COURT OF APPEAL OF ALBERTA

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COURT OF APPEAL FILE NUMBER:	2201-0148AC
TRIAL COURT FILE NUMBER:	P21/CANM/T-002 LPRT2022/MG0671
REGISTRY OFFICE:	CALGARY
APPLICANT:	TOWN OF CANMORE
STATUS ON APPEAL:	Applicant
STATUS ON APPLICATION:	Applicant
RESPONDENTS:	THREE SISTERS MOUNTAIN VILLAGE PROPERTIES LTD. AND LAND & PROPERTY RIGHTS TRIBUNAL
STATUS ON APPEAL:	Respondents
STATUS ON APPLICATION:	Respondents
INTERVENOR:	NATURAL RESOURCES CONSERVATION BOARD
STATUS ON APPEAL:	Intervenor
STATUS ON APPLICATION:	Respondent
INTERVENOR:	STONEY NAKODA NATIONS
STATUS ON APPEAL:	Intervenor
STATUS ON APPLICATION:	Respondent
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I. INTRODUCTION AND RELIEF SOUGHT

1. The Town of Canmore (the "Town") seeks direction on the extent to which the legislators of the Province of Alberta have circumscribed the authority of municipal Councils and municipal planning authorities to regulate land use within their boundaries. Specifically, is Council for the Town of Canmore bound by a 30-year-old provincial approval?

2. This Memorandum applies to two Applications for Permission to Appeal brought by the Applicant Town against the Respondents Three Sisters Mountain Village Properties Ltd. ("TSMVPL") and the Land and Property Rights Tribunal ("LPRT"). These Applications concern two Council decisions not to pass bylaws adopting new Area Structure Plans for development of two large areas of land within the boundaries of the Town.

3. The fundamental issue is whether or not Council was required by s. 619 of the *Municipal Government Act*[1] ("MGA") to adopt, by bylaw, two Area Structure Plans because they are "consistent" with a previous decision of the Natural Resources Conservation Board (the "NRCB") to the extent they "comply" with that decision. This issue is important not only from the perspective of the parties, but also from the perspective of all developers and municipalities where development approval is required at both the provincial level and the municipal level.

II. STATEMENT OF FACTS

4. In November 1992, the NRCB issued a Decision Report granting an application by Three Sisters Golf Resorts Inc. to construct a Recreational and Tourism Project in the Town with 4 golf courses, 6 hotel complexes and some residential development within the Bow Valley and Wind Valley (the "NRCB Approval").[2] The Order in Council was signed in January 1993.[3] The NRCB Approval approved the Bow Valley portion of the project but not the Wind Valley portion. In June

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[1] Section 619 of the *Municipal Government Act*, RSA 2000, c. M-26 **[TAB 1]**

[2] Natural Resources Conservation Board Decision Report: Application #9103, Application to Construct a Recreational and Tourism Project in the Town of Canmore, Alberta [NRCB Approval] at Land and Property Rights Tribunal Smith Creek ASP Record (unfiled) [LPRT Record: Smith Creek ASP] Vol. 1 Page 141 and Land and Property Rights Tribunal TSMV ASP Record (unfiled) [LPRT Record: TSMV ASP] Vol. 1 Page 110. References to pages in NRCB Approval are to pages in original decision. **[EKE TAB 1]**

[3] Order in Council 8/93 dated January 6, 1993 at LPRT Record: Smith Creek ASP Vol 7 Page 243 and LPRT Record: TSMV ASP Vol 2 Page 3148. **[EKE TAB 2]**

1994, the NRCB approved the NRCB Implementation Plan ("1994 Implementation Plan") to reflect the removal of the Wind Valley portion.[4]

5. Some 30 years later, only a portion of the lands under the NRCB Approval have been, or are in the process of being, developed. Almost 800 acres remain to be developed, representing 80% of the developable lands within the Town. TSMVPL acquired the lands which are the subject of these applications in 2013 and worked with the Town to develop Area Structure Plans for the lands which remained to be developed.

6. The Smith Creek Area Structure Plan ("Smith Creek ASP")[5] and the Three Sisters Village Area Structure Plan ("Village ASP")[6] both received first reading on February 9, 2021, and went to public hearing in March. The Smith Creek ASP was defeated unanimously at second reading on April 27, 2021. A significant number of amendments to the Village ASP were approved by Council prior to second reading on April 27, 2021; additional amendments were approved on May 25, 2021, prior to it being defeated on third reading on May 25, 2021.

7. TSMVPL appealed Council's decisions with respect to refusing the Smith Creek ASP and the Village ASP to the LPRT under s. 619 of the MGA.[7] [8] The two appeals (the "Appeals") were heard consecutively by the LPRT over a five-week virtual hearing. The LPRT hearings ended on March 28, 2022. The LPRT issued its decisions on the two Appeals on May 17, 2022 (the "LPRT Decisions").[9] [10] The Town applied for Permission to Appeal both Appeals on June 13, 2022, in two separate actions.

III. ARGUMENT

A. Test and Standard of Review

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[4] NRCB 1994 Implementation Plan at LPRT Record: Smith Creek ASP. Vol 5 Page 169 and LPRT Record: TSMV ASP Vol 2 Page 1352. **[EKE TAB 3]**
[5] Smith Creek Area Structure Plan at LPRT Record: Smith Creek ASP Vol 1 Page 389. **[EKE TAB 4]**
[6] Three Sisters Village Area Structure Plan LPRT Record: TSMV ASP Vol 1 Page 358. **[EKE TAB 5]**
[7] Smith Creek ASP LPRT Appeal at LPRT Record Smith Creek ASP Vol 1 Page 109. **[EKE TAB 6]**
[8] Three Sisters Village ASP LPRT Appeal at LPRT Record: TSMV ASP Vol 1 Page 100. **[EKE TAB 7]**
[9] *Three Sisters Mountain Village Properties Ltd. v Town of Canmore*, 2022 ABLPRT 671 at LPRT Record Smith Creek ASP Vol 1 Page 58 [Smith Creek LPRT Decision]. **[EKE TAB 8]**
[10] *Three Sisters Mountain Village Properties Ltd. v Town of Canmore*, 2022 ABLPRT 673 at LPRT Record: TSMV ASP Vol 1 Page 44 [TSMVP LPRT Decision]. **[EKE TAB 9]**

8. There are three criteria for a grant of Permission to Appeal under s. 688 of the MGA: (a) the proposed appeal must raise a question of law or jurisdiction; (b) the question of law or jurisdiction must be sufficiently important to merit further appeal; and (c) the appeal must have a reasonable prospect of success. The three criteria are applied to each proposed ground of appeal.[11]

9. Whether an appeal is of sufficient importance to justify proceeding to appeal usually depends on whether the appeal is jurisprudentially significant or has implications that go beyond the dispute between the parties. In exceptional cases, the adverse effect of an SDAB or LPRT decision on the applicant alone may amount to sufficient importance.[12]

10. An appeal has a reasonable chance of success if it is arguable, and a question of law is arguable if it is not frivolous.[13]

11. The standard of appellate review is relevant in assessing whether a proposed appeal has a reasonable chance of success. Questions of law, such as interpretation of the MGA or a land use bylaw, are reviewed on a standard of correctness. [14] With respect to the adequacy of reasons, the standard of review is reasonableness because the requirement to provide reasons is a matter of procedural fairness. The failure to provide reasons at all, or where the reasons are so inadequate they cannot be considered reasons, has been viewed as a procedural failure for which the standard of review is correctness.[15]

B. Grounds of Appeal

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[11] Section 688(3) of the *Municipal Government Act*, RSA 2000, c. M-26. **[TAB 1]**; *Seabolt Watershed Assn.* v. *Yellowhead (County)*, 2002 ABCA 124, at para. 9. **[TAB 2]**; *Carleo Investments Ltd.* v. *Strathcona (County)*, 2014 ABCA 302, at paras. 6-10. **[TAB 3]**; *PurpleRung Foundation* v. *Peace River (Town of) Subdivision and Development Appeal Board*, 2020 ABCA 341, at para. 7. **[TAB 4]**; *Augustana Neighbourhood Association* v. *Camrose (Subdivision and Development Appeal Board)*, 2021 ABCA 427, at paras. 16 and 18. **[TAB 5]**

[12] *Carleo Investments Ltd. supra,* at para 10. **[TAB 3]**; *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2019 ABCA 25, at para. 11. **[TAB 6]**

[13] *Edmonton (City of) Library Board* v *Edmonton (City of)*, 2020 ABCA 170, at para. 10. **[TAB 7]**

[14] *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65, at paras. 17, 33, 36-37. **[TAB 8]**; *Augustana Neighbourhood Association*, *supra* note 11, at paras. 19 to 22. **[TAB 5]**; *1765662 Alberta Ltd. (Windermere Registry)* v. *Edmonton (City)*, 2020 ABCA 137, at para. 12. **[TAB 9]**; *Edmonton (City of) Library Board v. Edmonton (City of)*, 2021 ABCA 355, at para. 27. **[TAB 10]**

[15] *Bergstrom* v. *Beaumont (Town)*, 2016 ABCA 221, at para. 48. **[TAB 11]**; *Springfield Capital Inc.* v. *Grande Prairie (City)*, 2016 ABCA 136, at para. 10. **[TAB 12]**

12. The Town seeks permission to appeal on the nine proposed grounds of appeal set out in paragraph 5 of the respective applications for Permission to Appeal.

i. Retrospectivity

13. The LPRT erred in concluding it had jurisdiction to hear the Appeals. Whether or not the LPRT has jurisdiction to hear the Appeals is an issue of sufficient importance to all municipalities to merit further appeal. The extent to which s. 619 prescribes local planning authority requires judicial consideration, as the number of projects in Alberta which require approval from the provincial bodies listed in s. 619 only grows and municipalities and residents are left wondering where and when their input will be taken into account. Clarification on who has jurisdiction to hear these appeals is similarly critical to avoid duplicity of proceedings and procedural certainty.

14. The LPRT failed to ascertain that s. 619(1) of the MGA is retrospective in nature and the presumption against its retrospective application has not been rebutted. Thus, s. 619(2) does not apply to the ASP approval process and s. 619(5) does not grant jurisdiction to the LPRT. With respect to retrospectivity, the LPRT concluded the NRCB Approval prevails under s. 619 notwithstanding s. 619 was enacted after the NRCB Approval was issued.[16] The LPRT reasoned that s. 619 "provides for paramountcy of provincial approvals that are in place at the time of a municipal action", stating "it is clear from the inclusion of ERCB in s. 619(1) that the legislative intent is that s. 619 should apply when an approval exists, regardless of when it may have been granted" and, as the NRCB Approval has not been revoked, "it continues to exist and prevails over municipal land use planning decisions and bylaws".[17]

15. The LPRT incorrectly focused on the purpose of s. 619 (to provide for paramountcy of provincial approvals that are in place at the time of a municipal action) and did not address the temporal scope of the legislation, which is required in order to determine if legislation operates retrospectively. The LPRT reasoned that "s. 619 should apply when an approval exists, regardless of when it may have been granted"; according to the LRPT's own reasoning, s. 619 <u>is</u> retrospective in nature as it applies to past events that occurred before its enactment.[18]

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[16] Smith Creek LPRT Decision para. 80; TSMV LPRT Decision at para. 81. **[EKE TABS 8 and 9]**
[17] Smith Creek LPRT Decision para. 81 and 82; TSMV LPRT Decision at paras. 82 and 83. **[EKE TABS 8 and 9]**
[18] *Ibid* **[EKE TABS 8 and 9]**

16. A retroactive statute is distinct from a retrospective statute. Dreidger explained the distinction as follows[19] (emphasis added):

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in regard of a past event. A retroactive statute operates backward. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

17. A retrospective statute changes the law from what it otherwise would be with respect to a prior event. Section 619 is a retrospective statute because it attaches legal consequences (a municipality's mandatory approval at the local planning level) to a past event (a decision rendered by a provincial board at the public policy level). Section 619 was added to the MGA in 1995.[20] It operates to ensure provincial paramountcy with respect to land use decisions rendered by certain provincial bodies; it does so by requiring municipalities to grant approval where consideration has already been given by a provincial authority.[21] The relevant provincial bodies are set out in s. 619(1), and include the NRCB. The existence of the NRCB, its approval process and the NRCB Approval all predate s. 619 being added to the MGA.

18. The LPRT incorrectly relied on the inclusion of the ERCB in s. 619(1) as evidence of legislative intent that s. 619 should apply to pre-existing approvals. The ERCB existed until 2013 (when it was succeeded by the AER), post-inclusion of s. 619 in the MGA.[22]

19. It appears the LPRT reached its conclusion on retrospectivity on the basis the NRCB Approval is a continuing and current condition, as opposed to a discrete past event. This is incorrect. A key characteristic of a condition or status is that it can change or end. The NRCB Approval was effective as of a date certain, cannot be revisited and is indefinite; the most significant or relevant feature of the NRCB Approval is the approval itself. While the NRCB

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[19] Elmer E. Driedger, "*Statutes: Retroactive Retrospective Reflections*" (1978) 56:2 Canadian Bar Review 264 at 268-9. **[TAB 13]**

[20] *Municipal Government Amendment Act*, SA 1995, c 24. **[TAB 14]**; *Borgel* v *Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192, at para. 19. **[TAB 15]**

[21] *Borgel*, 2020 ABCA 192, at para. 20. **[TAB 15]**

[22] The ERCB was governed by the *Energy Resource Conservation Act*, RSA 2000, c E-10 which was repealed and replaced by the *Responsible Energy Development Act*, SA 2012, c R-17.3 ("REDA") on June 17, 2013. REDA dissolved the ERCB and established the AER.

Approval imposes ongoing benefits and obligations on TSMVPL, the Town and the public, it is an event which has already happened; what continues are its consequences.[23]

20. The presumption against retrospectivity applies only to prejudicial statutes; it does not apply to statutes which confer a benefit. However, the law is silent on from whose perspective prejudice or benefit is to be evaluated.[24] Having concluded s. 619 is not retrospective, the LPRT did not consider the issue of prejudice or benefit.

21. A prejudicial effect statute includes situations where new legislation imposes a new duty or a new obligation with respect to an event that occurred in the past. The prejudicial consequence of s. 619 on the Town (and its residents) is limiting local autonomy and the ability of Council and planning authorities to make decisions in the best interests of residents.[25] The impact of s. 619 may benefit TSMVPL but it prejudices the Town. In addition, the mandatory language employed in s. 619(2), notably that when a decision has been made by one of the provincial boards listed in s. 619(1), "the municipality must approve the application…" clearly imposes a new obligation or duty on the municipality.

22. Having concluded s. 619 is not retrospective, the LPRT also did not consider whether the presumption against retrospectivity has been rebutted. The presumption can only be rebutted with clear and unambiguous language demonstrating the legislature intended the section to apply retrospectively to the NRCB Approval, which is absent in this case.

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[23] *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358, at para 45. **[TAB 16]**; See also *Épiciers Unis Métro-Richelieu Inc, division "Éconogros" v Collin*, 2004 SCC 59, at paras 46-47. **[TAB 17]** where LeBel J concluded legislation impacting a suretyship contract has retrospective effect because it applied to an event that already happened (the signing of the contract) but governed the future effects of the contract.

[24] See *Brosseau* v. *Alberta Securities Commission*,1989 CanLII 121 (SCC), [1989] 1 SCR 301 **[TAB 18]**: The so-called presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit.

> . . . there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption.

[25] *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, at para. 11. **[TAB 19]**; *Borgel*, 2020 ABCA 192, at para. 20, citing *Alberta Hansard* (May 10, 1995) at 1718. **[TAB 15]**

23. Determining the temporal application of s. 619 is not a straightforward exercise and the LPRT's reasons are insufficient to permit the parties to fully comprehend how they arrived at their conclusion on retrospectivity. This is not the first time this issue has arisen; in April 1998, Permission to Appeal was granted to the Town in Action 9703-0155-AC on 7 grounds of appeal, including the retrospective application of s. 619. The appeal did not proceed as the parties reached a settlement agreement.[26]

ii. Amendment to Statutory Plan

24. The LPRT erred in concluding it had jurisdiction to hear the Appeals by misinterpreting s. 619 of the MGA and deciding the Smith Creek ASP and the Village ASP were statutory plan amendments, as opposed to new statutory plans.[27] The LRPT held both ASPs were in fact amendments to prior ASPs, respectively the 1987 South Corridor ASP and the 2004 Resort ASP.[28]

25. The modern approach to statutory interpretation calls for legislation to be interpreted according to the text of its provisions, in their ordinary and grammatical sense, in conjunction with the relevant legislative context and in light of its purpose and intent.[29] In addition, municipal legislation is to be given a large and liberal interpretation in order to ensure the attainment of its objectives.[30] However, neither the text, context or the purpose of s. 619 suggests s. 619(5) ought to be interpreted as conferring jurisdiction on the LPRT to hear an application concerning the denial to adopt a new bylaw implementing a new statutory plan.

26. The text of s. 619(5) provides as follows (emphasis added):

> (5) If a municipality does not approve an application under subsection (2) <u>to amend a statutory plan</u> or land use bylaw or the municipality does not comply with subsection (3), the applicant may appeal to the Land and Property Rights Tribunal by filing with the Tribunal.

27. In concluding the bylaws adopting the ASPs were, in fact, amending existing Area Structure Plans (the 1987 South Corridor ASP and the 2004 Resort Area ASP), the LPRT expressly disregarded the legal form of the bylaw despite concluding the Town followed the process

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[26] Justice Cote's Order, Action Number 9703-0154AC. **[TAB 20]**
[27] Smith Creek LPRT Decision, at para. 80; TSMV ASP LPRT Decision at para. 81. **[EKE TABS 8 and 9]**
[28] Smith Creek LPRT Decision at para. 85; TSMV ASP LPRT Decision at para. 86. **[EKE TABS 8 and 9]**
[29] *Rizzo & Rizzo Shoes*, Re [1998] 1 SCR 27, at para. 21. **[TAB 21]**
[30] *United Taxi Driver's Fellowship of Southern Alberta* v *Calgary (City)*, 2004 SCC 19, at para. 8. **[TAB 22]**

applicable to new bylaws.[31] The LRPT incorrectly placed substance over form and failed to identify any legal authority or authorization in support of their approach.[32]

28. Moreover, the LPRT's conclusion appears to be based on the superficial logic that the existence of an ASP covering land within the plan area for the ASPs means any subsequent ASP would be an amendment of that previous plan and not a new plan, without any analysis of the content of the new plan and whether it substantively changes the existing plan. In so doing, the LPRT ignored both form and substance.[33]

29. With respect to the Smith Creek ASP, the LPRT failed to take into consideration that Land Use Bylaw DC-198 (adopted pursuant to a settlement agreement reached between the parties) requires adoption of an ASP before any future development of the lands covered by the Smith Creek ASP, not amendment of the existing ASP.[34]

30. With respect to s. 619(5), the LPRT concluded that while the LPRT found both the Smith Creek ASP and Village ASP were, in fact, statutory plan amendments, on a purposive reading of s. 619, the LPRT would have authority to consider the appeals even if there were no pre-existing ASPs. The LRPT completely disregarded the text of s. 619(5) which limits its jurisdiction to circumstances where a municipality does not "amend a statutory plan".

31. The text of the statute is clear: the LPRT only has jurisdiction where a municipality failed to amend a statutory plan or land use bylaw. On its face, s. 615(5) does not confer jurisdiction on the LPRT where an applicant challenges a municipality's failure to approve a new statutory plan or land use bylaw. Subsection 619(5) sets out a discrete list of the instances in which the LRPT may establish jurisdiction and that list is exhaustive. There is no known cannon of construction that extends a closed, exhaustive list. Moreover, the approach to interpretation of municipal statutes that requires they be given a broad, liberal construction is concerned with maximizing the

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[31] Smith Creek LPRT Decision at para. 86, TSMV LPRT Decision at para. 87. **[EKE TABS 8 and 9]**
[32] For example, s. 3 of the *Personal Property Security Act* RSA 2000, c. P-7 ("PPSA") expressly provides that the PPSA applies to transactions that *in substance* create a security interest.
[33] Three Sisters gave evidence that the 2004 Resort Area Structure Plan needed to be replaced with the Village Area Structure Plan because: (1) Their vision changed over time in substance (2) and the partially completed golf course was no longer be viable: LPRT Record: TMSV ASP Vol 4 pages 2262 – 2264. **[EKE TAB 12]**
[34] Agreement Between Town of Canmore and Three Sisters Resorts Inc., dated April 7, 1998 at LPRT Record: TSMV ASP Vol 2 pages 1651-1670 and LPRT Record: Smith Creek ASP Vol 6 pages 130-149. **[EKE TAB 10]**

semantic content of what the existing words in a text can bear; it cannot be used to add (or remove) elements to the text itself.

32. The term "amendment" is used repeatedly throughout s. 619 and principles of statutory interpretation affirm the use of the term must be considered intentional. Elsewhere in the MGA, a distinction is drawn between *new* statutory plans and bylaws and *amendments* to statutory plans and bylaws.[35] It is reasonable to infer the Legislature was aware of these differences and the decision not to include new statutory plans and bylaws was a deliberate choice, not an oversight. The LPRT cannot infer legislative intent to ignore clear text.

33. The LPRT bolstered its conclusion that new statutory plans and bylaws were included with reference to the purpose of s. 619. However, interpreting s. 619(5) in a manner that only accords jurisdiction to the LPRT where a municipality does not approve an *amendment* to a statutory plan or land use bylaw does not detract from the purpose of s. 619.

34. The purpose of s. 619 was set out by the Court of Appeal in *Borgel* v *Paintearth*[36] as follows:

> Considering the text of s 619 in the context of the *MGA* as a whole and its legislative history, and having regard to lower court judicial and tribunal interpretation, it is apparent that the purpose of s 619 is to reduce regulatory burdens and increase administrative efficiency and consistency. Section 619 achieves this by granting paramountcy to decisions of certain provincial bodies, to ensure projects are not blocked at the municipal level for issues already considered and approved at the provincial level.[37]

35. This purpose is given effect in s. 619(1) and 619(2). Section 619(1) sets out unequivocally that a decision issued by a named provincial board "prevails", whereas s. 619(2) prevents a municipality from revisiting the substance of the decision and any considerations that were already accounted for by the provincial body, requiring Council, the subdivision authority or development authority to adopt the decision made at the provincial level. Section 619(5) sets out the process by which one can seek review of a decision made at the municipal level in the event it does not give

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[35] For example, s. 636 of the MGA sets out different notice procedures a municipality must follow when preparing a new statutory plan and amending a statutory plan, thereby recognizing a distinction and s. 631 of the MGA, which deals with Intermunicipal Development Plans, provides guidance for their adoption and requires that they include provisions setting out a procedure for their amendment, drawing attention to the fact these distinct concepts were known to the drafters of the MGA.

[36] *Borgel*, 2020 ABCA 192, at para. 20. **[TAB 15]**

[37] *Borgel*, 2020 ABCA 192, at para. 22. **[TAB 15]**

primacy to a decision made at the provincial level. Section 619(5) is concerned only with jurisdiction. Limitations on a municipality's decision-making over land use decisions and the available appeal mechanism are distinct concepts.

iii. Meaning of Consistent

36. The LPRT misinterpreted or failed to interpret s. 619(2) of the MGA in concluding the NRCB Approval is consistent with each of the Smith Creek ASP and the Village ASP. In concluding the NRCB Approval is consistent with the Smith Creek ASP and the Village ASP, the LPRT failed to articulate or enunciate any legal test, principle or rationale it applied in determining the critical issue, consistency, as set out in s. 619(2) of the MGA.

37. Sections 619(1) and (2) of the MGA provide that an NRCB approval prevails over a statutory plan, land use bylaw or subdivision or development decision and the local planning authority must approve an application to amend a statutory plan or land use bylaw or an application for subdivision or development if it "is consistent with" the NRCB approval and to approve it to the extent it "complies with" the NRCB approval. While s. 619 narrows municipal planning powers, because any planning issues that have been addressed and resolved by the NRCB can no longer be addressed by the Town, planning issues that have not been addressed and resolved by the NRCB remain fully within Council's authority to consider and address.

38. The main issue in the Appeals was whether the ASPs were "consistent" with the NRCB Approval. While the required analysis under s. 619(2) is largely factual, that analysis presupposes those facts are weighed and measured within the correct legal framework. Where a decision-maker fails to construe the facts within the correct legal framework, the decision can be revisited on appeal.[38] Fundamentally, the LRPT gave no consideration to the salient legal issue – What does consistency mean for the purposes of s. 619(2)?

39. The LPRT failed to enunciate the legal framework it applied to the facts in determining the Appeals (or any legal framework, for that matter); failed to address the disparate analytic frameworks proposed by the parties and whether they were adopted or rejected and, if so, why;

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[38] *Canada v. MacDonald*, 2018 FCA 128 (CanLII), [2019] 2 FCR 302, at paras., 91-98 (aff'd *MacDonald* v. *Canada*, 2020 SCC 6). **[TAB 23]**

and failed to address the only decision from our Court of Appeal addressing the meaning of consistency in the context of s. 619(2), *Borgel* v. *Paintearth*.[39]

40. This is not a situation where the applicant is raising a question of mixed fact and law, for which there is no right of appeal. Questions of mixed fact and law involve the application of a legal standard to a set of facts; conversely, errors of law involve an incorrect statement of the legal standard, the flawed application of a legal test or, by extension, the application of no legal test whatsoever.[40] The LPRT proceeded directly to a factual analysis.

41. The LRPT also failed to articulate the applicable threshold of similarity that applied in order to establish consistency as defined in s. 619(2).[41] In evaluating the ASPs against the NRCB Approval section by section presumes that consistency is determined by parsing the words and individual sections, rather than by way of a holistic evaluation. The LRPT did not give a reason for adopting this methodology and this methodology is flawed.

42. While s. 619(1) is relatively clear with respect to the relative supremacy of licences and approvals granted by the NRCB, ERCB, AER, AEUB and AUC, s. 619(2) is unclear when it comes to the practical application of the subsection, e.g. what it means to be "consistent" with a licence, permit, approval or other authorization granted by these bodies.

43. The tribunal decision most directly on point is *Re. AES Calgary ULC*, where the Board directly considered the meaning of the terms "consistent" and "comply":[42]

> The key words in the Section 619 processes established for the MD and the MGB are "consistent" and "comply". The normal meaning giving to the word "consistent" is that any action or comparison must be shown to be accordant, agreeable, compatible, conforming, consonant, constant, equable, harmonious, regular, undeviating and

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[39] *Borgel*, 2020 ABCA 192. **[TAB 15]**

[40] *Mountain Shores Land Ventures Ltd* v *Wetaskiwin (County) Subdivision & Development Appeal Board*, 2016 ABCA 288, at para. 10. **[TAB 24]**; *R v Chung*, 2020 SCC 8, at paras. 17-19; 22-25. **[TAB 25]**

[41] *Mohr* v *Strathcona (County)*, 2020 ABCA 187, at paras. 21-25. **[TAB 26]**

[42] *Re. AES Calgary ULC*, 2002 CarswellAlta 2246 (Alta MGB), at para. 83. **[TAB 27]** In *AES*, the MGB noted that its role was "evaluating the details of the land use bylaw amendment and comparing those details to the details of the EUB approval." This statement in *AES* is distinguishable from the circumstance of the Appeals, where the NRCB Approval expressly preserves the exercise of discretion on the details of the municipal planning documents to the Town. The LPRT neither applied *AES* nor distinguished it.

> uniform. The normal meaning given to the word "comply" is that any action or comparison must be seen to agree, coincide, concur, and conform.

44. *Borgel v. Paintearth* provides sensible guidance on the practical application of s. 619(1) and (2). While the Court of Appeal did not directly consider the issues of consistency and compliance, it set out the purpose of s. 619 as follows (emphasis added):[43]

> Considering the text of s. 619 in the context of the *MGA* as a whole and its legislative history, and having regard to lower court judicial and tribunal interpretation, it is apparent that the purpose of s 619 is to reduce regulatory burdens and increase administrative efficiency and consistency. Section 619 achieves this by granting paramountcy to decisions of certain provincial bodies, to ensure projects are not blocked at the municipal level for issues already considered and approved at the provincial level.

45. A purposive reading of s. 619(2) suggests that while absolute consistency between the approval granted by the provincial decision-maker and the subsequent application before the municipality is not required for s. 619 to be engaged (or provincially approved projects could be blocked at the municipal level on trifles), in order to displace municipal decision-making on particular elements of the plan, the provincial body must have "already considered and approved" those elements. Elements of the plan which have not been considered and approved at the provincial level remain subject to the discretion of the municipal decision-maker.[44] The LPRT did not apply the analytic framework established in *Borgel*. With respect to the nature of the project, affordable housing, phasing, residential/non-residential split and the Thunderstone lands, the LPRT did not assess the ASPs as against the NRCB Approval in terms of whether or not the NRCB considered and approved those aspects of the project, nor did the LPRT apply this framework holistically.[45]

46. The extent to which s. 619 limits decision-makers at the municipal level is important from a jurisprudential perspective. Many developments require approval at both the Provincial and municipal level and the relative priority and extent to which municipal authority is limited is a live

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[43] *Borgel*, 2020 ABCA 192, at para. 22 **[TAB 15]**

[44] See, for example, in *Borgel*, where the AUC had already considered and approved the location of the wind turbines, the SDAB was precluded from revisiting or changing the location.

[45] Interestingly, the LPRT did use this language ("reconsider") in reference to Honour of the Crown in Finding 9 of the Smith Creek LPRT Decision, yet concluded the LPRT does not have authority to consider Honour of the Crown even though the NRCB did not consider it.

issue. The appeal would also result in significant practical benefit for planning law in Alberta and has implications beyond the dispute between the parties.[46]

iv. Project Inconsistent

47. The NRCB approved a Recreation and Tourism Project based on certain key parameters, including a particular mix and density of specific types of commercial, industrial and residential development over an anticipated period of time. What was proposed by TSMVPL through the Smith Creek ASP and the Village ASP is a predominantly residential development, with an entirely different proportion and phasing of land uses and anticipated build-out period. Where the application before the municipality is for a project fundamentally different than what was authorized at the provincial level, then s. 619(2) is not engaged because it cannot be said the NRCB approved or considered the project as a whole.

48. The LPRT concluded as follows: "The NRCB Approval stated that the project was approved, but that certain details could be changed with the approval of the Town. This latitude does not allow the Town to refuse the project altogether if it complies with the NRCB Approval. Section 619 requires the Town to approve the application to the extent that it complies with the NRCB Approval."[47] This conclusion is not only internally inconsistent, it demonstrates the failure to enunciate a legal framework for determining consistency. It also demonstrates the failure to appreciate that while a municipal decision-maker may be required to adopt certain parts or aspects of a plan, it may retain the discretion to amend or refuse other parts.

49. The NRCB Approval does not authorize TSMVPL to develop on the lands covered by the NRCB Approval and fill in the details later. In fact, the NRCB Approval expressly preserves the Town's authority to adopt or not adopt the ASPs for proper planning reasons.

50. The ASPs provide for development well outside of what was considered by the NRCB. At its simplest, the NRCB approved a Recreational and Tourism project to be completed between 1993 and 2023. Any development beyond those parameters was not considered by the NRCB and

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[46] *1765662 Alberta Ltd (Windermere Registry)* supra, at para. 3. **[TAB 9]**
[47] Smith Creek LPRT Decision at para. 115; TSMV LPRT Decision at para. 125. **[EKE TABS 8 and 9]**

was not conclusively determined by the NRCB. The LPRT erred in misconstruing this argument as alleging the NRCB Approval was time limited or expired.

51. Development in the Town has not stood still for the last 30 years. Not only has the proposed project evolved as demand evolved, so has the development surrounding it, along with the applicable municipal development policies and priorities. Section 619 cannot be interpreted in a way that undermines Council's responsibility to plan its communities in a manner which achieves orderly, economical and beneficial development, use of land and patterns of human development, and improves the quality of the physical environment.[48]

52. In addition, the NRCB Approval is based on 30-year-old social, economic and environmental evidence. These were the three key areas considered by the NRCB in determining if the project was in the public interest. This evidence included demand for golf courses, hotels and residential development, population projections and environmental policies.[49] The LPRT heard no evidence that the social, economic and environmental evidence relied upon by the NRCB remained accurate or suitable in 2022. To the contrary, the LPRT heard the evidence relied upon by the NRCB was no longer accurate.[50]

53. The NRCB considered a Recreational and Tourism Project with 4 golf courses, 6 hotel complexes and some residential development within the Bow Valley and Wind Valley.[51] In evaluating whether the project was in the public interest, the NRCB balanced a myriad of factors. Removing or altering key aspects of the project disrupts this balancing and undermines the conclusion, as does changing the social, economic and environmental circumstances on which public interest was evaluated.[52]

v. Inconsistent with Section 7 and Conditions of NRCB Approval

54. The NRCB Approval expressly preserves the Town's authority under the MGA to adopt or not adopt the ASPs for proper planning reasons. The LPRT erred in not addressing this

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[48] Section 617 of the *Municipal Government Act*, RSA 2000, c. M-26. **[TAB 1]**
[49] NRCB Approval, pages 11-3, 11-5, 11-6, 11-8, 11-18, 13-1 to 13-10. **[EKE TAB 1]**
[50] LPRT Record: Smith Creek ASP Vol 18 pages 1071 - 1072 **[EKE TAB 13]**
[51] NRCB Approval p. 2-2 **[EKE TAB 1]**
[52] For example, the NRCB did not consider the need for residential development absent all the golf courses and hotels. Similarly, the NRCB did not consider the issue of affordable housing in today's Canmore market.

recognition and preservation of municipal discretion by the NRCB and how to reconcile it with s. 619. The LPRT interpreted the NRCB Approval as permitting TSMVLP significant flexibility in addressing changing conditions and demands (e.g. reduced demand for golf courses), but declined to interpret the NRCB Approval as permitting the Town to address changing planning policies and best practices – despite language in the NRCB Approval providing for exactly that.

55. Section 7 of the NRCB Approval provides as follows (emphasis added):

- In order to achieve a measure of equity for the proponent, the Board believes that any approval it might issue should give the Applicant a reasonable degree of certainty of use but at the same time not usurp the powers of the municipal planning authorities. The Board has no desire to see the interest of the local residents and stakeholders thwarted by sterilizing the effectiveness of the public process in local planning matters. In short, the Board believes that both levels of jurisdiction, the Board and the local planning authorities, can discharge their respective duties in the public interest.[53]
- Because both the approval of the NRCB and the approval of the Town of Canmore as a municipal planning authority, or the Alberta Planning Board on appeal from the Town, are required by legislation and because neither approval is sufficient alone to enable the Applicant to construct facilities on the project lands, it follows that an order of the Board in respect of the project is not fully determinative of the issues as to whether the project may proceed. The Board recognizes that it could approve all or part of the project but that the Applicant may not be successful in developing the parts of the project approved by the Board owing to failure by the Applicant to receive approval from the Town (or the appeal board) for more detailed plans for development in such areas.[54]
- The Board was urged by several participants, particularly BowCORD and individuals from the local area, to refrain from approving any part of the Application, as the Board approval would arguably hamper the citizenry in their local initiatives to be effective in restricting or controlling development in the area. Since the local citizens are entitled to participate in the processes of planning approvals to be granted by the Town following this decision of the Board, and since such processes could result in a complete rejection of all or any part of the project approved by the Board, the Board has difficulty understanding how much more effective a process the local citizenry could wish. Some participants in the hearing suggested that certain procedural conventions in the Town planning process may operate to reduce community participation. The Board assumes that the Town will consider this matter.[55]
- The Board is satisfied that such an approval would not denude the Town of its authority under the *Planning Act*, nor would it preclude the effectiveness of public participation processes in the Town, owing to the need for both the

[53] NRCB Approval, pg. 7-1 **[EKE TAB 1]**
[54] NRCB Approval, pg. 7-4 **[EKE TAB 1]**
[55] NRCB Approval, pg. 7-4 – 7-5 **[EKE TAB 1]**

> approval of the Board and the approval of the Town before the project may ultimately proceed.[56]

56. The Approval Conditions found at Appendix C of the NRCB Approval provide as follows (emphasis added):[57]

> 3. The design of the project in the area immediately north of the boundary referred to in clause 2, may be changed with the approval of the Town of Canmore, provided that the changes are satisfactory to Alberta Forestry, Lands and Wildlife with respect to the provision of wildlife corridors.
>
> 4. The phasing of the project, the land uses and related population densities, as proposed by Three Sisters for the Bow Valley portion of the project, are approved, but the detailed timing and specific land uses and population densities may be changed with the approval of the Town of Canmore.
>
> 5. The locations of community services, transportation routes and public utilities, as proposed by Three Sisters for the Bow Valley portion of the project, are approved, but the locations and design details may be changed with the approval of the Town of Canmore.

57. Consistency with the NRCB Approval requires consistency in all respects, including the promise by the NRCB that residents would have their opportunity to be heard at the municipal level and the ability to completely reject the project approved by the NRCB. The LPRT not only failed to address how s. 7 of the NRCB Approval and the explicit preservation of municipal authority in the conditions on approval reconcile with its conclusions on consistency, the LPRT inconsistently relies on these limitations in some circumstances and ignores them in others.[58]

58. Council was permitted to refuse the ASPs to the extent they included elements that were not addressed by the NRCB (different recreational, changes to phasing) and that were inconsistent with the NRCB Approval (affordable housing, non-residential lands). But Council was also permitted to refuse the ASPs to the extent they included any matters the NRCB expressly

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[56] NRCB Approval, pg. 7-6 **[EKE TAB 1]**
[57] NRCB Approval, pp. C-2 – C-3 and p. 11-13 to 11-14 **[EKE TAB 1]**
[58] For example, Town approval of a change to the design of the project in the area north of the Wind Valley was acknowledged to be required in Condition 3 (though the LPRT found approval to have been historically provided by way of including the Thunderstone Lands in the approved Terms of Reference in 1998) but Town required approval of the timing and specific land uses and population densities in Condition 4 was found not to allow the Town to refuse the project even when the phasing and specific land uses were not acceptable to Council.

authorized the Town to decide, such as planning considerations, timing of phases, increases in population densities and specific lands uses.

vi. Inconsistent Elements

59. While the Town maintains the current version of the Three Sisters project *as a whole* is inconsistent with NRCB Approval, key areas of dispute arose during the LPRT hearings with respect to the ASPs, highlighting the inconsistency of the ASPs with the NRCB Approval and the LPRT's failure to recognize the Town's authority with respect to matters not considered or addressed by the NRCB or expressly identified as requiring Town approval:

a. **Recreational and Tourism Project** – Golf courses were the foundational recreational amenity for the project before the NRCB and they were located on the most undermined lands. This world class resort was the reason the project required approval from the NRCB. Development projects comparable to the development described in the ASPs do not require NRCB approval, highlighting the inconsistency between what was before the NRCB in 1992 and what is contained in the ASPs. That recreational piece has not been replaced in the ASPs. Under the NRCB Approval, wildlife corridors contributed to open space and recreational opportunities; they are now separated from the development area with a wildlife fence and use is extremely limited.[59] The LPRT erred in not considering the nature of the project considered and approved by the NRCB and concluding the nature of the project remained consistent.

b. **Affordable Housing** – The LPRT incorrectly concluded the NRCB wholly addressed the issue of affordable housing in the Town by requiring the applicant to provide 50 to 60% of relatively lower cost housing forms. Since the NRCB Approval, the Town has included in its Municipal Development Plan a policy to adopt an action plan to require 20% of housing to be non-market affordable housing. The ASPs provide for 10% of multifamily units to be perpetually affordable housing ("PAH"). No PAH was required in Stewart Creek. The LPRT heard evidence that housing form has been shown not to address the issue of affordable housing in Canmore.[60] The NRCB Approval did not limit its expectations with respect to affordable housing to housing form and the LPRT erred in not taking into consideration the NRCB's recommendations and comments with respect to affordable housing and the representations by the developer at the

[59] Transcripts, LPRT Record: TSMV ASP Vol. 4, p. 2717-2722. **[EKE TAB 12]**
[60] Transcripts, LPRT Record: Smith Creek ASP Vol. 18, p. 1270-1277, 1419-1421 and LPRT Record: TSMV ASP Vol. 4, p. 2722-2724, 2765-2766. **[EKE TABS 13 and 12]**

hearing.[61] [62] These NRCB Approval must given a purposive interpretation, as being responsive to the problem, which must take into consideration not only the form of housing but the price of housing and the relationship between price and resident incomes.

c. **Phasing** – Residential development on the Three Sisters lands has far outpaced non-residential development and Council expressed concern the phasing of the Village ASP does not adequately address the issue. On Three Sisters lands to date, 98% of the assessed value is residential. Council's amendments to the Village ASP addressed this concern by requiring non-residential development prior to residential development.[63] The LPRT erred in concluding the phasing in the Village ASP as submitted by TSMVLP was consistent with the NRCB Approval when the proposal before the NRCB was to start with significant hotel and golf course development and the Implementation Plan provided for development to run from west to east. Moreover, the LPRT gave no consideration to Condition 4 of the NRCB Approval which permitted changes to phasing with the Town's approval. In addition, the LPRT failed to take into consideration the existing, adjacent residential development and the admission by TSMVLP that hotel development does not require pre-existing residential development.[64]

d. **Residential/Non-Residential Split** – The Town's Municipal Development Plan speaks to a desire to achieve 33/66 residential/non-residential assessment split. This is inline with the NRCB's estimation of the assessment impact of the project on the Town.[65] The Smith Creek ASP is predominantly residential and the ASPs together achieve 22/78. The 2004 Resort Area ASP included a golf course with the balance of the development heavily weighted in favour of non-residential, with the result the Village ASP is more residential than the 2004 Resort Area ASP and as contemplated by the NRCB.[66] On this basis, the LPRT erred in concluding the ASPs were consistent with the NRCB Approval.

e. **Inclusion of the Thunderstone Lands** – The inclusion of the Thunderstone Lands in the Smith Creek ASP was not consistent with the NRCB Approval. The LPRT acknowledged the Town's approval was required to add lands to the NRCB Approval but concluded Council had approved their inclusion when it approved the Terms of Reference in 2018. This conclusion is a reviewable error because a

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[61] See NRCB Approval at D-4: "It is recommended that the Town require of Three Sisters a commitment to appropriately participate in the development of an affordable housing plan" and the comments by the NRCB at 11-21: "The Board would, if it approves the project, recommend that the Town require of Three Sisters, a commitment to appropriately participate in the development of an affordable housing plan or take individual measures to deal with affordable housing". **[EKE TAB 1]**

[62] Excerpts from NRCB Transcripts at LPRT Record: Smith Creek ASP Vol 16 p. 372. **[EKE TAB 11]**

[63] Transcripts, LPRT Record: Smith Creek ASP Vol. 18, p. 1402-1404, LPRT Record: TSMV ASP Vol. 4, p. 2731-2742. **[EKE TABS 13 and 12]**

[64] TSMV ASP LPRT Decision at paras. 141-143. **[EKE TAB 9]**

[65] See NRCB Approval at p. 2-12: "Increases in tax assessment at the completion of the proposed project were estimated at some $580 million, with $385 million of the total estimate being from residential sources." **[EKE TAB 1]**

[66] Transcripts, LPRT Record: TSMV ASP Vol. 4, p. 2757-2760, 2819-2820, 2866-2868. **[EKE TAB 12]**

Council is not bound by previous decisions of Council.[67] In addition, the LPRT erred in considering the "many supporting reports and studies" when including the Thunderstone Lands, which is wholly irrelevant to the issue of consistency.[68]

vii. Relevant Evidence and Irrelevant Evidence

60. In concluding the NRCB Approval is consistent with each of the Smith Creek ASP and the Village ASP, the LPRT failed to take into consideration relevant evidence (as set out above) and took into consideration irrelevant evidence. At the hearings, TSMVLP spent a significant amount of time on the history of the ownership and development of the lands and the cost associated with the early stages of development. This investment appears to have been taken into consideration by the LPRT despite being wholly irrelevant to the issue of consistency – the only issue to be determined by the LPRT was whether or not the two ASPs are consistent with the NRCB Approval.

viii. LPRT Order

61. The LPRT exceeded its jurisdiction under s. 619 of the MGA by ordering the Town to adopt the Smith Creek ASP and the Village ASP even though s. 619(8) limits its authority to ordering a municipality to amend a statutory plan and the LPRT did not address this discrepancy. By ordering the Town to adopt the ASPs as originally submitted by TSMVLP without incorporating any subsequent amendments, the LRPT incorrectly based its decision to not allow the subsequent amendments on the basis the amendments were "not rigorously studied".[69] Under s. 619, this is irrelevant. The issue turns on consistency and what was considered by the NRCB.

62. Moreover, Condition 4 of the NRCB Approval provides "the detailed timing and specific land uses and population densities may be changed with the approval of the Town".[70] The LPRT does not explain <u>why</u> Council was precluded from amending phasing in the Smith Creek ASP.

63. In addition, the LPRT erred in not considering those portions of the NRCB Approval which recognized and preserved the Town's authority under the MGA to adopt or not adopt the ASPs for proper planning reasons and the possibility Council was not <u>required</u> to adopt the ASPs in their entirety, as presented. Both the NRCB Approval and s. 619 only require approval at the municipal

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[67] *Roberts* v. *Calgary (City)*, 1966 CanLII 422 (ABQB) at p. 629. **[TAB 28]**
[68] Smith Creek LPRT Decision para. 130 **[EKE TAB 8]**
[69] TSMV LPRT Decision at paras. 223-224 **[EKE TAB 9]**
[70] NRCB Approval, pp. C-C-3 **[EKE TAB 1]**

level to the extent there is compliance with the provincial approval, yet the LPRT's approach was, essentially, all or nothing.

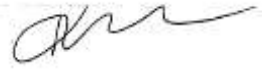
ix. Inadequate Reasons

64. The LPRT failed to provide any or adequate reasons for the LPRT Decision. The MGA imposes a duty on the LPRT to give written reasons for its decision. The failure to provide proper, adequate and intelligible reasons will result in the decision being set aside. Reasons must demonstrate "why or how or on what evidence" the decision was reached.[71] Reasons must permit the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes.[72] With respect to adequacy of reasons, authorities have given weight to the fact tribunal members are not legally trained and perfection is not expected. In this case, the LPRT was comprised of experienced and knowledgeable members (including a municipal lawyer), had the benefit of experienced in-house legal counsel and held a 5 week long hearing with extensive written and oral legal argument. This LPRT is distinguishable from the many less sophisticated SDABs that sit in Alberta and is held to a higher standard.[73]

IV. CONCLUSION

65. The Town requests that permission to appeal be granted on both Appeals on the grounds of appeal set out in the Applications for Permission to Appeal, or as may be modified by the Court, with costs in its favour.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of August, 2022.

REYNOLDS MIRTH RICHARDS & FARMER LLP
Per: 

Kelsey L. Becker Brookes
Solicitors for the Applicant, Town of Canmore

Estimated time for Argument: 30 minutes

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[71] Section 687(2) of the *Municipal Government Act*, RSA 2000, c. M-26. **[TAB 1]**; Frederick A. Laux, *Planning Law and Practice in Alberta*, Fourth Edition, p. 10-49 to 10-50. **[TAB 29]**; *Lor-al Springs Ltd. v. Ponoka County Subdivision and Development Appeal Board*, 2000 ABCA 299, at paras 12 and 15. **[TAB 30]**
[72] *Lac La Biche (County)* v. *Lac La Biche (Subdivision and Development Appeal Board)*, 2014 ABCA 305, at paras 33 and 34. **[TAB 31]**
[73] *McCauley Community League* v. *Edmonton (City)*, 2010 ABCA 215, at para 24. **[TAB 32]**

LIST OF AUTHORITIES

1. *Municipal Government Act*, RSA 2000, c. M-26
2. *Seabolt Watershed Assn. v. Yellowhead (County)*, 2002 ABCA 124
3. *Carleo Investments Ltd. v. Strathcona (County)*, 2014 ABCA 302
4. *PurpleRung Foundation v. Peace River (Town of) Subdivision and Development Appeal Board*, 2020 ABCA 341
5. *Augustana Neighbourhood Association v. Camrose (Subdivision and Development Appeal Board)*, 2021 ABCA 427
6. *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2019 ABCA 25
7. *Edmonton (City of) Library Board v Edmonton (City of)*, 2020 ABCA 170
8. *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65
9. *1765662 Alberta Ltd. (Windermere Registry)* v. *Edmonton (City)*, 2020 ABCA 137
10. *Edmonton (City of) Library Board v. Edmonton (City of)*, 2021 ABCA 355
11. *Bergstrom* v. *Beaumont (Town)*, 2016 ABCA 221
12. *Springfield Capital Inc.* v. *Grande Prairie (City)*, 2016 ABCA 136
13. Elmer E. Driedger, "*Statutes: Retroactive Retrospective Reflections*" (1978) 56:2 Canadian Bar Review
14. *Municipal Government Amendment Act*, SA 1995, c 24
15. *Borgel* v *Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192
16. *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358
17. *Épiciers Unis Métro-Richelieu Inc, division "Économgros" v Collin*, 2004 SCC 59
18. *Brosseau* v. *Alberta Securities Commission*, 1989 CanLII 121 (SCC), [1989] 1 SCR 301
19. *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2
20. Justice Cote's Order, Action Number 9703-0154AC

21. *Rizzo & Rizzo Shoes*, Re [1998] 1 SCR 27

22. *United Taxi Driver's Fellowship of Southern Alberta* v *Calgary (City)*, 2004 SCC 19

23. *Canada v. MacDonald*, 2018 FCA 128 (CanLII), [2019] 2 FCR 302

24. *Mountain Shores Land Ventures Ltd* v *Wetaskiwin (County) Subdivision & Development Appeal Board*, 2016 ABCA 288

25. *R v Chung*, 2020 SCC 8

26. *Mohr* v *Strathcona (County)*, 2020 ABCA 187

27. *Re. AES Calgary ULC*, 2002 CarswellAlta 2246 (Alta MGB)

28. *Roberts* v. *Calgary (City)*, 1966 CanLII 422 (ABQB)

29. Frederick A. Laux, *Planning Law and Practice in Alberta*, Fourth Edition

30. *Lor-al Springs Ltd. v. Ponoka County Subdivision and Development Appeal Board*, 2000 ABCA 299

31. *Lac La Biche (County) v. Lac La Biche (Subdivision and Development Appeal Board)*, 2014 ABCA 305

32. *McCauley Community League v. Edmonton (City)*, 2010 ABCA 215

STATUTES: RETROACTIVE RETROSPECTIVE REFLECTIONS

ELMER A. DRIEDGER*

Ottawa

One of the most difficult problems in the process of statutory construction is the application of the presumption against the retrospective operation of statutes.

Many years ago, as a legal officer in the Department of Justice, I had to deal with the problem whether a particular statute applied in respect of an event that took place before the statute was enacted. This raised the question whether the presumption against the retrospective operation of statutes applied. To answer that, it was necessary to ask the fundamental question—What is a retrospective operation? Naturally, I went to the text-books to find out. I was astonished and disappointed that I found nothing to answer this question. All I could find in the text-books and articles was a statement of the presumption and references to countless decisions where the presumption was applied or not applied. I then began to read cases. But no answer to my question emerged. I found mostly confusion. Nowhere could I find a clear definition of a retrospective statute, or any clear statement of principle as to when the presumption applied or did not apply. Since my question remained unanswered, I undertook a study of the decisions to see if I could not formulate a workable answer. I came to some conclusions, on the basis of which I disposed of the case before me. Subsequently I wrote a paper entitled "The Retrospective Operation of Statutes"[1] in which I set forth my conclusions.

The first conclusion I came to was that there was confusion between two presumptions, namely, the presumption against interference with vested rights, and the retrospective presumption. I could not see how a statute that interferes with or destroys a previously acquired right could be said to be retrospective. The decision in *Rex* v. *Levine*[2] illustrates this distinction.

In that case the accused was in possession of liquor on premises that were used partly as a store and partly as a dwelling house. At the time of purchase the premises were included in the definition of

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[1] Legal essays in Honour of Arthur Moxon. Edited by J. A. Corry (1953), p. 1.

[2] (1926), 46 C.C.C. 342.

"residence" in the Liquor Control Act, and accordingly the accused was lawfully in possession at the time of purchase. The statute was then amended so as to exclude from the definition of "residence" premises of the class described. The accused was convicted and the conviction was affirmed by the Manitoba Court of Appeal. Prendergast J.A., who delivered the majority judgment, held[3] that the effect of the amendment in its application to the case under consideration was in no way retrospective. He went on to say:[4]

> Now, none of the ingredients of the offence charged are "in respect to transactions or considerations already past". The existence or presence of the liquor on the premises, only refers to its existence or presence there on the 27th. The appellant's possession of it, is merely her possession of it on that day. The condition or lay-out of the premises which made them "a place other than the private dwelling house in which she resides" (being the inclusion of a store), is also the condition of the premises on that same day. So that all the things and matters that are either formally set forth or implied in the information, happened or existed on the 27th, quite independently of anything that happened or existed before. . . .
>
> Of course, the appellant's status was altered by the amendment, and certain rights which she previously had, came thereby to an end. But that is the effect and in fact the function, of most, if not all, public enactments of a regulating character. I cannot conceive that a statute prohibiting, for instance, the keeping of more than 10 barrels of gasoline in factories where 20 were previously allowed, or (which is more to the point) the keeping of certain inflammable material otherwise than in buildings with a metal roof, could be deemed retrospective, although interfering with existing rights.

That decision cited *West* v. *Gwynne*.[5] There the question was whether section 8 of the Conveyancing Act, 1892, was of general application, or whether its operation was confined to leases made after the commencement of the Act. It provided that "in all leases" containing a covenant against assigning or underletting without licence or consent, the covenant should be deemed to be subject to a proviso to the effect that no fine was payable for such licence or consent. It was said in argument that a statute is presumed not to have a retrospective operation unless the contrary appears by express language or by necessary implication. Cozens-Hardy M.R. said[6] he assented to that general proposition, but he also said he failed to appreciate its application to the present case.

Buckley L.J. was of the opinion that "the word 'retrospective' is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another".[7]

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[3] *Ibid.*, at p. 348.

[4] *Ibid.*, at pp. 348-349.

[5] (1911), L.R. 2 Ch. D.1.

[6] *Ibid.*, at p. 11.

[7] *Ibid.*, at pp. 11-12.

In *Acme Village School District* v. *Steele-Smith*[8], Lamont J.[9] recognized the idependence of the two presumptions; the first "that statutes are not to be construed as having retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary or distinct implication", and the second, that statutes "should not be given a construction that would impair existing rights, unless that effect cannot be avoided without doing violence to the language of the enactment".

Sedgwick[10] defined a retrospective statute as one that takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed.

It seemed to me that this statement, taken as a whole, was incorrect; a statute surely cannot be called retrospective merely because it takes away or impairs a right acquired under existing laws. Only the second branch of this statement could, in my opinion, be regarded as a definition of a retrospective statute.

In searching judicial decisions for an answer to my question, I began with *The Queen* v. *The Inhabitants of St. Mary, Whitechapel*.[11] The statute there provided that "no woman residing in any parish with her husband at the time of his death shall be removed, nor shall any warrant be granted for her removal, from such parish, for twelve calendar months next after his death, if she so long continue a widow". Before the enactment of the statute the woman had become a widow and an order of removal had been made. Lord Denman C.J. said:[12]

> It was said that the operation of the statute was confined to persons who had become widows after the Act passed, and that the presumption against a retrospective statute being intended supported this construction; but we have before shewn that the statute is in its direct operation prospective, as it relates to future removal only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing. The clause is general, to prevent all removals of the widows described therein after the passing of the Act; the description of the widow does not at all refer to the time when she became widow; and we are therefore of opinion that the pauper was irremoveable at the time she was removed.

Lord Denman's observations struck me as being eminently sound. A widow is a widow, no matter when she became one, and the application of the statute to a widow who became one before the

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[8] [1933] S.C.R. 47.

[9] *Ibid.*, at pp. 50-51.

[10] The Construction of Statutory and Constitutional Law (2nd ed., 1874), p. 160.

[11] (1848), 116 E.R. 811.

[12] *Ibid.*, at p. 812.

statute is no more a retrospective application than is the application of a statute to persons who were born before the statute.

This decision suggested to me two distinct kinds of "requisites" for the application of a statute "drawn from time antecedent to its passing", namely, (1) a characteristic (status) and (2) an event; and I concluded that a statute cannot be said to be retrospective if it is brought into operation by a characteristic or status that arose before it was enacted; but that it is retrospective if it is brought into operation by a prior event described in the statute. Clear support for this conclusion is to be found in *West* v. *Gwynne*.[13] The fact-situation there bringing about the operation of the statute was a characteristic only, and not an event. To the same effect was the decision in *Acme Village School District* v. *Steele-Smith*[14] where a statute was held to apply to an agreement made before the statute was enacted.[15] But in *Maxwell* v. *Callbec*[16] the fact-situation on which the statute operated was "where by the fault of two or more persons damage or loss is caused"—an event, and it was held that the statute applied only to damage or loss occurring after the enactment of the statute.

I then formulated an answer to my fundamental question as follows:[17]

> It is perhaps dangerous to generalize, but the position appears to be that whenever the operation of a statute depends upon the doing of something or the happening of some event, the statute will not operate in respect of something done or in respect of some event that took place before the statute was passed; but if the operation of the statute depends merely upon the existence of a certain state of affairs, the *being* rather than the *becoming*, the statute will operate with respect to a status that arose before the passing of the statute, if it exists at the time the statute is passed. Having decided that a statute is not by reason of the retrospective rule precluded from operating in particular circumstances, there is the further, and unrelated, question whether the statute is precluded from so operating for the reason that it impairs existing rights.

In formulating the foregoing conclusions I was, of course, concentrating on the meaning of retrospective. It is obvious that not all retrospective statutes attract the presumption; only those, to use the words of Sedgwick, that "create a new obligation, or impose a new duty or attach a new disability in respect to transactions or considerations already passed". In brief, the presumption applies only to prejudicial statutes; not beneficial ones. Although this must necessarily be implied in what I said, my failure to say so expressly

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[13] *Supra*, footnote 5.

[14] *Supra*, footnote 8.

[15] See also *Chapin* v. *Matthews* (1915), 24 D.L.R. 457, and *Nadeau* v. *Cook*, [1948] 2 D.L.R. 783.

[16] [1939] S.C.R. 440.

[17] *Op. cit.*, footnote 1, p. 15.

in the immediate context of the above quoted paragraph has caused some confusion in the minds of my readers. Also, at that time I did not see the problems that can arise in relating new duties, obligations or disabilities to prior transactions. Referring to Sedgwick's definition, when can it be said that an obligation, duty or disability is *in respect to* a prior transaction?

Because of the frailty of language it is often difficult to say whether the words in a statute setting forth a fact-situation are intended to describe an event or a characteristic. For example, suppose a statute applied to a "person who was employed on January 1st, 1970". It is impossible to tell from those words alone whether the person described is one who took employment that day (event), or one who on that day was an employee (characteristic).

Thus, in *The Queen* v. *Vine*[18] the statute provided that "every person convicted of a felony" should be disqualified from selling spirits by retail; the majority held this to mean a "convicted person" and therefore applicable to persons convicted before the statute was enacted, but Lush J., dissenting, said[19] the phrase meant "every person who shall hereafter be convicted". According to the majority there was no occasion to consider the presumption since its application to persons convicted prior to the statute was not a retrospective application. In Lush's view, however, it was, and he applied the presumption.

The ideas I expressed in my 1950 essay I carried forward into my text on the *Construction of Statutes*[20]. I thought at the time that I had found the complete answer to my fundamental question. However, after I began the teaching of this subject, class-room experience taught me otherwise. While I still stand by what I wrote in 1950 and later in 1974, I began to realize I did not have the complete answer. I also discovered that the expression of my thoughts was not as clear as it might be, since my students had difficulty in following me, and some were confused by my explanations. Hence, I had another go at it in the 1976 *Supplement* to my text. There I deal more clearly with the difference between a retroactive statute and a retrospective one.

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before

[18] (1875), L.R. 10 Q.B. 195.

[19] *Ibid.*, at p. 201.

[20] (1974)

the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

In *West* v. *Gwynne*[21] the true reason for holding that the statute there was not retrospective is, I suggest, that there is no reference in the statute to a past event or transaction. The only reference is to leases of a certain kind. Yet Buckley L.J. rejected the presumption because the statute was not operative as of a past time. His definition of retrospectivity was in reality a definition of retroactivity. He said:[22] "If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective." And in *Phillips* v. *Eyre*[23], an Act of Indemnity, which did operate as of a past time, was called retrospective.

I had always known that there was a difference, even though in the dictionaries the definition of each word includes the other, and in the decisions the two words are often equated and used interchangeably. I did not previously attach any particular significance to the difference, but I discovered that unless a clear distinction is made between the two words, there is bound to be confusion. Thus, a statute could be retroactive but not retrospective, retrospective but not retroactive, or both retroactive and retrospective; and both retroactive statutes and retrospective statutes could be, and usually are, prospective also. The presumption applies to both, but the test of retroactivity is different from that of retrospectivity. For retroactivity the question is: Is there anything in the statute to indicate that it must be deemed to be the law as of a time prior to its enactment? For retrospectivity the question is: Is there anything in the statute to indicate that the consequences of a prior event are changed, not for time before its enactment, but henceforth from the time of enactment, or from the time of its commencement if that should be later.

In my 1974 *Supplement* I took one further step in trying to clarify my own thinking, and what I have said earlier, namely, that only if an enacted law attaches an obligation or disability or imposes a duty *as a new consequence* of a prior event, can it be said to be retrospective. An example I gave[24] was the statute considered in *Nadeau* v. *Cook*,[25] which provided that:

> Where any person recovers in any court in the province a judgment for an amount exceeding one hundred dollars, exclusive of costs, in an action for

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[21] *Supra*, footnote 5.

[22] *Ibid.*, at p. 12.

[23] (1870), L.R. 6 Q.B. 1.

[24] P. 17.

[25] *Supra*, footnote 15, at p. 784.

> damages resulting from bodily injury to, or the death of, any person occasioned by, or arising out of, the operation or use of a motor vehicle by the judgment debtor, upon the determination of all proceedings including appeals . . . such judgment creditor may . . . apply by way of originating notice to a judge of the Supreme Court of Alberta for an order directing payment of the judgment out of the [Unsatisfied Judgment] fund. . . .

Judgment for damages was recovered after the statute was enacted, but the accident giving rise to the action occurred before. The court held that the application of the statute to the judgment was not a retrospective one. Ford J. said that the words "damages resulting from . . . the operation or use of a motor vehicle" defined the cause of action and did not have a limiting effect. Here, the enacted law was a consequence of the judgment and not of the accident; the fact-situation on which the enactment operated was the recovery of the judgment.

Another example I gave was *Ward* v. *Manitoba Public Ins. Corp.*,[26] where the statute under consideration, together with the regulations, provided for increased premium assessments based on demerit points calculated according to the number and nature of offences committed by the insured. The court held that the inclusion of offences committed before the statute was enacted was not a retrospective operation. Guy J.A. said[27] that "we are satisfied that the intent of the legislators to deal with records implies an intent to deal with antecedent basic facts and apply them to prospective charges for insurance premiums". Here, the increased charges were the result of the record of the accused, and not the commission of the offence.

Also *In re a Solicitor's Clerk*,[28] where the statute provided that "Where a person who is or was a clerk to a solicitor . . . has been convicted of larceny . . . or any other criminal offence in respect of any money or property belonging to or held by the solicitor . . . an application may be made . . . that an order be made directing that . . . no solicitor shall . . . take or retain the said person into or in his employment." It was held that the making of an order in respect of a clerk who had been convicted prior to the enactment of the statute was not a retrospective operation. Goddard C.J. said:[29]

> But in my opinion this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect. . . . This Act simply enables a disqualification to be imposed for the future which is no way affects anything done by the appellant in the past.

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[26] [1975] 2 W.W.R. 53.

[27] *Ibid.*, at p. 55.

[28] [1957] 1 W.L.R. 1219.

[29] *Ibid.*, at p. 1222.

The fact-situation here was the characteristic of the clerk as a convicted person. Similarly, in *The Queen* v. *Vine*,[30] where the statute imposed a disability on "every person convicted of a felony", it was held that the statute applied to persons convicted before the statute was enacted; here, the statute attached a disability to a characteristic and not to the felonious act or the conviction.

Also, in *Chapin* v. *Matthews*[31] where the statute provided that no covenant in any agreement should be binding on the purchaser of farm machinery if a court or judge should decide it to be unreasonable, the court applied the statute to agreements made before the statute was enacted; here again, the description was by characteristic. This decision may be contrasted with *J. I. Case Threshing Machine Co.* v. *Whitney*[32] where a similar statute was considered. In it there was a provision that "in the case of a vendor repossessing any . . . implement . . . the implement shall . . . be appraised . . . by two arbitrators", and it was held that the provision did not apply in respect of an implement that was repossessed before the enactment came into force and sold thereafter without appraisal; here the fact-situation was an event, namely, the act of repossessing. The distinction between characteristic and event was recognized by Stuart J. when he said that[33] "It does not follow that a similar result would be reached with respect to the other sections of the Act . . . where the expression 'shall be sold' is found"; that would be an event.

In conducting my lectures in the following year, I realized that I still did not have the complete answer. I now realized that there are three kinds of statutes that can properly be said to be retrospective, but only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Secondly there are those that attach prejudicial consequences to a prior event; they attract the presumption. Thirdly there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not a consequence of the event; these do not attract the presumption.

It is usually easy enough to identify a retroactive statute. It will say that it came into force on a day prior to its enactment, or that it operates on past transactions. What is difficult is first, to identify a retrospective statute, and secondly, what is even more difficult, to distinguish between those retrospective statutes that attract the

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[30] *Supra*, footnote 18.

[31] *Supra*, footnote 15.

[32] [1922] 3 W.W.R. 643.

[33] *Ibid.*, at pp. 470-471.

presumption and those that do not. The latter difficulty may be illustrated by two examples:

(1) Every person convicted of impaired driving is disqualified from holding a licence

This provision imposes a new disability, and the courts would in all likelihood hold that the statute would be given retrospective effect if it were applied in respect of prior convictions.[34]

(2) Every person convicted of impaired driving shall pay an additional insurance premium of $100.00 to the Government Insurance Commission

Here also a further penalty is imposed in respect of a conviction, but, following *The Queen* v. *Vine*,[35] *In re a Solicitor's Clerk*[36] and *Ward* v. *Manitoba Public Ins. Corp.*[37] the courts in all likelihood would hold that its application in respect of prior convictions was not a retrospective operation.

Here we have, I believe, the most difficult problem with the retrospective presumption. The first two examples look alike, but, following the cases cited, the results are different. How can we distinguish the two kinds of situations? What would the courts say about this:

A person who has been convicted of an indictable offence is ineligible to hold public office.

The extreme cases are easy. Thus, if a statute provided that "every one who has attained the age of eighteen years is qualified" to vote at an election, no one would say that the statute applies only to persons who attained the age of eighteen years after its enactment. This is a beneficial provision. But if a statute should provide that the lands of "every one who has been convicted of the offence of treason" are forfeited to the Crown, no one would apply that statute to convictions before its enactment. This is a prejudicial provision.

But the situations in between these two extremes are the difficult ones.

The principle I have postulated is that the presumption applies if the statute would attach a new duty, penalty or disability—that it to say, a prejudicial consequence—to a prior event. But when is a prejudicial law a consequence of an event, and when is it not? An answer may be found in the following decisions.

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[34] See *In re Athumley*, [1898] 2 Q.B. 547; *Ward* v. *British Oak Insurance*, [1931] 2 K.B. 637; *In re Pulborough*, [1894] 1 Q.B. 725.

[35] *Supra*, footnote 18.

[36] *Supra*, footnote 28.

[37] *Supra*, footnote 26.

In *The Queen* v. *Vine*,[38] the statute considered there provided that:

> Every person convicted of a felony shall forever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted. . . .

The question, as stated by Cockburn C.J., was whether a person who had been convicted of felony before the Act was passed became disqualified on the passing of the Act. There was no provision in the Act that could be construed as a rebuttal of the retrospective presumption.

Cockburn C.J. held that the Act did apply. He said[39] that "if one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony" he could feel the force of the argument in favour of applying the presumption. "But", he said, "here the object of the enactment is not to punish offenders, but to protect the public against public houses in which spirits are retailed being kept by persons of doubtful character".

He obviously construed the words "every person convicted of a felony" as referring to a status or characteristic only, and not to a past transaction. He also said[40] "the words are in effect equivalent to 'every convicted felon' ". Miller, and Archibald J.J. concurred, but Lush J. disagreed. He expressed the view[41] that a person who had previously been convicted would forfeit his licence, and this was, therefore a highly penal enactment.

The majority regarded the new disability as protection to the public, and not a new punishment, Archibald J. said[42] "it is an enactment with regard to public and social order, and the infliction of the penalty is merely collateral". In his view the statute was retrospective, since he considered that a new disability was attached to past events. But on Cockburn's view, which, it is submitted, is the correct view, the statute was prospective only, since the fact-situation described in the statute was a characteristic that arose in the past and not a past event.

In *In re Pulborough*[43] the Court of Appeal considered a provision of the Bankruptcy Act, 1883, which provided that "where a debtor is adjudged bankrupt" he should be subject to certain

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[38] *Supra*, footnote 18.
[39] *Ibid.*, at p. 201.
[40] *Ibid.*, at p. 202.
[41] *Ibid.*, at p. 201.
[42] *Ibid.*, at p. 202.
[43] *Supra*, footnote 34.

disqualifications, including being elected to the office of member of a school board. The question was whether the statute applied to a person who had been adjudged bankrupt before its enactment.

The majority held that it did not. Lopes L.J. said:[44]

> It has been contended that the words "is adjudged bankrupt" are to be read, "has been adjudged bankrupt either before or after the passing of this Act".
>
> I cannot so read those words. Independently of other considerations, with which I will presently deal, and regarding them only from a grammatical standpoint, I should read them, "is adjudged bankrupt under this Act". The sentence would then be, where a debtor "is adjudged bankrupt under this Act he shall, subject to the provisions of this Act, be disqualified". This reading seems more consonant with sense than "where a debtor has been adjudged bankrupt under this Act, or any previous Act, he shall, subject to the provisions of this Act, be disqualified". The former reading gives to "is" its ordinary and natural meaning; the latter distorts it. . .
>
> Under s. 32 of the Bankruptcy Act, 1883, the respondent on being adjudged a bankrupt is disqualified from being elected a member of the school board until the adjudication of bankruptcy against him is annulled, or he obtains from the Court his discharge, with a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part.
>
> A new disability, therefore, is imposed upon him, and disabilities are imposed on other persons which had no existence before the Bankruptcy Act of 1883. Having regard to the scope of the Act, and the rule of construction applicable to statutes, I am confirmed in my view as to the true reading of the words in s. 32 "is adjudged bankrupt".

Davey C.J. stated:[45]

> Now, reading those words alone, and apart from considerations arising out of the subject-matter of the section in which they occur, I should certainly understand them (according to the ordinary use of the English language) to mean, if any man shall or may hereafter be adjudged bankrupt; and unless there be some controlling context in the Act or in the section, I hold that to be the meaning of the words. It has been suggested that the words may be read as meaning "where a man is an adjudicated bankrupt". The answer seems to me to be that those are not the words before us, and that the words we have to construe are grammatically different. I think the words "is adjudged" are the verb, whereas in the paraphrase suggested the word "adjudicated" would be an adjective. The one form of sentence points to an event to happen, whereas the form suggested predicates a certain quality of the subject which may just as well attach to him by a previous adjudication as by a subsequent one.

Lord Esher, however, dissented. He said:[46]

> In my opinion, s. 32 is not penal within the meaning of the proposition, which states that a penal statute must be construed strictly, and in my opinion it is not, in the true sense of the term, retrospective. . . .
>
> I cannot think that the legislature intended these disqualifications as punishments, for by the same section it appears that the disqualifications are to

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[44] *Ibid.*, at pp. 736, 737-738.

[45] *Ibid.*, at p. 740.

[46] *Ibid.*, at pp. 733, 734.

> be removed if the debtor obtains a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part. To my mind, to say that the legislature intended to punish a debtor of whom that can be said would be to charge the legislature with injustice. The disqualifications are intended solely for the protection of the public, and not by way of punishment. The case of *Reg.* v. *Vine* is a strong authority to shew that under such circumstances that which is enacted is not penal.

West v. *Gwynne* and *R.* v. *Vine* were referred to in *In re a Solicitor's Clerk*.[47] The statute considered there provided that "where a person who is or was a clerk to a solicitor . . . has been convicted of larceny . . . an application may be made . . . that an order be made directing that . . . no solicitor shall . . . take or retain the said person into or in his employment". The solicitor's clerk had been convicted before the statute was enacted, but it was held that the statute applied. Lord Goddard C.J. said:[48]

> It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past.

The case of *In re a Solicitor's Clerk* was followed by the Manitoba Court of Appeal in *Ward* v. *Manitoba Public Ins. Corp.*[49] Under the statute and regulations there, additional premiums were assessed on the basis of convictions for offences, and it was held that the intent of the statute was to "deal with antecedent basic facts and apply them to prospective charges for insurance premiums".[50]

In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply.

There can be differences of opinion about the intent of the statute. In the case of *R.* v. *Vine* the majority held that the object of the statute was not to punish offenders but to protect the public; Lush, J. dissenting, said it was a highly penal enactment, and on his view the presumption would apply.

In *In re Pulborough* the majority held the disabilities to be disabilities to be added to those set out in the Bankruptcy Act; Lord Esher, however, did not think that the new disqualifications were

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[47] *Supra*, footnote 28.

[48] *Ibid.*, at pp. 1222-1223.

[49] *Supra*, footnote 26.

[50] *Ibid.*, per Guy J.A., at pp. 55-56.

intended as punishment, but that they were intended solely for the protection of the public.

In *In re a Solicitor's Clerk*, Lord Denman said the statute would be retrospective if anything done prior to the Act should be made void or voidable or if a penalty were inflicted "for having acted in this or any other capacity before the Act came into force".

In *Ward* v. *Manitoba Public Insurance* the statute and regulations were clearly for the protection of the public.

To summarize:

1. A retroactive statute is one that changes the law as of a time prior to its enactment.

2. (1) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment.

(2) A statute is not retrospective by reason only that it adversely affects an antecedently acquired right.

(3) A statute is not retrospective unless the description of the prior event is the fact-situation that brings about the operation of the statute.

3. The presumption does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.

4. The presumption does not apply if the new prejudicial consequences are intended as protection for the public rather than as punishment for a prior event.

In the Court of Appeal of Alberta

Citation: Three Sisters Golf Resorts Inc. v. Canmore (Town), 1997 ABCA 137

Date: 19970421
Docket: 9703-0154-AC
Registry: Edmonton

Between:

Three Sisters Golf Resorts Inc.

Respondent

- and -

The Town of Canmore

Appellant

- and -

The Municipal Government Board

Respondent

The Honourable Mr. Justice Côté

Application for Leave to Appeal

COUNSEL:

B. A. Sjolie, for the Appellant Town of Canmore

K. D. Wakefield, for the Respondent Three Sisters

W. J. Nugent, for the Respondent Municipal Govt. Bd.

M.A. Unsworth, for the Dept. of Justice of Alberta

M. D. Gates, for the Dept. of Justice of Canada

LEAVE TO APPEAL

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[1] The appellant Town may not raise the Board's alleged failure to give adequate reasons. But it has leave to appeal on any or all of the following questions of law or jurisdiction:

1. Does s. 619 of the ***Municipal Government Act*** apply to decisions of the Natural Resources Conservation Board made before s. 619 came into force?

2. Did the Municipal Government Board erroneously consider matters not relating to whether the proposed land use bylaw amendment was consistent with the approval by the Natural Resources Conservation Board?

3. Did the Municipal Government Board erroneously decline to consider certain matters relating to whether the land use bylaw amendment applied for was consistent with the approval by the Natural Resources Conservation Board, namely

(a) transportation,

(b) open spaces,

(c) phasing, or

(d) two or more of these?

4. Did the Municipal Government Board misinterpret s. 619 in any or all of four ways, namely

(a) excluding all role for municipal control over topics which the Natural Resources Conservation Board had decided,

(b) considering that consistency was a matter of the spirit and intent of the approval by the Natural Resources Conservation Board, rather than the actual terms of the approval,

(c) excluding any scope for changed circumstances between the approval by the Natural Resources Conservation Board and the application for land use bylaw amendment, or the hearing by the Municipal Government Board, or,

(d) considering that s. 619 fettered the municipal subdivision approval process?

5. Did the Municipal Government Board misinterpret the approval by the Natural Resources Conservation Board by holding that mere mentions of topics by the Natural Resources Conservation Board could be licenses, permits, approvals or other authorizations which the Town

(a) must approve under s. 619(2), or

(b) may be ordered to amend its land use bylaw to comply with under s. 619(8), or

(c) both?

6. Do any of the powers, rights or duties of the Municipal Government Board under s. 619 infringe s. 96 of the ***Constitution Act,*** 1867?

7. May an application under s. 619 to amend a land use bylaw, or an order of the Municipal Government Board under s. 619, extend to any area or piece of land which was, or may not have been, covered by the approval by the Natural Resources Conservation Board?

JUDGMENT DATED at EDMONTON, Alberta,
this 21st day of April,
A.D. 1997

2002 CarswellAlta 2246
Alberta Municipal Government Board

AES Calgary ULC, Re

2002 CarswellAlta 2246

In the Matter of the Municipal Government Act being Chapter M-26 of the Revised Statutes of Alberta 2000 (Act)

In the Matter of an Appeal lodged by AES Calgary ULC (AES)

D. Thomas Member, L. Lundgren Member, S. Cook Presiding Officer

Judgment: July 2, 2002
Docket: MGB 091/02

Counsel: John Merrett, Jonathon Liteplo, for AES
J. P. Mousseau, for EUB
Bill Shores, for Alberta Department of Energy
Gavin S. Fitch, for Carolyn Hurst et al
Brian O'Ferrall, for Gleneagles and Louson Investments

Subject: Public; Civil Practice and Procedure; Property; Municipal

Headnote

Municipal law --- Planning appeal boards and tribunals — Practice and procedure — Hearing — Miscellaneous

***S. Cook Presiding Officer*:**

Introduction

1 This is an appeal to the Municipal Government Board (MGB) pursuant to Section 619(5) of the Act. AES sought Alberta Energy and Utility Board (EUB) approval to build a power plant near Chestermere Lake in the Municipal District of Rocky View (MD). It received a favourable EUB ruling. Based on this, it applied to the MD under section 619(2) of the Act for a bylaw amendment redesignating 44 acres of land. The application proposed to change the land use from a Ranch and Farm District to a Direct Control District to accommodate the new plant.

2 The MD declined to pass the amendment and AES appeals that decision. Section 619 of the Act provides, in part:

> (7) The Municipal Government Board, in hearing an appeal under subsection (6), may only hear matters relating to whether the proposed statutory plan or land use bylaw amendment is consistent with the licence, permit, approval or other authorization granted under subsection (1).

3 In deciding this case the MGB must, among other points, decide if:

- AES had the necessary approval to allow it to request an amendment;
- the proposed by-law was consistent with any such approval;
- the many parties seeking intervenor status on various related issues should be heard, particularly in view of s. 619(7)(b) of the Act which says the MGB

(b) is not required to notify or hear from any person other than the applicant and the municipality against whom the appeal is launched.

Format of this Decision

4 The Board heard and considered the representations and the evidence shown on Appendix A. It has also considered the documents shown on Appendix B. Appendix C is draft of the MD of Rocky View Bylaw C-5487-2002. This Board Order is in five sections, generally described as follows:

SECTION I	*BACKGROUND*
	History of the AES Power Plant proposal and the EUB decision on that proposal
	History of the AES Redesignation Application made to the MD
	The issues on this appeal
	The process followed by the MGB
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Section I Background

5 AES is part of a family of companies owned by the AES Corporation based in the United States. The AES Corporation owns or has owned 180 power plants in 28 countries around the World.

6 AES proposes to build and operate a power plant on 44 acres of land located approximately 3.2 kilometres west of the Town of Chestermere, 5.6 kilometres south of Highway 1 and 1.6 kilometres east of the City of Calgary. The proposal is for a 525-megawatt, natural gas-fired, combined-cycle power plant.

History of the AES Proposal and the Alberta Energy and Utilities Board (EUB) Decision

7 On April 17, 2001, AES applied to the EUB for approval to build and operate this plant near Chestermere. The EUB held public hearings and completed a comprehensive review of the evidence brought forward by AES, the MD and many other parties. The scope of this EUB review is significant because many of the proposed intervenors before the MGB wished to argue, or reargue, points already considered in that decision. The EUB report shows it considered all of the following issues.

- Public Consultation and Involvement
- Site Selection and Existing Infrastructure

- Environmental Issues
    - Air Quality
    - Water Quality & Source of cooling tower Water
    - Noise
- Risk Assessment and Emergency Response
    - Risk Assessment
    - Emergency Response Plan
- Socio-Economic Issues
    - Land Use, Planning and Zoning
    - Land Value
    - Public and Economic Benefits
- Corporate Matters
    - Corporate Structure
    - Corporate History
    - Compliance Issues
    - Responsibility and Liability

8 On December 11, 2001, the EUB issued Decision 2001-101. The terms of the EUB ruling are significant because some parties and proposed intervenors argue that no decision has yet been made that is sufficient to trigger the right to demand a land use planning by-law amendment. They focus particularly on outstanding conditions 9 and 10. That document is 71 pages long. At page 52 it gives an overview of the EUB ruling in the following terms.

9 "Therefore, the Board approves Application No. 2001113 with the following conditions:

1. AES will include all the recommendations contained in sections 7.3 and 7.5 of Dr. Bercha's report into the design and operation of its power plant. In addition, AES will consider including the recommendations contained in section 7.4 of Dr. Bercha's report into the final design and operation of its power plant (Page 37).

2. AES will design and implement a monitoring program to determine the extent to which the cooling tower drift may contain biochemical contaminants and will report the results of the monitoring program to the Board at semi-annual intervals until the Board determines such monitoring is no longer required (Page 29).

3. AES shall provide continuous ambient monitoring for NO2, wind speed and wind direction. Monitoring shall be conducted in accordance with Alberta Environment's Air Monitoring directive. AES shall suggest an appropriate monitor location; this location must receive approval from Alberta Environment. Monitoring data must be reported monthly. A minimum of 6 months of background data must be gathered prior to start-up of the facility. An additional 3 years of data must be gathered during and after the start-up of the facility, for the purpose of confirming resulting ambient concentrations. AES shall also observe any monitoring requirements defined by Alberta Environment (Page 24).

4. The Board directs AES to work with local residents and EUB staff to design and conduct an appropriate noise validation survey once the plant is operating at full capacity to confirm PSLs are being met. Should the PSLs be exceeded an appropriate enforcement action, including possible suspension of operations, would be initiated by the EUB (Page 33).

5. AES will submit the draft ERP to the EUB Operations and Compliance Branch for review and approval in conjunction with the MD's review (Page 34).

6. Beginning immediately, AES will provide quarterly reports to the Board detailing its progress for each quarter (Page 23 and 29).

7. To verify that the performance of the new technologies meets the guaranteed emission limits at various operating conditions, such as start-up, full load etc., AES shall file with the Board, in addition to the quarterly progress report, the following information.

8. Acceptance test reports for:

Gas turbine-generator,

Selective Catalytic Reduction or other post-combustion method for reducing NOx emissions,

Water Treatment Plant, and Cooling Tower

Should any design changes be required, details of the original design problem and subsequent modifications to rectify the problem should be filed with the Board immediately after the decision to implement the modifications is made. As well, if certifying bodies are involved, their reviews of the test results must also be included.

When performance tests are conducted for the purpose of verifying guaranteed performance, performance codes and parameters required to be established prior to the tests must comply with standards commonly used in North America, such as The American Society of Mechanical Engineers (ASME) standards for gas turbines, and ASME or Cooling Technology Institute (CTI) standards for cooling tower (Pages 23 & 29).

9. Should AES desire to make any material changes to the plant or vary the design, the construction, and/or specifications of the plant from what is described in its application, evidence given at the hearing, or what the Board has approved, AES must acquire Board approval prior to proceeding with any such changes (Page 23 & 29).

10. Prior to commencing construction of the power plant, AES shall prepare and file with the Board, for its approval, a report, which identifies the nature of the future decommissioning of the power plant, its probable cost, and the means of securing the funds required to complete the decommissioning (Page 48).

11. Prior to commencing construction of the power plant, AES Calgary ULC shall provide to the Board, for its approval, an analysis of appropriate level of insurance coverage regarding the risk of significant public liability. In addition, and also prior to commencing construction of the power plant, AES shall file a copy of its public liability insurance policy with the Board for its approval and shall file a commitment from the insurer that it will notify the Board of any modifications to said policy. Should AES, at any time, allow the policy to lapse or be deemed by the EUB to be inadequate, the plant shall cease to operate until such time as the policy is reinstated, replaced, or returned to a level of adequacy. Board approval of both the decommissioning and liability insurance reports will be a condition of any facility approval granted by the Board (Page 48).

History of the AES Redesignation Application made to the MD

10 On November 7, 2001, AES applied to the MD for a land use bylaw amendment to accommodate the proposed power plant. The amendment was drafted in order to change the land use category applicable to the subject land, from a Ranch and Farm District to a Direct Control District. The draft Direct Control Bylaw was prepared in consultation with MD staff and

became known as Bylaw C-5487-2002 (Appendix C to these reasons). This bylaw was the subject of a public hearing by MD Council on February 13 and 14, 2002.

11 After the public hearing, the MD Council decided to rescind its earlier first reading of bylaw C-5487-2002. By the time the proposed bylaw had reached this municipal stage, elections had somewhat changed the membership of the MD's Council. In addition, the public hearings attracted considerable public attention, much of it opposed to the construction of such a power plant at the proposed location. As the Reeve explained in a letter outlining why mediation would be unlikely to succeed, the MD's decision was not based on perceived conflicts between the proposed bylaw and the EUB decision, but on broader concerns about using the land in question for a power plant at all. That letter, dated March 4, 2002 to AES from the MD's Reeve, Alan W. Hall, included the following statement:

> Council's decision to rescind First Reading was made largely on the basis that the proposed electrical generation plant was not a land use that they would endorse in the proposed location, rather than the fact the application contravened the EUB decision in any way.

12 This refusal led AES, on March 15, 2002, to appeal to the MGB under Section 619(5) of the Act. AES maintained that the application was consistent with EUB Decision 2001-101, and that Section 619(2) of the Act, therefore, required the MD to approve the land use bylaw amendment.

The Issues on this Appeal

13

1. Section 619(6)(b) of the Act states that the MGB is not required to notify or hear from any person other than the applicant and the municipality against whom the appeal is launched.

   (a) Is it a benefit to the MGB to hear from the many area landowners and other agencies seeking to intervene on the issues in this appeal?

   (b) Does a resolution under Section 508 of the Act give automatic status for another municipality (the Town of Chestermere) to make submissions to the MGB?

2. Section 619(1) of the Act states that a licence, permit, approval or other authorization granted by the EUB prevails over any land use bylaw or any decision of the MGB or any other authorization granted under this Part of the Act.

   (a) Does the EUB Decision Report 2001-101 constitute a licence, permit, approval or other authorization? If not, was the application to the MD, and thus this appeal to the MGB, premature?

3. An application for leave to appeal is before the Court of Appeal challenging the EUB Decision Report 2001-101. In addition, the EUB has been asked to reconsider and rescind its decision. However, the Act obliges the MGB to deal with these proceedings in a timely way.

   (a) Does the application for leave to appeal or the request to reconsider the EUB decision provide a sufficient reason for the MGB to adjourn its hearing or postpone issuing its decision?

4. The MD refused to approve an application by AES to redesignate the land in order to accommodate the proposed power plant.

   (a) Assuming the EUB Decision 2001-101 is an approval or other authorization, was the redesignation application, made to the MD by AES, consistent with the EUB decision?

   (b) Even if the application was consistent, is there any residual authority in the Act allowing the MD to refuse the application?

(c) If there is no authority for the MD to refuse the application, does the MGB have a discretion to reject an appeal from such a refusal?

The MGB process respecting the AES appeal

14 On March 15, 2002, the MGB received the appeal from AES along with the Section 619(5) statutory declaration showing that the MD was unwilling to attempt mediation.

15 The MGB notified AES and the MD that April 22, 23 and 24, 2002, were the days scheduled for the MGB to hear the appeal. Section 619(6)(a) of the Act requires that the MGB hearing commence within 60 days of receipt of the appeal. The MGB also established a pre-hearing document exchange process.

16 The AES Power Plant proposal had been a high profile issue in the Calgary area for at least 18 months prior to the MGB hearing. Many landowners in the area objected to the location of the proposed plant and had been participants in the EUB's public hearings held in 2001. The local media had followed the power plant story throughout and the public at large soon learnt that an appeal had been lodged. This generated many telephone calls and written requests for status to make submissions to the MGB at the appeal hearing. On April 12, 2002 and following, the MGB sent out letters to all 404 interested parties advising them of the scope of the MGB's jurisdiction and providing formal notice of the Board's hearing.

17 On April 19, 2002, the MGB received a letter from Gavin Fitch, Counsel representing several area landowners, asking the MGB to postpone its hearing because, among other things, the landowners had made a formal request to the EUB for a review of its decision. As a result of this request, the MGB modified somewhat its intended hearing procedure. First, it heard from the party seeking the postponement. It invited the other parties, and the proposed intervenors to respond to the request. The question of whether or not the EUB decision report amounted to an approval was put forward at the same time and initial arguments advanced.

18 For the reasons below, the MGB decided not to postpone the hearing. It reserved its decision on the arguments about the status of the EUB approval and the timing of the MGB's decision.

19 In order to understand the details of the issues before the MGB, the panel decided to proceed to hear the merits of the appeal from AES and the MD. Following these submissions, the panel then heard the applications for intervenor status including details of what they proposed to argue. The panel decided that AES and the MD had provided sufficient evidence and information on the principal issues and denied the status requests of most others seeking intervention.

20 In order to make a decision on the jurisdictional arguments over the status of the EUB Decision Report and the timing of the MGB's decision, the panel granted limited status to certain parties allowing them to submit written arguments within 10 days. The MGB then adjourned the hearing pending receipt of those submissions. On June 17, 2002, having reviewed all the material, the MGB decided it did not need to reconvene the hearing.

Section II Legislation

21 The MGB considered the entire panoply of legislation concerning the approval of a power plant by the EUB and its impact on municipally controlled land use planning. The following provisions were particularly significant to the arguments advanced in this case.

Municipal Government Act

22 Section 508 authorizes a municipality to become a complainant or intervenor in MGB hearings.

> 508 (1) When the council of a municipality considers that the interests of the public in the municipality or in a major part of the municipality are sufficiently concerned, the council may authorize the municipality to become a complainant or intervenor in a hearing before the Board.

(2) For the purposes of subsection (1), a council may take any steps, incur any expense and take any proceedings necessary to place the question in dispute before the Board for a decision.

23 Section 619 describes the paramount nature of EUB decisions. It prescribes the rules for decision making by a municipality following an application pursuant to an EUB decision and the rules for any subsequent appeal to the MGB.

619 (1) A licence, permit, approval or other authorization granted by the NRCB, ERCB or AEUB prevails, in accordance with this section, over any statutory plan, land use bylaw, subdivision decision or development decision by a subdivision authority, development authority, subdivision and development appeal board, or the Municipal Government Board or any other authorization under this Part.

(2) When an application is received by a municipality for a statutory plan amendment, land use bylaw amendment, subdivision approval, development permit or other authorization under this Part and the application is consistent with a licence, permit, approval or other authorization granted by the NRCB, ERCB or AEUB, the municipality must approve the application to the extent that it complies with the licence, permit, approval or other authorization granted under subsection (1).

(3) An approval of a statutory plan amendment or land use bylaw amendment under subsection (2)

(a) must be granted within 90 days after the application or a longer time agreed on by the applicant and the municipality, and

(b) is not subject to the requirements of section 692 unless, in the opinion of the municipality, the statutory plan amendment or land use bylaw amendment relates to matters not included in the licence, permit, approval or other authorization granted by the NRCB, ERCB or AEUB.

(4) If a municipality that is considering an application under subsection (2) holds a hearing, the hearing may not address matters already decided by the NRCB, ERCB or AEUB except as necessary to determine whether an amendment to a statutory plan or land use bylaw is required.

(5) If a municipality does not approve an application under subsection (2) to amend a statutory plan or land use bylaw or the municipality does not comply with subsection (3), the applicant may appeal to the Municipal Government Board by filing with the Board

(a) a notice of appeal, and

(b) a statutory declaration stating why mediation was unsuccessful or why the applicant believes that the municipality was unwilling to attempt to use mediation.

(6) The Municipal Government Board, on receiving a notice of appeal and statutory declaration under subsection (5),

(a) must commence a hearing within 60 days after receiving the notice of appeal and statutory declaration and give a written decision within 30 days after concluding the hearing, and

(b) is not required to notify or hear from any person other than the applicant and the municipality against whom the appeal is launched.

(7) The Municipal Government Board, in hearing an appeal under subsection (6), may only hear matters relating to whether the proposed statutory plan or land use bylaw amendment is consistent with the licence, permit, approval or other authorization granted under subsection (1).

(8) In an appeal under this section, the Municipal Government Board may

(a) order the municipality to amend the statutory plan or land use bylaw in order to comply with a licence, permit, approval or other authorization granted by the NRCB, ERCB or AEUB, or

(b) dismiss the appeal.

(9) Section 692 does not apply when the statutory plan or land use bylaw is amended pursuant to a decision of the Municipal Government Board under subsection (8)(a).

(10) A decision under subsection (8) is final but may be appealed by the applicant or the municipality in accordance with section 688.

(11) In this section, "NRCB, ERCB or AEUB" means the Natural Resources Conservation Board, Energy Resources Conservation Board or Alberta Energy and Utilities Board.

Alberta Energy and Utilities Board Act

24 Section 15 gives the EUB power to make orders and to impose conditions in any order it has made.

15 (1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

(3) Without restricting subsection (1), the Board may do all or any of the following:

. . .

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

(e) make an order granting the whole or part only of the relief applied for;

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Hydro and Electric Energy Act

25 Section 11 prohibits any person from constructing a power plant without approval of the EUB.

11 No person shall construct or operate a power plant unless the Board, by order, has approved the construction and operation of the power plant.

26 Section 19 defines the powers of the EUB in dealing with an application for approval of a power plant.

19 (1) On an application for an approval, permit or licence under this Part, or for an amendment of an approval, permit or licence, the Board may grant the approval, permit, licence or amendment subject to any terms and conditions that it prescribes or may deny the application.

(2) Without restricting the generality of subsection (1), the Board may do one or more of the following:

(a) require changes in the plans and specifications of a hydro development, power plant or transmission line;

(b) require changes in the location of a hydro development, power plant or transmission line;

(c) prescribe a date before which the construction of, or operation of, the hydro development, power plant or transmission line must commence;

(d) prescribe the location and route of the transmission line as precisely as it considers suitable;

(e) prescribe the location of the right of way of the transmission line and the relationship of its boundaries to the transmission line or any part of the transmission line.

Energy Resources Conservation Act

27 Section 26 gives the EUB direction about the need for hearings for any order or direction it is authorized to make.

26 (1) Unless it is otherwise expressly provided by this Act to the contrary, any order or direction that the Board is authorized to make may be made on its own motion or initiative, and without the giving of notice, and without holding a hearing.

(2) Notwithstanding subsection (1), if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person

(a) notice of the application,

(b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,

(c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,

(d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and

(e) an adequate opportunity of making representations by way of argument to the Board or its examiners.

28 Section 41 deals with appeals from EUB orders or directions to the Court of Appeal.

41 (1) Subject to subsection (2), on a question of jurisdiction or on a question of law, an appeal lies from the Board to the Court of Appeal.

(2) Leave to appeal shall be obtained from a judge of the Court of Appeal on application made within one month after the making of the order, decision or direction sought to be appealed from, or within a further time that the judge under special circumstances allows, and on notice to the parties affected by the appeal or the respective solicitors by whom the parties were represented before the Board, and to the Board, and on hearing those of them that appear and desire to be heard, and the costs of the application are in the discretion of the judge.

(3) An order or direction of the Board takes effect at the time prescribed by the order or direction, and its operation is not suspended by any appeal to the Court of Appeal, or by any further appeal, but the Board itself may if it thinks fit suspend the operation of its order, when appealed from, until the decision of the Court of Appeal is rendered, or the time for appeal to the Supreme Court of Canada has expired, or any appeal is abandoned.

(4) Within 30 days after leave has been obtained, the Board shall forward to the Registrar of the Court the transcript and record of the hearing and its findings and reasons for the order or direction.

(5) On receipt of the transcript, record, findings and reasons from the Board, the Registrar shall set the appeal down for hearing at the next sittings that will commence at least 2 weeks after the appeal is so set down, and the party appealing, after the appeal has been set down, shall give to the parties affected by the appeal or the respective solicitors by whom those persons were represented before the Board, and to the Board, notice in writing that the appeal has been so set down for hearing, and the appeal is to be heard by the Court of Appeal as speedily as practicable.

(6) On the hearing of the appeal, no evidence other than the evidence that was submitted to the Board on the making of the order appealed from shall be admitted, and the Court of Appeal shall proceed either to confirm, vary or vacate the order appealed from and in the latter event shall refer the matter back to the Board for further consideration and redetermination.

(7) On the hearing of the appeal, the Court may draw all inferences that are not inconsistent with the facts expressly found by the Board and that are necessary for determining the question of jurisdiction or of law, as the case may be, and shall certify its opinion to the Board.

. . .

(10) If the order or direction is set aside or a variation is directed, the matter shall be reconsidered and redetermined by the Board, and the Board shall vary or rescind its order in accordance with the judgment of the Court of Appeal or the Supreme Court of Canada.

Section III The Applications for Status to Make Submissions Tothe MGB

Background Prior to the hearing, the MGB received 376 form letters, in four different styles, from individuals seeking status to make submissions to the MGB or individuals wishing to express support for the actions of the MD in denying AES' application to redesignate this land. It received 28 other letters that were more individual in style. Most of those 28 letters detailed the process residents experienced during the EUB hearings. There were also a number of letters commenting on the potential negative effects the proposed plant would have on the area. Each of these requests addressed the question of consistency of the land use bylaw amendment application made by AES with the EUB decision in some way or other. The Alberta Department of Energy sought status to speak in support of the appeal expressing particular concern over the integrity and efficiency of Alberta's regulating approval process.

29 Prior to the hearing, the MGB panel reviewed all these requests. After hearing the arguments of AES and the MD respecting the main issue of the appeal, the MGB heard oral argument for status from the following individuals:

- Mayor Mikkelsen for the Town of Chestermere
- Brian O'Ferrall on behalf of Gleneagles Investments Ltd. and Louson Investments Ltd.
- Bill Shores on behalf of the Alberta Department of Energy
- Dan Jack
- Bea Germain
- Carolyn Hurst
- Ray Blanchard
- T. J. Taylor
- Terry Veenendaal

• Holly Clifford

30 Section 619(6)(b) of the Act (set out above) provides that the MGB is not required to notify or hear from any person other than the applicant and the municipality against whom the appeal is launched. Status for others is, therefore, discretionary. The requests for status must be assessed against this statutory provision as well as against the Board's limited mandate on an appeal of this nature. There is no right to, and no point in giving, status to parties to address matters that are beyond this Board's mandate. This is particularly so where another body has the exclusive mandate to address those same issues and has already done so, on notice to these same proposed intervenors.

Summaries of the Submissions

The Alberta Department of Energy

31 The Alberta Department of Energy supports the appeal by AES and sought status to make submissions on the following general grounds.

1. The AES application for redistricting is consistent with the EUB approval.

2. The refusal by the municipality to approve the application of AES affects not only AES but also the policies of the Government of Alberta, whose interests in this regard are represented by the Department of Energy.

3. The interpretation of section 619(2) of the Act is a matter of interest to the Department which has an obligation to ensure that applicants who have EUB approvals can proceed without facing any unauthorized and unnecessary regulatory burdens.

4. The MGB has discretion to grant standing to the Department of Energy under section 619(6)(b).

5. The MGB ought to grant standing to the Department of Energy in all the circumstances of this case.

32 The Department of Energy, as the responsible area of government, has a particular mandate to ensure that Alberta's overall regulatory process in the energy area is both fair and efficient. The Department's written submissions were helpful in setting out its view of the interrelationship between the role of the EUB and the approval and regulatory process it administers; the role of the municipality in terms of its duty to enact appropriate land use bylaws following an approval; and the role of the MGB on an appeal like this.

33 The Board decided to grant the Department limited status (a) to file its written brief and (b) to address the jurisdictional and timeliness issues raised in these proceedings.

The Town of Chestermere

34 The Town of Chestermere adopted a resolution of Council pursuant to Section 508 of the Act set out above. It is the Town's position that, by doing so, it obtains an automatic right to make submissions to the MGB on the issues in the appeal. The Town noted that Section 508 authorizes the Town to become a complainant or intervenor in a hearing before the MGB when the Town Council considers that the interests of the public in the municipality are sufficiently concerned. The Town explained that it is concerned about the water supply for the plant, the precedent set by allowing the power plant as a land use in the Calgary/Chestermere corridor, and the safety and health issues for the Town. The Town intervened in the EUB proceedings and made similar submissions at that time.

35 The MGB is of the opinion that Section 508 does not grant automatic status to the Town of Chestermere to make submissions to the MGB for hearings held pursuant to Section 619 of the Act. Section 619 promotes the timely development of projects approved by the EUB. In the MGB's opinion, Section 619 is paramount; its purpose is to remove or restrict municipal obstacles that could hinder or unduly burden the applicant with an EUB approval. Section 619(6)(b) relieves the MGB from

hearing from any person other than AES and the MD. The MGB is of the view that this section overrides Section 508 owing to the paramount nature of Section 619.

36 In addition, Section 508 only authorizes a municipality to seek to become a party to a proceeding. Nothing in that section overrides any statutory or procedural barriers the municipality must face in pursuing its interventions. Section 508 simply addresses the need for municipal council approval before actions are taken in the municipality's name. It is not designed to grant the council an automatic right of audience in any proceedings where the Council wishes to be heard.

37 The MGB did grant the Town of Chestermere limited status to address the timeliness and jurisdictional arguments before the Board.

Other Intervenors

38 The other individuals requesting status are landowners or residents or both with holdings in the general vicinity of the plant, whether the holdings are in Calgary, Chestermere or the MD. In summary, these individuals raised the following points in their letters and in their oral submissions on April 22, 2002.

1. The EUB did not have the benefit of the most recent position of the MD during its hearings. The MD's position changed after the municipal elections in October 2001. Therefore, the proposed land use bylaw amendment is not consistent with the EUB decision and the EUB decision is flawed. The EUB did not provide adequate notice of its public hearings to all the interested parties wishing to intervene.

2. AES has not received permission from the City of Calgary for water supply. The other conditions in the EUB decision have not yet been met. This demonstrates that the redesignation application made by AES is inconsistent and premature until AES can demonstrate that it has met all these conditions.

3. AES is in financial difficulty which is just one of the facts that have changed since the EUB held its hearings and issued Decision 2001-101.

4. The proposed plant is, for a variety of reasons, inappropriate for this location.

Findings and Decisions

39

1. There is no benefit for the MGB to hear from any parties other than AES and the MD respecting the issue of whether or not the proposed land use bylaw amendment is consistent with EUB Decision 2001-101. As will be seen from the analysis below this is the limit of the MGB's jurisdiction.

2. The MGB grants limited status to the parties listed below to make submissions on the MGB's jurisdiction.

    1. The Town of Chestermere

    2. The Alberta Department of Energy

    3. Carolyn Hurst, L. Jane Hawkins, Maureen Hawkins, Kelly Warrack, Gerry Ziegler, Joe Bleile, Joyce Hodgson, Bill Gaskarth, Barry Wakeford, Lousan Investments Ltd. and Gleneagles Investment Ltd.

Reasons

40 Section 619 of the Act (set out above) authorizes the MGB to proceed with a hearing once an appeal is received. It is not required to notify or hear from any persons other than the person appealing and the municipality against whom the appeal is launched. The MGB could have proceeded in this manner but felt it was necessary to recognize the large numbers of people who had contacted the MGB about the hearing. The MGB also felt that persons wishing to gain status before the MGB should have

the opportunity to convince the MGB that they have additional information on the consistency issue not provided or missed by the MD and AES.

41 The MGB understands the concerns of the parties requesting status. The MGB got the message that many landowners in the vicinity do not want the power plant at this location. The MGB also got the message that many people are of the view that the EUB made its decision based on misinformation or facts that are now different than they were at the time of the EUB hearings.

42 Many of the issues raised by the individuals requesting status are issues outside the MGB's jurisdiction. Concerns about flaws in the EUB process, and a change in facts after the EUB hearings are matters properly before the Alberta Court of Appeal or the Review Panel of the EUB. Since applications have been made to the Court and the EUB, the individuals seeking relief on these issues will have input in those processes.

Consistency

43 The MGB's only authority is to hear matters relating to whether or not the proposed land use bylaw amendment is consistent with EUB Decision 2001-101. While some individuals and the Alberta Department of Energy directly addressed the point of consistency in their requests for status, the MGB found that it had already received comprehensive information and evidence on this point, presented by AES and the MD. The MGB could see no benefit in hearing further argument of the same nature on this very narrow issue.

Limited Status

44 However, the MGB was challenged to decide whether or not EUB Decision 2001-101 is considered to be a licence, permit, approval or other authorization granted by the EUB, as described in Section 619 of the Act. The MGB recognized that this is an arguable legal point and could have an effect on the MGB's jurisdiction in this matter. Accordingly, the MGB granted limited status to the parties referred to above, to make legal submissions on the jurisdictional point and submissions respecting the timing of the MGB's decision respecting all matters. These arguments and submissions along with the MGB's decision on jurisdiction are set out in Section IV of this Order.

Section IV Jurisdiction of the MGB and Timeliness of the MGB Decisions

Timeliness of the MGB'S Decisions

45 A number of area landowners have applied to the Alberta Court of Appeal for leave to appeal EUB decision 2001-101. Their authority to do so arises from Section 41 of the Energy Resources Conservation Act set out above. Some participants argued that the MGB proceedings, or a decision, should be postponed until a decision is made on that application.

46 On April 19, 2002 the same landowners formally applied to the EUB for a review and rescission of Decision 2001-101. Their authority to make such an application is not disputed. Counsel for the EUB and the parties were asked to determine when this application might be adjudicated. The EUB advises that it has activated the review request process and expects all submissions on the request to be received by June 5, 2002. A realistic schedule for the EUB to decide whether or not it will review Decision 2001-101 indicates early to mid-July 2002.

47 The MGB must decide if the fact that either, or both, of these applications is (are) outstanding warrants an adjournment of the MGB's proceedings or a delay in issuing the MGB's decision. The submission of the parties who addressed this timeliness issue is as follows.

Summaries of the Submissions

Alberta Department of Energy

48 Section 619 contemplates timely MGB decisions through an expedited process. The MGB should not delay its final decision based on the possibility that the EUB may review its decision or that the Court may grant leave to appeal. Section

41 of the Energy Resources Conservation Act says that the operation of an order or direction of the EUB is not suspended by an appeal to the Court of Appeal. Further, the EUB has not suspended its decision based on the application for a review of Decision 2001-101.

AES

49 AES asks that the MGB conclude the hearing and issue its decision within 30 days. Section 619 of the Act directs the issuance of timely decisions by the MGB. AES notes that, if necessary, the MGB has significant ability to review, rescind or vary its decisions pursuant to Section 504 of the Act.

The MD of Rocky View

50 The MD takes the position that the MGB should keep the appeal hearing in recess and should not issue its decision until such time as the EUB decides if it will review its decision. If the EUB does review its decision then the MGB should not issue its decision until the review has been concluded and the results are known. The MD is concerned that, if the MGB decides to order approval of the land use bylaw amendment and the EUB decides to suspend its approval or significantly alter its approval, then the MGB Order may be without meaning or may be incorrect. Further, the MD may have lands designated for a power plant that could not be constructed and operated under the Direct Control land use category.

Findings and Decisions

51

1. Neither the application for leave to appeal to the Alberta Court of Appeal respecting the EUB decision, nor the request that the EUB reconsider its decision, provide compelling reasons for the MGB to delay its processes in this case.

2. Both the Alberta Court of Appeal and the EUB have the ability to grant stays and neither has done so.

3. The MGB's decision can provide for any necessary contingencies in the event of a change in the status or content of the EUB decision.

4. There is no reason for the MGB not to close its hearings, which it does as of June 17, 2002. The MGB will comply with its statutory obligation to issue its decision and reasons within 30 days of that date.

Has the Eub Yet Given an Approval?

52 Section 619(1) of the Act states that a licence, permit, approval or other authorization granted by the EUB prevails over any land use bylaw or any decision of the MGB or any other authorization granted under this Part of the Act. Section 619(2) provides that a municipality's obligation to approve a land use bylaw amendment or other similar instrument arises when the application is consistent with a license, permit approval or other authorization granted by the EUB.

53 The EUB's Decision 2001-101 is, in the submission of some parties or intervenors, not in fact the form of decision spoken of in Section 619(1) and (2) but rather a more preliminary document, subject to outstanding conditions, from which a sufficient "decision" may eventually, but has not yet, emerged. Therefore, it is argued, no obligation has yet arisen on the MD to take the action for which it applied. Without such an obligation there is no failure or refusal from which to appeal.

54 These arguments, set out more fully below, require the MGB to interpret Section 619 in light of the various regulatory and legislated processes to decide whether Decision 2001-101 is a sufficient decision, approval etc. to trigger the municipality's obligation. The arguments advanced on this point are as follows.

Carolyn Hurst et al (The Landowner Group)

55 The landowner group argues that the MGB has no jurisdiction to hear and decide the appeal because the EUB has not issued a licence, permit, approval or other authorization for the AES power plant, based on the following points:

1. Decision Report 2001-101 is a report as the result of a public hearing process the EUB decided to conduct because of the objections it received to the AES application for approval of the power plant. If there had been no objections, the EUB would not have conducted the public hearing and there would have been no Decision Report 2001-101.

2. There is a distinction between the EUB's finding that approval of the power plant is in the public interest and the issuance of an approval to construct and operate the power plant. No approval to construct and operate the power plant has been issued by the EUB. This is demonstrated in condition 10 attached to the Decision Report. Condition 10 explicitly states that there will be no facility approval unless the EUB first approves the decommissioning and liability reports required by conditions 9 and 10.

3. Decision 2001-101 is nothing more than the EUB's reasons for deciding that granting approval of the power plant is in the public interest. It is a fundamental premise of the law of appellate review that an appeal is taken against the formal judgement or ruling and not against the reasons for the judgement or ruling. The MGB's jurisdiction is predicated on there being an EUB approval, but the EUB Decision Report only provides a decision with reasons, not an approval, therefore, the MGB's jurisdiction is not engaged. Because the Decision Report constitutes an order, decision or direction of the EUB, an appeal to the Court of Appeal is allowed pursuant to Sections 42 of the Energy Resources Conservation Act and Section 26 of the Alberta Energy and Utilities Board Act. Accordingly, the Landowner Group has made an application to the Court of Appeal even though no approval has been issued by the EUB.

4. Section 619 of the Act does not refer to a decision of the EUB. Section 619 expressly states that the EUB has granted a licence, permit, approval or other authorization. A decision is not something which is granted.

5. The MGB is referred to the modern rules of statutory interpretation set out in the leading Canadian text on statutory interpretation (Driedger on the Construction of Statues, 3rd ed., 1994). Section 619 of the Act does not refer to a decision report such as Decision 2001-101. Clearly, Decision 2001-101 is not a licence or permit. An approval is something which actually authorizes an activity which falls within the EUB's jurisdiction. The Decision Report does not authorize anything, other than the granting of a formal licence, permit or approval. Without the formal, specific approval of the EUB, AES cannot construct or operate the power plant.

6. The obvious legislative purpose of Section 619 must be interpreted in a manner consistent and harmonious with the statutes administered by the EUB. In order to define and label Decision Report 2001-101, the words "permit, licence, approval or other authorization" must mean the same thing to the MGB as they do to the EUB. Section 19 of the *Hydro and Electric Energy Act* (HEE Act) gives authority to the EUB to grant an approval for a power plant subject to any conditions that it prescribes. The HEE Act specifies that the EUB must issue an order approving the power plant. Decision Report 2001-101 is not an order.

7. Decision Report 2001-101 does not authorize AES to commence construction of the power plant. A formal approval from the EUB is still required for the construction and operation of the plant. The use of the words "other authorization" in Section 619 should not come into play in the attempt to discover the status of Decision Report 2001-101. The term "other authorization" is a catchall term for authorizations the EUB may make other than a licence, permit or approval. The understanding of this term should be based on the specific words that precede it and should, therefore, relate to a document that actually authorizes the undertaking of an activity or the construction and operation of a facility.

Louson Investments and Gleneagles Investments

56 These companies submit that the EUB must issue an order pursuant to Sections 11 and 19 of the HEE Act (set out above) and this has not been done. As there is no other authorization for power plants, the MGB has no jurisdiction to decide on appeal until this is done, and until a request based on such a valid authorization is put to the MD.

57 Conditions 9 and 10 of Decision Report 2001-101 clearly indicate that an approval from the EUB is still outstanding. Conditions 9 and 10 are pre-conditions that must be met before the EUB issues an approval under the HEE Act. Decision

Report 2001-101 is nothing more than an indication the EUB is inclined to approve the power plant if certain conditions are met. Further, in the submission of these companies, compliance with those conditions must be the subject of a further hearing by the EUB pursuant to Section 26 of the *Energy Resources Conservation Act*.

The Department of Energy

58 The Department of Energy submits that the MGB must look at the substance of Decision Report 2001-101 rather than the form of the document. The Decision Report explicitly states that the application to construct and operate a power plant "is approved." The placing of conditions on the approval does not undermine the granting of that approval. The landowner group has adopted an inconsistent position by seeking to appeal Decision 2001-101 to the Court and then denying that the Report has any legal effect before the MGB.

59 The argument for this position is outlined as follows:

1. At the MGB hearing, Counsel for the EUB advised that the EUB does not issue an "order". It issues a decision. A document formally entitled an "Approval" will be issued when AES complies with conditions 9 and 10 of the EUB approval.

2. Decision 2001-101 is in substance an "order" that has approved the construction and operation of the power plant for the purposes of section 11 of the HEE Act. It is, in substance, an "approval or other authorization" for the purposes of Section 619(2) of the Act. The fact that it is not entitled "order" or "approval or other authorization" does not change its substance.

3. The application made to the EUB by AES was for an approval to construct and operate the plant. The EUB has approved the application.

4. Pursuant to Section 19 of the HEE Act, the EUB granted the approval subject to conditions. It did not deny the application. The presence of conditions does not undermine the approval. In fact, conditions can only be imposed on an approval.

5. In the Decision 2001-101, the EUB expressly treats the conditions as part of the approval, noting that the conditions form an integral part of the approval and failure to comply with them may result in the suspension of the approval.

6. Conditions 9 and 10 of the EUB approval begin with the words "prior to commencing construction of the power plant" certain information must be filed with the Board for its approval. The distinction here is that the conditions do not begin with the words "prior to the EUB approving the application". This is a clear expression that all the conditions form part of an overall approval of the power plant. If there was no approval, there would be nothing to suspend, as warned by the EUB, therefore, the EUB issued an approval for the power plant.

7. In a land use planning context, where an authority has a discretion, it may impose conditions to increase the standards explicitly set out in the planning scheme. Such conditions do not undermine the substance or validity of the approval.

8. The legislature clearly intended section 619(2) of the Act to have a significant sweep. It did not focus on the "form" of approvals. Instead, it used sweeping language to ensure that this provision was engaged whenever the EUB granted a "licence, permit, approval or other authorization." The use of the terms "approval or other authorization" signifies an intent to focus on substance over form.

AES

60 AES points out that it made an application to the EUB for approval to construct and operate a power plant. That application was number 2001113. At page 52 of the EUB Decision 2001-101, the EUB writes that "the Board approves application number 200113 ...".

61 AES explains that conditions of approval are common in EUB decisions and do not negate the approval. In the EUB decision, most of the conditions are conditions that must be satisfied following commencement of operations. Some are ongoing

requirements, which AES undertook immediately after the EUB issued its decision approving the project. For example, AES is meeting the condition for submitting quarterly progress reports to the EUB. If there was not an approval, there would be no need for quarterly progress reports.

Reeve Alan Hall on behalf of the MD

62 The MD of Rocky View takes the position that EUB Decision 2001-101 is a licence, permit, approval or other authorization within the meaning of Section 619 of the Act, and that the MGB has jurisdiction to hear and decide the appeal. The legislation applicable to deciding the jurisdictional point involves Section 619 of the Act, Section 11 and 19 of the HEE Act and Section 15 of the *Alberta Energy and Utilities Board Act*. All this legislation read together demonstrates to the MD that a consistent approach has been taken by the EUB and the EUB has issued a decision which attaches conditions to an approval. These conditions do not have the effect of suspending the approval unless they are not met.

Findings and Decision

63

1. The EUB Decision 2001-101 is an "approval" or "other authorization" (hereinafter referred to as the "approval" or "conditional approval") issued by the EUB for the AES Power Plant.

2. Even though further authorization may be forthcoming, the extent of the approval given in Decision 2001-101 is a sufficient approval within the meaning of Section 619(1) and (2) of the Act to permit an application to be made to the MD and to trigger the MD's obligation to approve such a request.

3. A request was made to the MD and the application denied. This triggered a right to appeal to the MGB under Section 619. Therefore, the appeal made by AES pursuant to Section 619 of the Act is not premature and the MGB has jurisdiction to accept, hear and decide the appeal.

Reasons

64 The MGB finds that, in issuing decision 2001-101, the EUB issued an approval for the power plant. Even if the word "approval" can only be construed to mean that the EUB must first confirm that conditions 9 and 10 have been met, which is yet to come, the MGB views Decision 2001-001 as an authorization. The MGB agrees with AES and the Department of Energy that the substance of the decision is an approval for the purposes of Section 619 of the Act. It is sufficiently concrete to indicate to the MD those things that need to be accommodated by its land use planning bylaws.

65 Decision 2001-101 authorizes AES to proceed in meeting the conditions of the approval. While the EUB did not call its decision an "order", the MGB finds that the decision is an order of the EUB. Counsel for the landowners argued that the rules for statutory interpretation imply narrow meaning for the words "other authorization", because it must be read in conjunction with a licence, permit or approval. The MGB finds it still has some meaning. Decision 2001-101 authorizes activities which AES must not only undertake now, but must undertake during and after, the construction and operation of the power plant commences. This implies that their decision making stage is beyond the approval in principle stage.

66 The MGB is also convinced that Decision 2001-101 is an approval or other authorization by reading the clear statement made by the EUB in Decision 2001-101. AES submitted application number 2001113 to the EUB for approval to construct and operate a power plant. In Decision Report 2001-101, the EUB stated that "the Board approves application number 2001113". To the MGB, the meaning is clear and there is no requirement to complete an in-depth review of statutory interpretation. The EUB's words are clear and cannot be interpreted in any other manner than as an "approval or other authorization."

67 While conditions 9 and 10 of the EUB approval require additional approvals, these approvals are related to specific concerns of the EUB. In the MGB's opinion, the imposition of these conditions does not abrogate the overall approval and authorization. Indeed, condition 8 of the approval states that certain changes that AES may desire, must receive approval from the EUB if those changes vary from the application the EUB has approved. The MGB also agrees with the Department of

Energy that, if the EUB had not approved the power plant, conditions 9 and 10 would have read "prior to the EUB approving the application" rather than "prior to commencing construction of the plant".

Section V The Appeal

Issues

68 The MD refused to approve a land use bylaw amendment application by AES to redesignate the subject lands to a Direct Control District, in order to accommodate the proposed power plant.

1. Was the redesignation application, made to the MD by AES, consistent with the EUB decision?

2. If the application was consistent, is there any residual authority in the Act allowing the MD to refuse the application?

3. If there is no authority for the MD to refuse the application, does the MGB have discretion to reject an appeal from such a refusal?

69 It was noted at the outset that, during the course of the MGB's hearing, the MD and AES advised that if the MGB is of the view that it must direct the MD to approve the application, they have been able to agree between themselves on a suitably varied bylaw amendment. AES acknowledged in saying this, that it wishes to and does recognize the need to come to a workable long-term relationship with the MD in which it intends to locate. The Board thanks the MD and the AES for working towards this limited resolution. It makes it unnecessary for the MGB to canvas some of the finer points of the purported inconsistencies. An amendment crafted by the MD in cooperation with AES is in many ways superior to one imposed by the MGB.

Summary Position of the MD

70 The MD takes the position that the MD Council, as the duly elected representatives of the MD, validly exercised its discretion pursuant to the Municipal Government Act to turn down the redesignation application. Therefore, the MGB should dismiss the appeal. The MD suggests that the MGB should respect the decision of the Council that the proposed land use was inappropriate based on submissions made to Council during its public hearing process.

71 The MD maintains that the proposed bylaw amendment was designed to bring the land use bylaw in conformity with the EUB decision as well as to provide direction to AES on land use issues not covered in the EUB decision. The MD maintains that issues raised by the AES application to amend the land use bylaw were not issues specifically addressed by the EUB approval and include:

- Traffic Impacts
- Access and Construction Access Roads
- Construction Management
- Dust and Noise Control
- Chemical Storage and Waste Disposal
- Landscaping
- Storm and Water Management
- Reclamation

72 The MD submits that, to the extent that the AES application to amend the MD's land use bylaw raises these additional planning issues, the amendment cannot be considered consistent with the EUB approval. While the MD takes the position that the

AES amendment does not contravene the EUB approval, it submits that its Council has the jurisdiction and complete discretion to decide planning issues not resolved by the EUB approval. The MD contends that the MGB does not have jurisdiction to review the merits of the MD's decision respecting planning matters not resolved by the EUB approval. This is because there is no appeal to the MGB or to any other body on such decisions by a municipal council concerning amendments to the land use bylaw.

73 Finally, the MD argues that the MGB is not required to order the MD to amend its land use bylaw under Section 619 of the Act. This section gives the MGB discretion to allow the appeal or to dismiss the appeal. The MD requests that the MGB exercise its discretion to dismiss the appeal.

74 If the MGB decides to grant the appeal, the MD requests that the MGB have regard to and adopt the provisions of the draft bylaw C-5487-2002 and further, that Council for the MD be identified as the Approving Authority for any Development Permit for which AES may apply.

Summary Position of Aes

75 AES submits that the provisions within the land use bylaw amendment application, reflected in draft bylaw C-5487-2002, are completely consistent with the EUB approval. AES worked in cooperation with the MD staff to ensure the amendment would be consistent. Indeed, the MD's staff advised the Council that the amendment had been drafted to bring the land use bylaw into conformity with the EUB decision. This information is all documented in the staff report to Council and the minutes of the MD's public hearing. AES maintains that the additional issues raised in the MD's submissions were all issues referred to by the EUB. Although the EUB did not list or specifically refer to these issues in its conditions of approval, these are not new issues to the EUB or the MD and do not represent any inconsistency between the amendment and the EUB approval. In any event, all these issues were addressed in the AES application to the EUB, or were submitted as information requested by the EUB during the EUB application and hearing process. This is all documented in Exhibit 4.

76 The issue of noise emissions from the proposed plant was specifically addressed in condition number 4 of the EUB approval. AES takes the position that condition number 4 is comprehensive, therefore, sections 1.5.0, 3.1.1(c) and 3.6.1 of the draft land use amendment bylaw should be deleted.

77 While the MD would normally have final decision making power on land use bylaw amendments, AES relies on Section 619 of the Act which takes away that power for projects approved by the EUB. Section 619 is paramount and the MD has no jurisdiction to withhold approval of an amendment consistent with the EUB approval.

78 Finally, AES advised the MGB that it had originally sought costs from the MD, but AES now withdraws that request and will not pursue the cost issue further.

Findings

79 The land use bylaw amendment application as shown in the form of the MD's draft bylaw C-5487-2002 is consistent with the conditional approval issued by the EUB in its Decision 2001-101.

Decision

80

> 1. Pursuant to Section 619(8)(a) of the Act, the MGB hereby orders the MD to amend its land use bylaw by adopting a bylaw which is the exact duplicate of draft bylaw C-5487-2002 which was the bylaw before the MD during its public hearings on February 13 and 14, 2002. Section 1.3 of the draft bylaw may be deleted if the MD wishes. Alternatively, the MD may adopt an amended form of that bylaw in the form agreed to between the MD and AES as advised during the MGB proceedings.

81 No public hearing shall be held as a result of the MGB's decision. Section 619(9) of the Act provides that Section 692 of the Act does not apply to the adoption of this amendment.

2. Pursuant to Section 499(3) of the Act, the MGB establishes the following terms, conditions, and timing for adoption of the land use bylaw amendment. These terms, conditions, and timing references are being added in recognition of the application presently before the EUB requesting a review of Decision 2001-101. (See: Section IV of this Order).

(a) If the EUB rejects the application for review of Decision 2001-101, the MD shall proceed with the adoption of the amendment within 3 weeks of the date of the EUB decision to deny the request.

(b) If the EUB grants a review of Decision 2001-101, the MD shall proceed with the adoption of the amendment within 3 weeks of the date of a decision issued by the EUB, provided the EUB has not substantially altered Decision 2001-101 as a result of the review process.

(c) If the EUB substantially alters Decision 2001-101 as a result of the review, the MD and AES shall evaluate the alterations in relation to the land use bylaw amendment and advise the MGB respecting any consistency issues between the altered decision and the land use bylaw amendment. Within two weeks of the date of the issuance of the altered decision by the EUB, AES and the MD shall forward their evaluations to the MGB and await further instructions from the MGB.

(d) If the EUB rescinds Decision 2001-101 as a result of the review, without at the same time making a replacement Order, this Order will be automatically rescinded.

Reasons

82 The MGB must first look at the authority and the direction given to the MGB by the Legislature in Section 619 of the Act. The MGB may only hear matters relating to whether or not the land use bylaw amendment proposed by AES is consistent with the EUB approval issued for the AES power plant. The MGB is restricted to evaluating the details of the land use bylaw amendment and comparing those details to the details of the EUB approval. When considering the land use bylaw amendment proposed by AES, the MD was similarly restricted to ensuring the amendment application was consistent with the EUB approval. Once consistency was achieved, Section 619 gave the MD no option but to approve the application to the extent that it complied with the EUB approval.

83 The key words in the Section 619 processes established for the MD and the MGB are "consistent" and "comply". The normal meaning giving to the word "consistent" is that any action or comparison must be shown to be accordant, agreeable, compatible, conforming, consonant, constant, equable, harmonious, regular, undeviating and uniform. The normal meaning given to the word "comply" is that any action or comparison must be seen to agree, coincide, concur, and conform.

Levels of Authority

The EUB

84 In addressing land use planning matters, the EUB established its authority and responsibility on page 4 of Decision Report 2001-101. The EUB said:

The Board's interaction with municipal land use planning regimes is set forth in section 619 of the *Municipal Government Act*. This provision provides that EUB approvals of energy facilities will take precedence over land-use planning instruments enacted by municipalities to the extent that the Board has addressed land-use issues in its decision. The Board, in Decision 2001-33 as well as in Decision 2000-30, expressed this conclusion. It is not the statutory responsibility of the Board to ensure that energy projects meet all local land use planning bylaws, area structure plans, and related planning instruments. The Board must decide whether such applications are in the public interest based on the purposes and aims of its own enabling legislation. Land use planning regimes are, however, relevant to the Board's consideration because they indicate from the municipality's perspective, the nature of the past, present, and future uses of a proposed site or lands in close proximity to a site. The Board is thus better able to determine whether the relative impacts created by energy facilities on the use of lands are acceptable.

85 On page 41 of Decision Report, the EUB expressed its views on land use planning matters related to the AES power plant proposal for this land. The EUB said:

> In terms of existing land use planning, the Board considers that Section 619 of the Municipal Government Act establishes that the Board's jurisdiction supersedes that of the municipalities in terms of the approval of energy facilities (as addressed in Section 2 of this report). Therefore, the Board is not constrained by the land use planning documentation in making its decision.

86 In the MGB's opinion, the EUB rightly claims the authority to approve the power plant on this land whether or not the land use bylaw has been amended. On page 41 of Decision Report 2001-101, the EUB explains that it heard extensive evidence about land use in this area of the MD and concluded that the plant would be a suitable land use in an area planned for future industrial uses, among other similar uses. Therefore, the EUB did address land use issues during its deliberations. It was entitled and obliged to do so given the prevailing authority of the EUB decision over any statutory plan or land use bylaw. The meaning could not be clearer. With respect to the details of land use planning for the site, the EUB deferred to the MD for such details. The MGB believes that Section 619 was written to allow a municipality some control over how a mega-project is developed. There are many planning considerations despite the overall approval issued by a body that is not the municipal council. The MD and AES identified those considerations and prepared a comprehensive bylaw amendment which is intended to provide municipal control over the issuing of development and building permits.

The MD

87 The MGB disagrees with the position of the MD that it has final authority respecting bylaw amendments for mega-projects approved by the EUB. Section 619(2) of the Act does not provide the MD discretion as to whether or not the bylaw amendment should be approved. This section is mandatory in that the municipality must approve the application to the extent that it complies with the EUB approval. The MGB recognizes the paramount nature of Section 619 and is of the opinion that the Legislature intended that Section 619 provide an environment free of additional regulatory burdens for projects approved by the EUB. In the MGB's view, the Legislature did not intend that an applicant with an EUB approval be denied the right to proceed by a different level of government. This conclusion is substantially reinforced by Sections 619(1), 619(2), 619(4), 619(5)(b) and 619(7) of the Act.

88 This does not mean that the MD is without authority or involvement in the implementation of the EUB approval. As shown in the draft bylaw amendment, the MD has substantial control over the issuance of development permits and the rules under which the power plant must be constructed.

The MGB

89 The MGB has very limited authority in deciding this appeal. The only matter before the MGB is whether or not the land use bylaw amendment is consistent with the EUB approval. As stated in the reasoning for denying the status applications, the MGB cannot review or alter the EUB approval. The MGB disagrees with the MD's contention that it does not have the authority to review the merits of the MD's decision respecting planning matters not resolved by the EUB approval. Section 619 authorizes the MGB to determine if the proposed bylaw amendment is consistent with the EUB approval. In order to do that, the MGB must evaluate the merits of the MD's decision on the question of consistency. As stated previously, the EUB purposely deferred resolution of certain planning matters to the MD, once it had reviewed the details of those planning concerns. In the MGB's opinion, this EUB action is in full accordance with Section 619 of the Act. If it were intended that the EUB resolve all the planning concerns, there would be no need for the municipality to give consideration to the issuance of building and development permits, nor the rules under which those permits could be issued.

90 With respect to the request by the MD for the MGB to dismiss the appeal, the MGB is unwilling to do so because it has found that the MD's action to deny the land use bylaw amendment is contrary to the Act. Since the amendment application is consistent with the EUB approval, the MD erred by not giving its approval of the amendment. As a result, the MGB would not fulfill its obligation if the appeal were to be dismissed. Rather, it is incumbent upon the MGB to ensure that the bylaw amendment

be approved as proposed, and the only realistic option open to the MGB to ensure the amendment is approved is to order the MD to amend the bylaw pursuant to Section 619(8)(a) of the Act. The Act does not contemplate the MGB exercising an independent authority to, in effect, negate the EUB approval by denying an appeal from an MD refusal in circumstances like these.

91 With respect to the request by the MD to include a provision in the bylaw amendment identifying the MD Council as the Development Authority for the issuance of development permits to AES, the MGB is unwilling to direct that this provision be included. The MGB is only authorized to determine consistency of the amendment with the EUB approval. In the MGB's opinion, identification of the MD Council as the Development Authority does not go to the matter of consistency with the EUB approval. As far as the MGB could determine, this was not a matter dealt with by the EUB in its approval of the power plant. In any event, Section 641 of the Act deals specifically with Council powers respecting the designation Direct Control Districts. Section 641(3) states that in respect of a direct control district, the council may decide on a development permit application or may delegate the decision to a development authority with directions that it considers appropriate. The MGB has authorized the deletion of Section 1.3 of the draft bylaw, if the MD so wishes. It may also pass a bylaw in the form agreed to by AES which the MGB understands includes Direct Control.

Consistency

92 Although the MD alleged that the introduction of eight land use issues in the draft bylaw creates an inconsistency with the EUB approval, the MD failed to show how these provisions, or any other provisions, in the draft bylaw amendment are inconsistent with the EUB approval. Each of the eight issues was before the EUB in the form of an addendum to the AES application or in the form of a response for information from the EUB or from the intervenors in the EUB process. The information that all these issues were before the EUB is documented in Exhibit 4 of the MGB's material. As stated previously, the EUB refers to all pertinent land use planning matters throughout its Decision Report 2001-101.

93 The MGB fails to understand why the MD claims that the proposed bylaw amendment is not consistent or does not comply with the EUB approval. In the record of the MD's hearings into the proposed land use bylaw amendment, the MD's own staff advised Council that the contents of proposed Direct Control Bylaw were drafted to bring the land use bylaw into conformity with EUB Decision 2001-101. Further, the Reeve of the MD advised AES that Council's decision to rescind first reading of the draft bylaw was made on the basis that the proposed electrical generation plant was not a land use Council would endorse in the proposed location, "rather than the fact that the application contravened the EUB decision in any way". This evidence reinforces the MGB's conclusion that the proposed bylaw amendment is consistent with the EUB approval

94 AES asked that the MGB delete those provisions in the proposed land use bylaw amendment dealing with noise because the EUB specifically addressed the issue of noise in condition 4 of the EUB approval. The MGB has reviewed condition 4 of the EUB approval and sections 1.5.0, 3.1.1(c) and 3.6.1 of the draft land use bylaw amendment. The MGB found that these provisions of the bylaw are consistent with condition 4 of the EUB approval and only serve to underline the EUB's decision in this regard. Inclusion of these provisions in the bylaw will provide a convenience for the MD when evaluating development permit applications. Because these bylaw provisions are consistent with the EUB approval, the MGB does not find it necessary to delete them from the bylaw.

Conclusion

95 After reviewing the EUB Decision Report 2001-101 and after reviewing the contents of the draft land use bylaw amendment, the MGB could not discover any inconsistency between the two documents. Accordingly, the MGB has decided that the MD must adopt the draft amendment.

96 This Order recognizes that timing of the adoption of the land use bylaw amendment must be tied into the decision of the EUB respecting the request for a review of Decision 2001-101 made by some of the landowners in the Chestermere area. Depending on the decision of the EUB, some of the provisions in the land use bylaw amendment may need to be altered with new provisions added or provisions deleted. If that is the case, and to ensure consistency is maintained between the EUB approval and the bylaw amendment, the MGB will still be involved in any necessary alteration to the amendment.

APPENDIX"A"

PERSONS WHO MADE SUBMISSIONS AT THE HEARING

NAME	*CAPACITY*
John Merrett, Fraser Milner Casgrain LLP	Counsel for AES
Jonathon Liteplo, Fraser Milner Casgrain LLP	Counsel for AES
Scott Gardner Project Director,	AES
Glen B. Scott, Brownlee Fryett	Solicitor for the MD
Gail Sokolan	Planner for the MD
Stan Schwartzenberger	Director of Planning and Development for the MD
J. P. Mousseau	Counsel for the EUB
Bill Shores, Shores Belzil Jardine	Counsel for the Alberta Department of Energy
Gavin S. Fitch, Rooney Prentice	Counsel for Carolyn Hurst et al
Brian O'Ferrall, McLennan Ross LLP	Counsel for Gleneagles and Louson Investments
Dave Mikkelsen	Mayor, Town of Chestermere
Holly Clifford	Area Landowner
Dan Jack	Area Landowner
Carolyn Hurst	Area Landowner
Thomas Tayor	Area Landowner
Terry Veenendaal	Area Landowner
Ray Blanchard	Area Landowner
Bea Germain	Area Landowner
Other Interested Parties	Observers and Members of the Media

APPENDIX"B"

DOCUMENTS RECEIVED PRIOR TO THE HEARING AND DURING THE HEARING

NO.	*ITEM*
1	AES Main Submission
2	AES Response to the MD's Submission
3	AES Rebuttal to the MD's Response to the AES Main Submission
4	AES References to the EUB Record by Topic Area
5	MD Main Submission
6	MD Response to the AES Main Submission
7	Record of the MD respecting the AES Redesignation Application to the MD
8	Request for Status by the Department of Energy
9	Request for Status by Rooney Prentice on behalf of Carolyn Hurst et al
10	Package Containing 404 letters from area landowners or other agencies requesting status to make submission to the MGB respecting the AES appeal
11	May 2, 2002 Submission from Rooney Prentice respecting the MGB's Jurisdiction
12	May 10, 2002 Rebuttal from Rooney Prentice to Submissions on the MGB's Jurisdiction
13	May 16, 2002 Submission from Rooney Prentice respecting timeliness of the MGB's Decision
14	May 1, 2002 Submission from McLennan Ross respecting the MGB's Jurisdiction
15	May 2, 2002 Submission from Shores Belzil Jardine respecting the MGB's Jurisdiction
16	May 27, 2002 Submission from Shores Belzil Jarding respecting timeliness of the MGB's Decision
17	May 2, 2002 Submission from Fraser Milner Casgrain respecting the MGB's Jurisdiction
18	May 9, 2002 Rebuttal from Fraser Milner Casgrain to Submissions on the MGB's Jurisdiction

19	May 27, 2002 Submission from Fraser Milner Casgrain respecting timeliness of the MGB's Decision
20	May 2, 2002 Submission from Brownlee Fryett respecting the MGB's Jurisdiction
21	April 30, 2002 Submission from the MD respecting the MGB's Jurisdiction
22	May 10, 2002 Submission from the MD respecting timeliness of the MGB's Decision

APPENDIX"C"

Following is a copy of draft Bylaw C-5487-2002.

A Bylaw of the Municipal District of Rocky View No. 44 to amend Land Use Bylaw C-4841-97

WHEREAS the Council of the Municipal District of Rocky View No. 44 has received an application to amend Part Five, Land Use Maps No. 43 and 43SW of Bylaw C-4841-97 to redesignate portions of the SW $^{1}/_{4}$-5-24-28-W4M from Ranch and Farm District to Direct Control District,

WHEREAS the *Applicant* has applied for (Application No. 2001113) and received approval from the Alberta Energy and Utility Board (EUB) (Decision 2001-101),

WHEREAS it is necessary for Council to amend the Land Use Bylaw C-4841-97 in order to give effect to the above approval,

WHEREAS a notice was published on January 29, 2002 and February 5, 2002 in the Rocky View Five Village Weekly, a newspaper circulating in the Municipal District of Rocky View No. 44 advising of the Public Hearing for February XX, 2002; and

WHEREAS Council held a Public Hearing and have given consideration to the representation made to it in accordance with Section 692 of the Municipal Government Act, being Chapter 24 of the Revised Statutes of Alberta 1995, and all amendments thereto.

NOW THEREFORE the Council enacts the following:

1. That Part Five, Land Use Maps No. 43 and 43SW of Bylaw C-4841-97 be amended by redesignating portions of the SW $^{1}/_{4}$-5-24-28-W4M from Ranch and Farm District to Direct Control District, as shown on the attached Schedule "A", forming part of this Bylaw. (the *Lands*)

2. That the special regulations of the Direct Control District comprise:

1 General Regulations

2 Land Use Regulations

3 Development Regulations

4 Definitions

5 Implementation

1.0.0 GENERAL REGULATIONS

1.1.0 That this bylaw shall be generally known as DC-XXX, as shown in Part 5 of the Land Use Bylaw C-4841-97, on Land Use Map No. 75.

1.2.0 The General Administration (Part Two) and General Regulations (Part Three) as contained in the Land Use Bylaw C-4841-97 shall apply unless otherwise specified in this bylaw.

1.3.0 Except where specifically noted that Council approval is required, the *Development Authority* shall consider and decide on applications for Development Permits for those uses which are listed as "Uses" in this bylaw.

1.4.0 All *development* upon the *Lands* shall be in accordance with all plans and specifications submitted pursuant to this bylaw and in accordance with all licenses, permits and approvals pertaining to the *Lands* required to be obtained from Alberta Environment (AENV) and the Alberta Energy and Utilities Board (EUB).

1.5.0 The *Applicant* shall prepare and submit to the Development Authority for the duration of the operation, Annual Operations Reports detailing regular and periodic noise monitoring as per 3.6.1 and annual monitoring of ground water chemistry, levels and rates and directions of flow, and any additional information which the Development Authority, having regard to the EUB decision and acting reasonably, may request. The Annual Operations Report shall be submitted 30 days prior to each annual anniversary date of the issuance of the Development Permit(s) for the site and may be referred to Council for its information or review.

2.0.0 LAND USE REGULATIONS

2.1.0 *Purpose and Intent*

The purpose and intent of this District is to provide for the construction and operation of a 525 MW nominal, 580 MW peak natural gas fired combined cycle power plant.

2.2.0 *List of Uses*

2.2.1 Fences

2.2.2 Extensive Agricultural Pursuits

2.2.3 Landscaping

2.2.4 Natural gas fired combined cycle power plant

2.2.5 Chemical storage facilities

2.2.6 Water storage facilities

2.2.7 Stormwater management pond and related facilities

2.2.8 Accessory Buildings less than 700 sq. m. (2296.6 sq. ft.)

2.2.9 Office

2.2.10 Signs

2.2.11 Roadways, Utility Services and Parking lots

2.2.12 Temporary Construction Office building(s)

2.3.0 *List of Discretionary Uses*

2.4.0 *Minimum Requirements*

2.4.1 Minimum yard setback to operations from the south property boundary, except for transmission towers or lines, retention pond, internal roads and signs: - 30.0 m (98.4 ft.)

2.4.2 Minimum yard setback to operations from the east property line,: - 76 m (249.3 ft.)

2.4.3 Minimum yard setback to operations from the east boundary of transmission line right of way 2173 JK except for transmission tower or lines or cooling towers or access roadways - 32 m (105.0 ft)

2.4.4 Minimum yard setback to operations from the north property line,: - 56 m (183.7 ft.)

2.4.5 Transmission Towers and Lines

a) 10 m (32.8 ft.) from any road, municipal except at crossings

2.4.6 Cooling Towers

a) 225.0 m (738.2 ft.) from RGE RD 285

b) 300.0 m (984.5 ft.) from TWP RD 240

2.4.7 Signs

a) 1 m (3.28 ft.) from all property lines

2.4.8 Notwithstanding the above setbacks, construction materials and equipment may be stored within setbacks from all property lines during the construction of the plant.

2.5.0 *Maximum Requirements*

2.5.1 Maximum Facility Capacities

a) Plant - 580 MW (maximum)

b) Steam turbine generators (STG's) - 116 MW each

c) Gas turbine generators - 190 MW each

2.5.2 Combined area for all permanent buildings and structures - 30,000 sq. m.

2.5.3 Height of Buildings/Structures

a) Maximum - 10 metres (32.8 ft.) except where noted

b) Powerhouse Building - 30 m (98.4 ft.)

c) Cooling Towers -20 m (65.6 ft)

d) Heat Recovery Steam Generator (HRSG) Exhaust Stacks - 45 m (147.6 ft)

e) Simple Cycle Bypass Stacks - 37 m (121.4 ft)

f) Heat Recovery Steam Generators (HRSG) - 30 m (98.4 ft)

g) General Services Building - 15 m (49.2 ft)

h) Transmission Towers - 36 m (118.1 ft)

2.5.4 Height of Fence: 5 m (16.4 ft.)

3.0.0 DEVELOPMENT REGULATIONS

3.1.0 No Development Permit for any use of the *Lands* contemplated in Section 2.0.0 of this bylaw shall be issued by the Development Authority until:

3.1.1 An application for a Development Permit for the *development* of a *natural gas fired combined cycle power plant* has been submitted in such reasonable quantities as may be required by the Development Authority and shall be accompanied by the following information, to the satisfaction of the Development Authority:

a) a key plan drawn to scale satisfactory to the Development Authority showing the proposed *development*, indicating the relation to nearby roadways, structures, waterways and to any topographic feature or landmark which will identify where the *development* is to be located and;

b) a plot plan drawn to a scale of not less that 1:1000 showing

i contours at intervals of not more that 1.0 meter (3.28 ft) throughout the site;

ii the specific location of any and all buildings or structures and or other attendant *development* related to the power plant and its operation;

iii the present and proposed means of access and egress from any municipal roadway to any *development* proposed for the *Lands* or portions thereof, including any intersection treatment(s) on or adjacent to the site and schedules for construction by the *Applicant* of same;

c) an outline of the projected method of controlling or mitigating any adverse effects resulting from noise or dust from the operation, including the submission of baseline data against which future measurements and analysis can be compared.

3.1.2 The *Applicant* has prepared a traffic impact report (Traffic Impact Analysis) for the entire *development* satisfactory to the Municipality and, in relation to any proposed improvements that impact lands within the City of Calgary, to the satisfaction of the City of Calgary. This Traffic Impact Analysis will define all improvements, including costs, required to reasonably mitigate any negative impacts on the transportation network and to secure standards of safety of the M.D. of Rocky View and the City of Calgary (where applicable) in the area of the development.

3.1.3 The *Applicant* has entered into a Development Agreement with the M.D of Rocky View to complete all road improvements recommended in the Traffic Impact Analysis at his/her sole expense;

3.1.4 The *Applicant* has submitted a hydro-geological study prepared by a *Qualified Professional*, that is satisfactory in both form and substance to the Municipality and AENV and establishes baseline well data for the *Lands* and *adjacent lands* where access has been permitted (Refusal of access must be documented to the satisfaction of the Development Authority), existing groundwater chemistry, and the rate and direction of groundwater flow. The study will also contain a groundwater monitoring plan which covers the entire period of operation;

3.1.5 The *Applicant* has submitted evidence that all necessary licenses, permits and approvals required from AENV, the EUB, the Alberta Transmission Administrator, and the City of Calgary pertaining to the *Lands* have been obtained; and

3.1.6 The *Applicant* has submitted an Emergency Response Plan completed by a *Qualified Professional*, which details, among other things, response procedures for spill control, ammonia releases, gas releases, mechanical/ structural failures and fire, to the satisfaction of the Municipality and the EUB;

3.2.0 *Construction Management*

3.2.1 The *Applicant* shall submit a *Construction Management Plan* completed by a *Qualified Professional* licensed to practice in the Province of Alberta, in form and substance satisfactory to the Municipality, which details, amongst other items, hours of operation and erosion, sedimentation, dust monitoring at regularly scheduled intervals during construction and for a period of six (6) months following initial start-up of operations, and noise control measures, to the satisfaction of the Municipality. The Construction Management Plan shall include a Traffic Management Policy relating to the supervision of the *Applicant's* contractors and employees and their use of municipal roads during the construction phase of the operation. This report shall detail methods the *Applicant* will employ to address complaints from the Community.

3.2.2 The *Applicant* shall enter into a Road Maintenance Agreement with the Municipality, over the life of the construction phase of the operation, to the satisfaction of the Director of Transportation and Field Services, prior to the issuance of any Development Permit for the *Lands*.

3.3.0 *Access and Construction Access Roads*

3.3.1 Primary access to the site will be from TWP RD 240.

3.3.2 A secondary means of access for emergency, construction and general plant operations purposes will be developed and maintained from RGE RD 285.

3.3.3 The designated construction access route shall be along 84 th Street and then along TWP RD 240, between 84 th Street and the project site. Construction and plant operations traffic will use the secondary access on RGE RD 285 if transmission line heights restrict access to the site from TWP RD 240.

3.4.0 *Servicing*

3.4.1 No development of the *Lands* for any use contemplated in Section 2.0.0 of this bylaw shall be permitted and no Development Permits shall be issued until:

a) The *Applicant* has prepared a Storm Water Management Plan, completed by a *Qualified Professional*, that is satisfactory to both the Municipality and AENV which demonstrates the manner in which stormwater will be retained on site and will not adversely impact the quality of stormwater which currently leaves the site.

b) The *Applicant* has entered into a servicing agreement with the City of Calgary for a water supply of recycled waste water from the Bonnybrook Sewage Treatment Plant.

c) Potable water services are supplied in accordance with the Public Health Act and AENV, respectively. No ground water will be used for either plant operations or as a source of potable water.

d) The *Applicant* has entered into a servicing agreement with the City of Calgary for disposal of sanitary sewage, including discharge water from power production, into the sewer system of the City of Calgary.

3.4.2 Erosion control measures shall be undertaken in accordance with the Stormwater Management Plan required in Section 3.4.1.

3.5.0 *Dust Control*

3.5.1 Dust control measures including submission of baseline measurements as in 3.1.1(c) shall be a condition of the Development Permit and the standards and responsibilities respecting same shall be established in the Development Permit.

3.6.0 *Noise Control*

3.6.1 Noise control measures including submission of baseline measurements as in 3.1.1(c) and periodic monitoring shall be a condition of the Development Permit and the standards and responsibilities respecting same shall be established in the Development Permit and shall conform to the EUB Noise Control Directive (ID 99-8).

3.7.0 *Chemical Storage*

3.7.1 No *development* of the *Lands* shall be permitted without and until the *Applicant* has prepared and submitted a Management Plan in form and substance satisfactory to both the Municipality and AENV, for the handling and storage of hazardous or other waste materials proposed to be either generated from the *development* or brought on site.

3.8.0 *Waste Disposal*

3.8.1 All chemical and hazardous waste, including oil products used in the production of power, shall be stored in drums and containers, as appropriate, and removed from the site to commercial disposal facilities.

3.8.2 All remaining refuse and waste materials shall be stored in weatherproof and animal-proof containers, screened from the view of adjacent properties and public thoroughfares, until it is removed to appropriate landfill facilities.

3.9.0 *Landscaping*

3.9.1 Landscaping shall be in accordance with a Landscaping Plan as prepared by a *Qualified Professional* and submitted with an application for a Development permit. The Landscaping Plan shall identify the location and extent of landscaping areas, the plant material proposed and the methods of irrigation and maintenance of landscaped areas.

3.10.0 *Reclamation*

3.10.1 The *Applicant* shall submit a Conservation and Reclamation Plan, in form and substance satisfactory to the Municipality, relating to minimizing and mitigating disturbance to soil and vegetation, salvaging surface and organic materials for use in reclamation, controlling wind and water erosion, effectively handling surface materials to ensure stability and prevent wind and water erosion, re-establishing surface drainage patterns and re-vegetating the land following plant decommissioning.

3.10.2 As a condition of the Development Permit, storage of removed overburden for final reclamation purposes will be managed and maintained by the *Applicant* on an ongoing basis.

4.0.0 DEFINITIONS

4.1.0 *Adjacent Land* - means:

a title of land that is contiguous to the *Lands* and includes land that would be contiguous if not for a public roadway, river or stream, or Municipal reserve.

4.2.0 *Applicant* - means:

the person(s) or company(ies) that own or have a right to own all of the *Lands* or his or her representative certified as such.

4.3.0 *Construction Management Plan* - means:

a program of activities that details the site management of all construction activity including, but not limited to, the management of construction debris and dust, erosion, sedimentation and noise.

4.4.0 *Development* - means:

a) any excavation or stockpile and the creation of either of them, a building or an addition to, or replacement, or repair of a building and construction of placing in, on, over or under land or any of them;

b) a change of use of land or a building or an act done in relation to land or a building that results in or is likely to result in change in the use of the land or building; or,

c) a change in the intensity of use of land or a building or an act done in relation to land or a building that results in or is likely to result in change in the intensity of use of the land or building.

4.5.0 *Lands* - means:

those portions of the SW $^{1}/_{4}$-5-24-28-W4M, as shown on the attached Schedule "A", forming part of this Bylaw

4.6.0 *Natural Gas Fired Combined Cycle Power Plant* -means:

a plant and related facilities and equipment designed to generate electrical power for sale. The plant and related facilities and equipment includes the following:

a) steam turbine generators (STG's)

b) gas turbine generators (GTG's)

c) power house rotor pull area

d) diesel fire pump building

e) heat recovery steam generator electrical buildings

f) fire water pump building

g) general services/administration building

h) heat recovery steam generators (HRSG's)

i) heat recovery steam generator exhaust stacks

j) by-pass stacks

k) generator step-up transformers

l) substation/switchyard

m) electrical transmission towers

n) maintenance services lay down area

o) circulating water treatment area

p) make-up water supply tank

q) cooling tower

r) cooling tower pump pit

s) appurtenances that connect the above facilities and equipment

4.7.0 *Qualified Professional* means:

an individual with specialized knowledge recognized by the Municipality and/or licensed to practice in the Province of Alberta. Examples of qualified professionals include, but are not limited to agrologists, engineers, geologists, hydrologists and surveyors.

4.8.0 All words and uses not defined in this section shall be defined as per Section 8 of Bylaw C4841-97.

5.0.0 IMPLEMENTATION

5.1.0 This Bylaw comes into effect upon its third reading.

PLANNING LAW AND PRACTICE IN ALBERTA

FOURTH EDITION

FREDERICK A. LAUX, Q.C.
GWENDOLYN STEWART-PALMER

Juriliber

Providing a rationale serves three main purposes: it promotes better decision- making by reducing the chances of arbitrary or capricious decisions, it reinforces public confidence in the decision making process and adds to an appearance of fairness, and, most importantly, it affords an opportunity to the parties to assess the question of appeal or judicial review, and facilitates the court's exercise of its supervisory jurisdiction on questions of law and jurisdiction where judicial proceedings are taken.[226] Since mandatory reasons are viewed by the courts as an important element in the process, failure to provide "proper, adequate and intelligible" reasons will result in the decision being set aside.[227]

§10.6(3)(a) Adequacy of Reasons

Most subdivision and development appeal boards consist of lay persons operating without benefit of legal counsel on a day-to-day basis. Thus, in the first few years of operation of the 1977 *Planning Act*,[228] board decisions were under constant, and frequently successful, attack in the courts on the ground that the reasons given were inadequate. The most common problem was that boards tended to give what the courts perceived as conclusions rather than reasons. For example, in one of the earliest reported cases concerning a development appeal board, the board was confronted with the question of whether or not to permit construction of a high-rise apartment building in a district which was primarily low density residential, but in which apartments were authorized as a discretionary use by the land use bylaw.[229] One of the arguments advanced at the board hearing by opponents of the development was that the proposed front yard set-back of only five feet instead of the bylaw mandated twenty feet, was inadequate. The board approved the development

226 *Northwestern Utilities Ltd. v. Edmonton (City)* (1979), 1 S.C.R. 684, 7 Alta. L.R. (2d) 370 at 385-86, 12 A.R. 449, 89 D.L.R. (3d) 161, 23 N.R. 565 (S.C.C.). For an excellent treatment of the subjects of value of reasons, the obligation to give reasons, content of reasons and the consequences flowing from the failure to give adequate reasons see Kushner, *"The Right to Reasons in Administrative Law"* (1986), 24 Alta. L. Rev. 305. See also *Baker v. Canada (Minister of Citizenship and Immigration)* (1999) 174 D.L.R. (4th) 193, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817, *reversing* (1996) 142 D.L.R. (4th) 554, 207 N.R. 57, 122 F.T.R. 320 (note), [1997] 2 F.C. 127 (Fed. C.A.), *affg* (1995) 31 Imm. L.R. (2d) 150, 101 F.T.R. 110 (Fed. T.D.). See also *Lor-al Springs Ltd. v. Ponoka (County) Subdivision and Development Appeal Board*, [2000] A.J. No. 1286, 2000 A.B.C.A. 299 at para. 11-15, (2000) 90 Alta. L.R. (3d) 52, (2000) 271 A.R. 149, (2000) 19 M.P.L.R. (3d) 216.

227 *Dome Petroleum Ltd. v. Alberta (Public Utilities Board)*, [1976] 2 A.R. 453 at p. 472, 13 N.R. 301 (Alta. C.A.), *affirmed* [1977], 2 S.C.R. 822, 2 A.R. 451, 13 N.R. 299 (S.C.C). The "adequacy" of reasons for purposes of the Act ought not to be confused with the "correctness" of the reasons. Reasons can be adequate from a drafting point of view even though they are the wrong reasons. Wrong reasons can only be challenged successfully in court if they disclose an error of law or jurisdictional defect.

228 Planning legislation prior to 1977 contained no requirement that an appeal board give reasons for its decision.

229 *Hannley v. Edmonton (City)* (1978), 7 Alta. L.R. (2d) 394, 12 A.R. 473, 91 D.L.R. (3d) 758, 8 M.P.L.R. 220 (C.A.). See also, *Couillard v. Edmonton (City)* (1979), 18 A.R. 31, 11 M.P.L.R. 190, 10 Alta. L.R. (2d) 295, 103 D.L.R. (3d) 312 (C.A.), and *Murray v. Rocky View (Municipal District No. 44)* (1980), 14 Alta. L.R. (2d) 86, 2 A.R. 80 (C.A.).

under its variance power and gave as its reason that the development would not "adversely affect the amenities of the neighbourhood". This statement was nearly word for word with the provisions of the Act clothing the board with the variance power. The court found the reasons not to be reasons at all, but conclusions, and set aside the decision.

The incidence of successful judicial review on the ground of the inadequacy of reasons has diminished as the courts have progressively established some general rules, outlining the content of properly drafted reasons, which most boards appear to be following. The standards that the courts have established now can be briefly summarized.[230] The adequacy of reasons is not judged with reference to the decision alone. Instead, the whole context in which the impugned decision was made must be addressed, including: the nature of the matter under appeal, any statutory directives, any applicable planning instruments, the written record of the board's proceedings, and the issues and arguments raised before the board by the parties.[231] The decision should disclose what findings of fact the board has made where evidence is contradictory on a key point, or where facts need to be established to determine whether a proposed development conforms to a plan or bylaw.[232] Where a bylaw permits a board to deviate from otherwise mandatory criteria if the board is of the opinion that it is reasonable and appropriate to do so, the board's decision must disclose on its face that it considered whether the criteria were applicable and, if applicable, why it was appropriate for the board to waive them.[233] It is not a sufficient reason merely to state that the waiver of the criteria poses no threat to the neighbourhood.

Although a board generally should in its decision address all the vital issues raised at the hearing by the various parties to demonstrate that it has taken into account all relevant concerns, it is not fatal to the adequacy of the reasons if a decision omits mention of an issue raised by a party in opposition to a development ultimately approved by the board,[234] where the issue is a factual one and no evidence of any kind was adduced at the hearing in respect

230 For an insightful summary of the law see *Lor-al Springs Ltd. v. Ponoka (County) Subdivision and Development Appeal Board*, [2000] A.J. No. 1286, 2000 A.B.C.A. 299, (2000) 90 Alta. L.R. (3d) 52, (2000) 271 A.R. 149, (2000) 19 M.P.L.R. (3d) 216 (Leave Application).

231 *Couillard v. Edmonton (City)*, *ibid.*, at p. 303. Thus, even if the decision itself, on its face, is deficient but is intelligible and adequate having regard to the materials before the court, that will suffice: *Rogers v. Strathcona (County) Development Appeal Board*, [1979] Alta. D. 1481 (C.A.). See also, *Keephills Aggregate Co. Ltd. v. Parkland (County) SDAB*, [2003] A.J. No. 1017, 2003 A.B.C.A. 242, (2003) 348 A.R. 41, (2003) 42 M.P.L.R. (3d) 28 and *Daysland (Town) v. Daysland (Subdivision and Development Appeal Board)*, [2011] A.J. No. 73, 2011 ABCA 33.

232 *O'Hanlon v. Foothills (Municipal District No. 31)* (1979), 17 A.R. 477, [1979] 6 W.W.R. 709, 11 M.P.L.R. 56, 105 D.L.R. (3d) 498 (C.A.), *affirmed* [1980] 1 W.W.R. 304, 21 A.R. 179 (C.A.).

233 *Noble v. Lethbridge (City) Development Appeal Board* (1982), 42 A.R. 222 (C.A.).

234 *The Liquor Depot at Callingwood Ltd. v. Edmonton (City)* (February 9, 1995; July 25, 1995), Docs. Edmonton 9503-0012-AC, 9503-0033-AC (Alta. C.A.), leave to appeal to S.C.C. refused (February 21, 1996) (S.C.C.). See also *Strathcona (County) v. Allan*, 2006 A.B.C.A. 129 (Leave to appeal).