the tribunal need not follow that interpretation if it prefers another interpretation that is also reasonable.

18 Nevertheless, prior decisions provide important context to the analysis. In *Irving Pulp & Paper*, the Supreme Court dealt with arbitral decisions of the Labour Board and the interpretation of a collective agreement. The majority referred to existing precedents as a "valuable benchmark against which to assess the arbitration board's decision" (at para 6). Rothstein and Moldaver JJ., (in dissent, with McLachlin C.J.C. concurring), went on to explain this point in agreement with the majority's comment (at paras 75, 78).

> The context of this case is informed in no small part by the wealth of arbitral jurisprudence concerning the unilateral exercise of management rights arising under a collective agreement in the interests of workplace safety. We will say more about the "balancing of interests" test that has emerged from that jurisprudence in a moment, but for now the salient point is that arbitral precedents *in previous cases* shape the contours of what qualifies as a reasonable decision *in this case*. In that regard, we agree with our colleague, Abella J., who describes this "remarkably consistent arbitral jurisprudence" as "a valuable benchmark against which to assess the arbitration board's decision in this case" (paras. 16 and 6).
>
> . . .
>
> Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption — for the parties, labour arbitrators, and the courts — that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law. As Professor Weiler, a leading authority in this area, observed in *Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd.* (1970), 21 L.A.C. 332:
>
> > This board is not bound by any strict rule of *stare decisis* to follow a decision of another board in a different bargaining relationship. Yet the demand of predictability, objectivity, and impersonality in arbitration require that rules which

  

> are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable.
>
> [Emphasis added; p. 344.]

See, also D. J. M. Brown and D. M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), at topic 1:3200 (including discussion of the "Presumption Resulting From Arbitral Consensus"); R. M. Snyder, *Collective Agreement Arbitration in Canada* (4th ed. 2009), at p. 51 (identifying Professor Weiler's view as "typical").

... Reasonableness review includes the ability of courts to question for consistency where, in cases like this one, there is no apparent basis for implying a rationale for an inconsistency.

*d) Addressing conflicting decisions*

19 Little direct authority exists for reviewing conflicting statutory interpretations by the same administrative body (See: L.J. Wihak, "Wither the Correctness Standard of Review? Dunsmuir, Six Years Later" (2014), 27 Can J Admin L & Prac 173 at 174).

20 This issue was first addressed by the Supreme Court of Canada in *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (S.C.C.), a pre-*Dunsmuir* decision. In *Domtar*, the question was whether divergent interpretations of the same legislation, albeit by two different administrative tribunals, could be raised as an independent basis for judicial review. The Supreme Court held that it could not. L'Heureux-Dubé J., writing for the Court, noted the importance of consistency in administrative decision making (at para 59):

> While the analysis of the standard of review applicable in the case at bar has made clear the significance of the decision-making autonomy of an administrative tribunal, the requirement of consistency is also an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law. Professor MacLauchlan notes that administrative law is no exception to the rule in this regard:
>
> > Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their [page785] affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense and good administration".

  

> (H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 Dalhousie L.J. 435, at p. 446.)

21 *Domtar* was considered by the Supreme Court in *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 SCC 4, [2001] 1 S.C.R. 221 (S.C.C.) at para 28, in the context of institutional consultation by an administrative body. Noting the importance of proper consultation to ensure consistency in decision making, the majority held (at para 28):

> Inconsistencies or conflicts between different decisions of the same tribunal would not be reason to intervene, provided the decisions themselves remained within the core jurisdiction of the administrative tribunals and within the bounds of rationality. It lay on the shoulders of the administrative bodies themselves to develop the procedures needed to ensure a modicum of consistency between its adjudicators or divisions (*Domtar*, *supra*, at p. 798).

22 The same approach was endorsed in *Thompson Brothers*, where this court considered the authority of the Workers' Compensation Appeals Commission to change its interpretation of existing policies: "The existence of allegedly conflicting decisions by a tribunal on a particular subject does not itself warrant judicial intervention, unless the particular decision under review is unreasonable" (at para 39, citing *Ellis Don* at para 28). Also see: *I.A.F.F., Local 255 v. Calgary (City)*, 2003 ABCA 136, [2003] 7 W.W.R. 226 (Alta. C.A.) at para 27, leave to appeal to SCC refused, (2004), 328 N.R. 194 (note) (S.C.C.); *Hydro Ottawa Ltd. v. I.B.E.W., Local 636*, 2007 ONCA 292 (Ont. C.A.) at para 59, (2007), 281 D.L.R. (4th) 443 (Ont. C.A.), leave to appeal to SCC refused, (2007), 383 N.R. 379 (note) (S.C.C.); *National Steel Car Ltd. v. U.S.W.A., Local 7135* (2006), 278 D.L.R. (4th) 345, 159 L.A.C. (4th) 281 (Ont. C.A.) at para 31, leave to appeal to SCC refused, (2007), 374 N.R. 389 (note) (S.C.C.).

23 Canadian courts and commentators have noted the difficulty in accepting two conflicting interpretations by the same administrative tribunal as reasonable. In the context of a public statute, the rule of law and the boundaries of administrative discretion arguably cannot be served in the face of arbitrary, opposite interpretations of the law.

24 For example, in *Novaquest Finishing Inc. v. Abdoulrab*, 2009 ONCA 491, 95 Admin. L.R. (4th) 121 (Ont. C.A.) at para 48, while the decision did not turn on this issue, Juriansz J.A. observed:

> From a common sense perspective, it is difficult to accept that two truly contradictory interpretations of the same statutory provision can both be upheld as reasonable. If two interpretations of the same statutory provision are truly contradictory, it is difficult to envisage that they both would fall within the range of acceptable outcomes. More importantly, it seems incompatible with the rule of law that two contradictory

  

> interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable.

25 Similar concerns were raised by the Ontario Court of Appeal in *Investment Dealers Assn. of Canada v. Taub*, 2009 ONCA 628, 311 D.L.R. (4th) 389 (Ont. C.A.) at para 67:

> I agree with Juriansz J.A. that it accords with the rule of law that a public statute that applies equally to all affected citizens should have a universally accepted interpretation. It follows that where a statutory tribunal has interpreted its home statute as a matter of law, the fact that on appeal or judicial review the standard of review is reasonableness does not change the precedential effect of the decision for the tribunal. Whether a court has had the opportunity to declare the decision to be correct according to judicially applicable principles should not affect its precedential status. As in *Abdoulrab*, it is not necessary to decide the issue in this case.

26 These comments were endorsed by the Federal Court of Appeal in *Canada (Attorney General) v. Mowat*, 2009 FCA 309, [2010] 4 F.C.R. 579 (F.C.A.) at paras 45-47, aff'd *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.). In that case, the court noted the diversity of opinions between the Federal Court and Human Rights Commissions regarding the authority to award legal costs to a successful complainant in determining the proper standard of review. The issue did not receive direct comment by the Supreme Court of Canada on appeal.

27 While some statutory provisions may be amenable to different, yet reasonable interpretations, it is difficult to conceive of meaningful legislation that would allow diametrically opposed interpretations, both of which are reasonable, not to mention correct.

28 Opposite interpretations of a legislative provision are also difficult to accept under the presumption of legislative coherence. An interpretation that is so broad that it fosters inconsistency or repugnancy should be avoided: *Alberta Power Ltd. v. Alberta (Public Utilities Board)* (1990), 66 D.L.R. (4th) 286, 19 A.C.W.S. (3d) 763 (Alta. C.A.) at para 31, leave to appeal to SCC refused, (1990), 120 N.R. 80 (note) (S.C.C.). In the context of the statutory interpretation of taxation powers, consistency is also particularly important. Tax legislation should be interpreted to achieve "consistency, predictability and fairness" to achieve equity and finality in taxation and allow taxpayers to manage their affairs (*Husky Energy Inc. v. Alberta*, 2012 ABCA 231, [2012] 11 W.W.R. 282 (Alta. C.A.), at para 12 leave to appeal to SCC refused, (2013), 447 N.R. 400 (note) (S.C.C.); *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) at para 12; *Toronto (City) v. Municipal Property Assessment Corp.*, 2013 ONSC 6137, 234 A.C.W.S. (3d) 267 (Ont. Div. Ct.) at para 30. at para 30).

  

29 Sara Blake also notes that, in many cases, only one interpretation of a statutory provision will be reasonable at page 211:

> When the reasonableness standard of review is applied, conflicting interpretations of a question of law may be upheld by the courts if both are reasonable, though an interpretation may be held to be unreasonable if it is inconsistent with the prevailing interpretation. However, when the test of correctness is applied, it is not likely that different interpretations of the law will be upheld, because there can be only one correct interpretation, while there can be several reasonable interpretations. Given that most statutes are not ambiguous and do not permit more than one reasonable interpretation, there will not often be different interpretations that may both be upheld as reasonable.

30 In a comprehensive review of the case law, one commentator has called on appellate courts to review administrative decisions in a way that ensures consistency in the interpretation of public statutes (L.J. Wihak at pages 198-199):

> Public statutes apply equally to all citizens and they should have universal, consistent application. Citizens are entitled to advanced knowledge, certainty, and clarity regarding their respective entitlements or obligations under these public statutes....
>
> Not only do judges have greater expertise in the law relative to administrative decision-makers, they also have a constitutional responsibility to ensure that each person in Canada is subject to the same law and legal principles, and that tribunals are acting legally. As such, "appellate courts require a broad scope of review with respect to matters of law" [citing *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 9].

**Conclusions**

31 Assuming reasonableness applies as the standard of review of administrative tribunals in the interpretation of their home statute or closely connected legislation, while an administrative decision maker is unconstrained by the principles of *stare decisis* and is free to accept any reasonable interpretation of the applicable legislation, the reasonableness standard does not shield directly conflicting decisions from review by an appellate court. In assessing the reasonableness of statutory interpretation by the administrative tribunal, the appellate court should have regard to previous precedent supporting a conflicting interpretation and consider whether both interpretations can reasonably stand together under principles of statutory interpretation and the rule of law.

32 In this case, the ARB adopted an interpretation of the Bylaw which found the respondent liable for business tax for the lease of parking spaces to tenants in connection with the lease of commercial office space. That result is opposite to the approach and outcome in

  

the BTC Decision, which this court found to be reasonable. The apparent conflict between the ARB decision under appeal and the BTC Decision does not create an independent basis for judicial intervention. However, the BTC Decision provides a direct contextual comparison against which to judge the intelligibility, transparency and justifiability of the ARB's decision.

33 The chambers judge appropriately referred to and relied on the analysis in the BTC Decision to inform her review of the ARB's decision on the appeal. In light of that context, the range of reasonable outcomes was significantly narrowed. Indeed, considering the importance of coherence in the interpretation of the Bylaw and its purpose in imposing a tax, it would be difficult to accept two opposite interpretations of the provision as reasonable.

34 In the result, we find the chambers judge did not err in her consideration of the BTC Decision to the ARB decision under review.

***ii. Did the fact that the chambers judge heard both applications for leave to appeal and the appeal itself, and some statements made by her at both hearings, give rise to reasonable apprehension of bias.***

35 The appeal to the court below required leave, which was granted by the same judge who eventually heard the appeal itself. The appellant submits that some of the judge's statements in the decision granting leave would lead "any reasonable person" to conclude that the chambers judge had "pre-decided" at least some critical issues. Of particular concern are the chambers judge's references, during the leave application, that the ARB had effectively ignored the BTC Decision to come to a different conclusion.

36 We see no merit in this argument. That the BTC Decision of this court was effectively ignored by the ARB was the basis on which leave was sought. It is therefore not surprising that the chambers judge would refer to it and offer some preliminary thoughts as to the significance of that omission.

37 Furthermore, if the appellant was truly concerned about the impartiality of the same judge hearing the appeal, that objection should have been taken at the beginning of that hearing, not for the first time on appeal. The appellant's conduct of remaining silent throughout, and thereby appearing content to proceed before the same judge who it now says was, or may have been, biased, offers some indication of the sincerity of this complaint. See also *Lavesta Area Group, Re*, 2012 ABCA 84, 40 Admin. L.R. (5th) 331 (Alta. C.A.); and *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, 144 D.L.R. (4th) 614 (S.C.C.).

38 Finally, upon a review of the record we think that if the chambers judge in granting leave went beyond what was necessary to address the ARB's neglect of this court's decision in BTC, we read those comments as her expression of frustration and bewilderment. She is not alone with those feelings.

  

39 While we find no merit in this argument, it fortifies our concern that generally when a court grants leave to appeal, little more than the grounds upon which leave is being granted need be identified. More elaborate reasons are best saved for those cases where leave to appeal is refused, as that will be the final word and the parties have a right to understand the reasoning leading to that conclusion.

40 That disposes of the appeal. There is as well a cross-appeal. We will turn to that now.

***iii. Issue on Cross-Appeal - Whether the chambers judge erred in finding the Bylaw establishing the Calgary Assessment Review Board satisfied the requirement of institutional independence.***

41 Although the matter was not raised before the ARB, the chambers judge granted leave on this issue as well, The cross-appellant argues that the legislative framework establishing the ARB is "minimalist" thereby raising questions whether the "guarantees" of independence such as security of tenure and remuneration are sufficient to create the perception of independence. The cross-appellant agrees that the common law requirements to establish independence are subject to legislative override, but maintains that must be done "expressly". In other words, where the legislation is silent or ambiguous, a court should find that the common law guarantees still apply. And, says the cross-appellant, in this case there was no express legislative intent to override the common law requirements of independence.

42 The same submissions were made on appeal to the chambers judge who found them to be without merit. We agree with her assessment.

43 To better frame the issue, there is no suggestion here that a board member's tenure or remuneration were at risk should that member, or a panel of members, make a decision not pleasing to the City, or that it was ever so. Rather, the cross-appellant argues that there remains the perception. In our opinion, the Supreme Court's decision in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 (S.C.C.), is dispositive of this argument. The issue in that case was whether members of the Liquor Appeal Board were sufficiently independent to render decisions that imposed penalties in response to violations of the *Liquor Control Act*. The specific concern related to the tenure of board members who were appointed "at pleasure". Ultimately the Supreme Court found that this was a clear, unambiguous expression of legislative intent and accordingly there was no basis upon which to import common law doctrines of independence. (para 27)

44 In the case before us, the Provincial Legislature by ss. 454.1 and 454.2 of the *Municipal Government Act* delegated to the municipality the authority to enact bylaws which required the municipality to appoint persons to the ARB, to prescribe the term of office of each member, the manner in which vacancies are to be filled, and to prescribe remuneration

  

and expenses for each member. The City of Calgary did so. It enacted ByLaw 25M2010 which provides that the General Chairman of the ARB and each member shall hold office for one year beginning on January 1 and ending on December 31 of the same year. (s. 6) The same Bylaw provides that remuneration and expenses payable to each member are to be determined by the City Clerk in consultation with the General Chairman. (ss. 9.1 and 9.2) As well, administrative controls are prescribed in both the regulations of the *Municipal Government Act* (310/2009) and s. 4 of the Bylaw.

45 These provisions, which clearly express the legislature's intent regarding independence of the tribunal have ousted common law guarantees of independence. In the result, we find that ARB does not lack the necessary degree of independence required of a tribunal charged with taxation assessment.

46 Judgment accordingly. The appeal and cross-appeal are dismissed.

*Appeal dismissed; cross-appeal dismissed.*

TAB 6

# 1 INTRODUCTION

## 1.1 Title

1.1.1 This Bylaw shall be known as and may be cited as "Brazeau County Land Use Bylaw."

## 1.2 Purpose

1.2.1 The purpose of this Bylaw is to regulate, control, and/or prohibit the use and development of land and buildings within Brazeau County to ensure health and safety of its inhabitants, and also achieve the orderly and economic development of land, and:

(a) To divide Brazeau County into land use districts;

(b) To prescribe and regulate the use of land or buildings within each district;

(c) To establish a method of making decisions on applications for development permits and the issuance of development permits;

(d) To provide the manner in which a notice of issuance for a development permit is given;

(e) To establish the number of dwellings that may be allowed on a parcel;

(f) To establish regulations to assist in the subdivision and development decision making process;

(g) To establish procedures of appealing the decisions related to this Land Use Bylaw;

(h) To establish general development standards and specific use regulations;

(i) To establish parking, signage, and landscaping standards; and

(j) To establish subdivision design standards for Brazeau County.

## 1.3 Effective Date

1.3.1 This Land Use Bylaw comes into effect on the date of its third reading. At that time, the former Bylaw No. 782-12, and its amendments, shall cease to apply to new subdivision and development in Brazeau County.

## 1.4 Application

1.4.1 This Land Use Bylaw shall serve as a tool to implement policies established in the Municipal Development Plan (MDP), other statutory plans, and the *Municipal Government Act* (MGA), as amended from time to time.

1.4.2 All development hereafter in Brazeau County shall conform to the provisions of this Bylaw.

## 1.5 Previous Bylaws

1.5.1 Brazeau County Land Use Bylaw 782-12 is hereby repealed and this Bylaw shall apply to all lands within Brazeau County.

1.5.2 Brazeau County shall continue to recognize Direct Control Bylaws listed and attached under Appendix 17.

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