Case Name:

Keller v. Bighorn (Municipal District, No. 8)

Between
Rod Keller, Applicant, and
Municipal District of Bighorn No. 8 and Wild Buffalo Ranching Ltd., Respondents

[2010] A.J. No. 606

2010 ABQB 362

481 A.R. 93

72 M.P.L.R. (4th) 291

2010 CarswellAlta 994

19 Admin. L.R. (5th) 198

2010 CarswellAlta 994

Docket: 0701 09911

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

S.L. Hunt McDonald J.

Heard: March 9, 10 and 12, 2010.
Judgment: May 27, 2010.

(63 paras.)

Municipal law -- Bylaws and resolutions -- Enactment of bylaws -- Requirements -- Readings -- Grounds for invalidity -- Ultra vires -- Uncertainty and vagueness -- Application by Rod Keller for judicial review of three bylaws enacted by the respondent Municipal District of Bighorn dismissed -- The combined effect of the bylaws would permit the respondent Wild Buffalo Ranching Ltd. to transfer "density credits" and proceed with a proposed residential development -- The bylaws were intra vires, reasonable and passed after the Municipality followed the proper

procedures -- The Alberta Land Stewardship Act did not apply retroactively to invalidate the bylaws and only the Stewardship Commissioner could challenge the bylaws on the basis of inconsistency with that Act -- The bylaws were sufficiently certain -- Alberta Land Stewardship Act, ss. 18, 48 -- Bighorn Bylaw 06/07 -- Bighorn Bylaw 07/07 -- Bighorn Bylaw 08-z/07 -- Interpretation Act, s. 5 -- Municipal Government Act, s. 537.

Municipal law -- Planning and development -- Zoning regulations -- Density -- Application by Rod Keller for judicial review of three bylaws enacted by the respondent Municipal District of Bighorn dismissed -- The combined effect of the bylaws would permit the respondent Wild Buffalo Ranching Ltd. to transfer "density credits" and proceed with a proposed residential development -- The bylaws were intra vires, reasonable and passed after the Municipality followed the proper procedures -- The Alberta Land Stewardship Act did not apply retroactively to invalidate the bylaws and only the Stewardship Commissioner could challenge the bylaws on the basis of inconsistency with that Act -- The bylaws were sufficiently certain -- Alberta Land Stewardship Act, ss. 18, 48 -- Bighorn Bylaw 06/07 -- Bighorn Bylaw 07/07 -- Bighorn Bylaw 08-z/07 -- Interpretation Act, s. 5 -- Municipal Government Act, s. 537.

Application by Rod Keller for judicial review of three bylaws enacted by the respondent Municipal District of Bighorn. The combined effect of the bylaws would permit the respondent Wild Buffalo Ranching Ltd. (Wild Buffalo) to transfer "density credits" from one parcel of land to another, permitting Wild Buffalo to proceed with a proposed residential development. The proposed development site was directly adjacent to lands owned and maintained by the applicant as a nature preserve. The applicant took the position that the bylaws were ultra vires the Muncipality, void for uncertainty and were conditional upon a public consultation process that did not occur. The applicant also argued that he was not given prior notice of the Municipality's intention to consider and give third readings to two of the bylaws on August 14, 2007 and that the bylaws passed were materially different from the bylaw presented for the April 2007 public hearing. The applicant further argued that Bylaw 07/07 should be declared invalid on the basis the Area Structure Plan failed to comply with Bylaw 08-X/07 and with the amended Municipal Development Plan. The applicant also took the position the Alberta Land Stewardship Act applied to invalidate the bylaws.

HELD: Application dismissed. The bylaws were intra vires, reasonable and passed after the Municipality followed the proper procedures. The Alberta Land Stewardship Act did not apply retroactively to invalidate the bylaws and only the Stewardship Commissioner could challenge the bylaws on the basis of inconsistency with that Act. The bylaws were sufficiently certain to be understood by those who would be affected by them. The motion passed did not commit the Municipality to a course of public consultation. There was no statutory obligation imposed upon the Municipality to give further notice that it intended to consider and give third reading to a bylaw. The Area Structure Plan complied with Bylaw 08-X/07 and the amended Municipal Development Plan.

Statutes, Regulations and Rules Cited:

Alberta Land Stewardship Act, s. 13, s. 18, s. 48, s. 49, s. 50, s. 62

Bighorn Municipal Development Plan, s. 3.3, s. 3.3.1(XV), s. 9.1.11 s. 15.6, s. 15.6.14, s. 15.6.15, s. 15.6.16

Bighorn Bylaw 06/07,

Bighorn Bylaw 07/07,

Bighorn Bylaw 08-z/07,

Interpretation Act, RSA 2000, c. I-8, s. 5, s. 28

Municipal Government Act, RSA 2000, c. M-26, s. 536, s. 537, s. 538, s. 617, s. 632, s. 633(2), s. 639, s. 640(1), s. 692

Counsel:

K. Staroszik, QC, for the Applicant.

L. M. Sali, QC, for the Respondent, Wild Buffalo Ranching Ltd.

J. Klauer, for the Respondents, Municipal District of Bighorn.

Reasons for Judgment

1 **S.L. HUNT McDONALD J.**:-- This is an application for Judicial Review of three bylaws, enacted by the Respondent Municipal District of Bighorn ("the Municipality") in June and August 2007. The combined effect of the bylaws would permit the Respondent Wild Buffalo Ranching Ltd. ("Wild Buffalo") to transfer "density credits" from one parcel of land owned by Wild Buffalo to another. An arrangement by which subdivision rights, or density, may be transferred from one parcel of land to another is often referred to as a "transfer of subdivision density" or a "transfer of development credits" scheme ("TDC scheme"). The TDC scheme implemented by the Municipality would permit Wild Buffalo to proceed with a proposed residential development called Carraig Ridge. The site proposed for Carraig Ridge is directly adjacent to lands owned and maintained as a nature preserve by the Applicant, Rod Keller.

Background

2 In 1989, Mr. Keller purchased a 406-acre parcel of ranch land in the Bow River Corridor, 20 kilometres west of Cochrane, Alberta ("the Keller lands"). He built a house on the property and has resided there ever since. In 2006, Wild Buffalo purchased an adjacent 662-acre parcel of land ("the Carraig Ridge lands"). Wild Buffalo and/or its principal, Mr. Ian McGregor, also owns land north of the Carraig Ridge and Keller lands ("the Jamison Road lands").

3 The Keller, Carraig Ridge and Jamison Road lands are located in an area designated a "Small Holdings Area" within the Municipal District of Bighorn No. 8. Under the Municipal Development Plan ("MDP") as it existed prior to June 2007, these lands could each be subdivided into 40-acre lots with one residence per lot. Wild Buffalo's plan for the Carraig Ridge lands was to build a residential development consisting of 45 homes, but under the MDP subdivision would be limited to 16 lots.

4 In February 2007, Wild Buffalo applied to the Municipality for the enactment of three bylaws. Bylaw 06/07 would amend the MDP as follows:

1. To Section 3.3 Municipal Goals, the following new goal is added:

   3.3.1 xv) To provide opportunities to apply innovative land use planning and environmental conservation concepts that improve municipal efficiencies and reduce rural sprawl.

2. To Section 15.6, Small Holdings, add Policies 15.6.14 through 15.6.18 as follows:

   15.6.14 Notwithstanding the subdivision limitations established elsewhere in section 15.6, landowners wishing to redistrict (rezone) and subdivide land in the Small Holdings Policy area may undertake a "Transfer of Subdivision Density (TSD)" program as an optional planning technique to concentrate subdivision into a smaller human footprint and to

reduce the amount of land that would otherwise be fragmented within the Small Holdings area.

15.6.15 The TSD option allows gathering and transferring of subdivision density potential (as identified in policy 15.6.3) from one or more Sending Parcels within the Small Holdings area and concentrating it into one or more Receiving Parcels, also located in the Small Holdings area.

15.6.16 In order to prevent future subdivisions of a Sending Parcel after the transfer of its subdivision density to a Receiving Parcel, a conservation easement must be registered on the title of the Sending Parcel at the time of subdivision approval. The Sending Parcels may only send the number of lots that are allowed under policy 15.6.3.

15.6.17 Landowners choosing to undertake the TSD option shall be required to prepare an Area Structure Plan and shall apply the Transfer of Subdivision Density (TSD) District of the Land Use Bylaw to the land that is the Receiving Parcel.

15.6.18 Similarly, a Conservation Easement (CE) District shall be applied through the Land Use Bylaw to those Sending Parcel lands that are subject to a Conservation Easement in accordance with policy 15.6.16.

Bylaw 07/07 would provide for the approval of the Area Structure Plan prepared by Wild Buffalo ("the Carraig Ridge ASP"). Bylaw 08-Z/07 would amend the Land Use Bylaw ("LUB") by adding several definitions:

"Transfer of Subdivision Density (TSD)" means a land use policy that reduces or eliminates subdivision potential in one or more parcels while increasing, by the same number, subdivision potential in one or more other parcels. The technique gathers a base development density assigned to all parcels in an area and divides the land into Sending Parcels and Receiving Parcels as defined elsewhere in this section.

"Sending Parcels" means land that is restricted from future subdivision and/or development as part of a comprehensive Transfer of Subdivision Density program. Sending Parcels require the registration of a Conservation Easement on the certificate of title to ensure the terms of development restrictions remain in effect in perpetuity.

"Receiving Parcels" means land that is granted the benefit of more subdivision and/or development than the base density allows as the result of a comprehensive Transfer of Subdivision Density program implemented in accordance with Municipal Development Plan policy.

Bylaw 08-Z/07 would also add the new districts of "Transfer of Subdivision Density District (TSD) and Conservation Easement District (CE) to the LUB, and rezone the subject lands from Agriculture Conservation District to Transfer of Subdivision Density District.

5 Collectively, these bylaws would permit Wild Buffalo to transfer subdivision rights from the Jamison Road lands to the Carraig Ridge lands. In exchange, the registration of a conservation easement against the Jamison Road lands would

restrict Wild Buffalo's right to subdivide there. Ultimately, Wild Buffalo would be able to apply to subdivide the Carraig Ridge lands into a total of 45 lots.

6 First reading was given to the three bylaws on February 13, 2007. Section 692 of the *Municipal Government Act*, R.S.A. 2000, c.M-26 ("MGA") provides:

> 692 (1) Before giving second reading to
>
> (a) a proposed bylaw to adopt an intermunicipal development plan,
> (b) a proposed bylaw to adopt a municipal development plan,
> (c) a proposed bylaw to adopt an area structure plan,
> (d) proposed bylaw to adopt an area redevelopment plan,
> (e) a proposed land use bylaw, or
> (f) a proposed bylaw amending a statutory plan or land use bylaw referred to in clauses (a) to (e),a council must hold a public hearing with respect to the proposed bylaw in accordance with section 230 after giving notice of it in accordance with section 606.
>
> (2) Despite subsection (1), if a proposed development relates to more than one proposed bylaw referred to in subsection (1), the council may hold a single public hearing.

7 In accordance with s.692 of the MGA, a public hearing for each of the Bylaws was held on April 19, 2007. The minutes of the April 19 2007 public hearing indicate that after a presentation by Wild Buffalo, a number of parties spoke and submitted materials in favour and opposed to the bylaws. Mr. Keller attended the April 19 2007 meeting, spoke in opposition to the bylaws and submitted an 89-page report.

8 On June 12 2007, the Municipality passed second and third reading for Bylaw 06/07. After second reading was passed, but before third reading, the Municipality passed a motion:

> Moved by Councillor Dunki that Council direct staff to undertake a public consultation process regarding the transfer of subdivision density policy, with the intention of seeking improvements to the policy as set out in the draft Bylaw 06/07 by determining such things as the values that the community wants to protect and their ranking relative to one another.

9 After the June 12 2007 Council meeting, Councillor Maria Dunki circulated a letter to her constituents. Entitled "June Bighorn Update", the letter referred to the Carraig Ridge proposal and indicated:

> To facilitate the Land Use Bylaw changes (or "rules" document) Council also asked Administration to set up a community consultation process "with the intention of... determining such things as the land values that the community wants to protect and their ranking relative to one another." No date has been set, but I will give you lots of notice. Most area residents will recall a similar process a few years ago that was well received. Council recognizes the importance of the opportunity to discuss, share, learn together and thus provide Council with direction. The Public Hearing process is mandated by the Municipal Government Act but is only one way of finding out the public view. Consultation is the other way and Council recognizes this.

10 No additional public consultation took place between June 12 and August 14, 2007, when second and third reading was given to Bylaw 07/07 and Bylaw 08-Z/07. However, the Municipality held community workshops the following year, on May 29 and June 19, 2008, to discuss the transfer of subdivision density policy with landowners.

Though Mr. Keller attended both of these workshops, the Bylaws he seeks to challenge had already been passed. He filed the Originating Notice challenging the three bylaws on October 3, 2007.

Issues

11 The issues are as follows:

1. Does s.537 of the *Municipal Government Act* apply to the challenge to Bylaw 06/07?
2. What is the appropriate standard of review?
3. Should the Bylaws be declared invalid on the basis that:

(a) The bylaws are ultra vires the Municipality; or
(b) The bylaws are void for uncertainty; or
(c) The bylaws were conditional upon a public consultation process which did not occur;

4. Should Bylaws 08-Z/07 and 07/07 be declared invalid on the basis that:

(a) Mr. Keller was not given prior notice of the Municipality's consideration of the Bylaws on August 14, 2007;
(b) The bylaws that were passed was materially different from the bylaw presented for the public hearing in April, 2007.

5. Should Bylaw 07/07 be declared invalid on the basis that:

(a) The Area Structure Plan fails to comply with Bylaw 08-Z/07 and sections 9.1.11, 3.3.1(XV), 15.6.14, 15.6.15, and 15.6.16 of the amended Municipal Development Plan.

6. The Effect of the Alberta Land Stewardship Act

12 The Municipality points out that while Mr. Keller has raised the issue of the *vires* of Bylaw 07/07 in argument, he did not do so in the Amended Originating Notice. In argument, counsel for Mr. Keller submitted that his contention in this regard is that Bylaw 07/07 is part of "scheme that is *ultra vires*", insofar that if either Bylaw 06/07 or Bylaw 08-Z/07 are struck down, Bylaw 07/07 would lack a legislative foundation. In my view, notwithstanding the failure to include reference to the *vires* of Bylaw 07/07 in the Amended Originating Notice, it is appropriate to consider the issue in this context.

Analysis

1. Section 537 of the Municipal Government Act

13 Sections 536 to 538 of the MGA provide:

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

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

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

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

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

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

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

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

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

(i) the bylaw is required to be put to a vote of electors and the vote has not been conducted or if the bylaw was not given the required approval in such a vote,
(ii) the bylaw is required to be advertised and it was not advertised, or
(iii) a public hearing is required to be held in respect of the bylaw and the public hearing was not held,

14 I agree that s.537 would limit the Applicant's ability to argue that Bylaw 06/07 was conditional upon further consultation. At the hearing of this matter, the Applicant limited the argument in this regard to Bylaws 07/07 and 08-Z/07. I disagree with Wild Buffalo that, because the Applicant has referred to ss. 536 to 538 in his Originating Notice of Motion, s.537 bars his application in respect of Bylaw 06/07 in its entirety. I agree with the Applicant that a bylaw enacted without jurisdiction is a nullity and therefore subject to challenge notwithstanding the passage of the 60-day limit in s.537. Moreover, to the extent that the Applicant has raised the issues set out in s.538, it is proper to consider them.

2. Standard of Review

15 The standard of review with respect to a Municipal Council's jurisdiction to make bylaws is correctness: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485. The Applicant also challenges the process followed by the Municipality in passing the bylaws, in particular with respect to statutory notice requirements, and I am satisfied that it is appropriate to determine whether the Municipality correctly complied with its statutory obligations in this regard.

16 In his supplementary materials, the Applicant has also challenged the reasonableness of the Municipality's decisions, assuming that they are found to have been *intra vires*. Interestingly, the Applicant contends that the appropriate standard of review in this regard is patent unreasonableness, while the Municipality argues that the proper standard for assessing an *intra vires* decision of a Municipal Council is "reasonableness, with a high degree of deference

being afforded to the Council's decision."

17 All parties are aware of the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, wherein the Court collapsed the previous categories of patent unreasonableness and reasonableness into one category, thereafter to be known as reasonableness. In the wake of *Dunsmuir*, it is unusual for a party seeking judicial review to argue or concede that the appropriate standard of review for an *intra vires* decision is patent unreasonableness, but understandable confusion arises as a result of s.539 of the *Municipal Government Act*, which provides:

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

18 Prior to *Dunsmuir*, s.539 was interpreted to mean that the appropriate standard of review for *intra vires* municipal actions should be patent unreasonableness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 at para.38._With the patent unreasonableness standard effectively collapsed into the reasonableness standard, the question raised by s.539 is whether it operates to preclude judicial review of *intra vires* bylaws or resolutions altogether, or merely evidences an intention on the part of the Legislature to provide significant but not complete privative protection, thereby weighing in favour of a high degree of deference within the reasonableness standard.

19 Since the Municipality has argued for the latter interpretation and the Applicant has argued for a patent unreasonableness standard, and because of my determination with respect to the reasonableness of the bylaws implementing the TSD scheme, it is not necessary to resolve the question of whether s.539 would operate to bar judicial review of an *intra vires* bylaw altogether. I agree with the Municipality's assertion, however, that the first step in the standard of review analysis mandated by *Dunsmuir* is to determine whether the degree of deference is well settled by the case law, and that the case law strongly suggests that a high degree of deference is appropriate. This was made clear by the Supreme Court of Canada in *Nanaimo*, at para.35: __

> ... Municipal Councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing intra vires decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the intra vires decisions of municipalities should be reviewed upon a deferential standard.

See also *Montreal (Ville) v. 2952-1366 Quebec Inc.* [2005] 3 S.C.R. 141, at para.47; *St. Paul (County) No. 19 v. Belland*, 2006 ABCA 55, [2005] A.J. No. 152, at paras. 13-16.

3. Are the Bylaws Ultra Vires and/or Unreasonable?

20 Part 17 of the MGA sets out the authority of a municipality for planning and development. Section 617 of the MGA provides:

> 617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted
>
> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
> (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta, without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

21 Section 632 of the MGA sets out the list of items which must, and which may, be addressed in a Municipal Development Plan:

> 632(1) A council of a municipality with a population of 3500 or more must by bylaw adopt a municipal development plan.
>
> (2) A council of a municipality with a population of less than 3500 may adopt a municipal development plan.
>
> (3) A municipal development plan
>
> (a) must address
>
> (i) the future land use within the municipality,
> (ii) the manner of and the proposals for future development in the municipality,
> (iii) the co-ordination of land use, future growth patterns and other infrastructure with adjacent municipalities if there is no intermunicipal development plan with respect to those matters in those municipalities,
> (iv) the provision of the required transportation systems either generally or specifically within the municipality and in relation to adjacent municipalities, and
> (v) the provision of municipal services and facilities either generally or specifically,
>
> (b) may address
>
> (i) proposals for the financing and programming of municipal infrastructure,
> (ii) the co-ordination of municipal programs relating to the physical, social and economic development of the municipality,
> (iii) environmental matters within the municipality,
> (iv) the financial resources of the municipality,
> (v) the economic development of the municipality, and
> (vi) any other matter relating to the physical, social or economic development of the municipality,
>
> (c) may contain statements regarding the municipality's development constraints, including the results of any development studies and impact analysis, and goals, objectives, targets, planning policies and corporate strategies,
> (d) must contain policies compatible with the subdivision and development regulations to provide guidance on the type and location of land uses adjacent to sour gas facilities,
> (e) must contain policies respecting the provision of municipal, school or municipal and school reserves, including but not limited to the need for, amount of and allocation of those reserves and the identification of school requirements in consultation with affected school authorities, and

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

22 Section 639 of the MGA provides that every municipality must pass a land use bylaw. Section 640(1) sets out a list of items that must, and may, be considered in an LUB:

> 640(1) A land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality.
>
> (2) A land use bylaw
>
> (a) must divide the municipality into districts of the number and area the council considers appropriate,
> (b) must, unless the district is designated as a direct control district pursuant to Section 641, prescribe with respect to each district,
>
> (i) the one or more uses of land or buildings that are permitted in the district, with or without conditions, or
> (ii) the one or more uses of land or buildings that may be permitted in the district at the discretion of the development authority, with or without conditions,
>
> or both;
>
> (e) must establish the number of dwelling units permitted on a parcel of land.
>
> (4) Without restricting the generality of subsection (1), a land use bylaw may provide for one or more of the following matters, either generally or with respect to any district or part of a district established pursuant to subsection (2)(a):
>
> (o) the density of population in any district or part of it; ...

23 Section 633(2) of the MGA sets out the list of items that a municipality must and may address in an Area Structure Plan:

> 633(2) An area structure plan
>
> (a) must describe
>
> (ii) the land uses proposed for the area, either generally or with respect to specific parts of the area,
> (iii) the density of population proposed for the area either generally or with respect to specific parts of the area,

and

(b) may contain any other matters the council considers necessary.

24 The Applicant submits that a transfer of development rights is not included in s.632, s.640 and s.633(2) and therefore an amendment to an existing MDP, LUB and/or ASP to allow for a transfer of subdivision density is *ultra vires*. In the alternative, the Applicant submits that, if the Municipality has jurisdiction to implement a transfer of subdivision density scheme, it does not have the power under any of these provisions to "randomly and arbitrarily" transfer subdivision rights and may only do so for conservation purposes.

25 The parties are agreed that the law mandates a broad and purposive approach to the interpretation of municipal authority under the MGA: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary*, [2004] 1 S.C.R. 485; *Keyland Development Corporation v. Cochrane (Town of)*, [2007] A.J. No. 275 (Q.B.). Both the Respondent Municipality and the Applicant have directed me to an article in the Journal of Environmental Law and Practice: Kwasniak, Arlene: *The Potential for Municipal Transfer of Development Credit Programs in Canada*, (2004) 15 J.E.L.P. No.2, at pps. 47-70, wherein Professor Kwasniak notes, at p.60, that, because of this broad and purposive approach, municipalities likely have implied authority to develop systems for the transfer of density. Professor Kwasniak relied in this regard upon the decision of the Alberta Court of Appeal in *698114 Alberta Ltd. v. Banff (Town of)*, [2000] A.J. No. 992 (C.A.). In that case, the Court considered a bylaw that allocated commercial development rights according to a lottery scheme and expressly approved the Chambers Judge's conclusion that, while the lottery scheme was not expressly authorized by the MGA, "the broad powers of regulation and control" therein provided the municipality with the authority to implement the lottery system.

26 Under s.632(a)(ii), an MDP must address the manner of future development within the municipality. Under s.632(b)(iii) and s.632(3)(b)(vi), it may address environmental matters and the physical, social and economic development of the municipality. Though the legislation does not refer specifically to a TDC scheme, in my view such a scheme clearly falls within the broad powers of regulation and control provided to the municipality under these sections of the MGA. Similarly, s.640(4)(o) very clearly provides authority to the municipality to provide for density in its LUB, and s.633(2)(a) requires a municipality to address issues of land use and population density in any ASP. The Applicant may disagree with how the Municipality has chosen to exercise its powers in this regard, but the legislation clearly extends to the Municipality the authority necessary to amend its MDP and LUB and to approve an ASP that includes the components necessary for the transfer of subdivision density from one part of the municipality to another.

27 The Applicant's argument in the alternative is that, if the Municipality has the authority to implement a TDC scheme, it must do so only for conservation purposes. He has directed me to a number of articles and materials from the United States, where such schemes are apparently common, in support of the proposition that a TDC scheme is a tool to achieve conservation only. (See: Pruetz, Erica: *Transfer of Development Rights Turns 40*: American Planning Association and Planning & Environmental Law, 2007; *Fact Sheet: Transfer of Development Rights*, American Farmland Trust, 2001.) He also points out that Professor Kwasniak writes, at p.49-50:

> In rural settings the objectives of TDC programs typically are to preserve landscape features such as agriculture, open space, wildlife habitat, or important ecological features as well as to prevent fragmentation ... a TDC program meets these objectives by shifting permissible densities from areas where development is less desirable to areas where it is more desirable.

28 Aside from these indicators of how such schemes are typically implemented in the United States, the Applicant has cited no authority for the proposition that the broad powers conferred upon a municipality under s.632 and s..640 of the MGA to address development and population density should *prima facie* be limited to a conservation purpose. A TDC scheme implemented by a municipality in the Province of Alberta does not depend for its validity upon the rationale for such schemes in other jurisdictions; it is sufficient if the scheme falls within the jurisdiction of the

municipality under the MGA.

29 Moreover, "conservation purposes" may be very much in the eye of the beholder. Obviously, in Mr. Keller's view, it is more important to limit development at the Carraig Ridge site than to limit development on the Jamison Road lands. In preventing any further subdivision on the Jamison Road lands, however, it appears that the Municipality may achieving at least two of the objectives described by Professor Kwasniak: the prevention of fragmentation and the preservation of agriculture on the Jamison Road lands. This may advance a conservation objective, though not the conservation objective that Mr. Keller would like. In essence, Mr. Keller would prefer to see the Carraig Ridge site remain low density at the potential expense of further subdivision on the Jamison Road lands. The municipality has evidenced a preference to increase the density at Carraig Ridge in favour of preserving the Jamison Road lands. The question of which lands are better preserved is not a jurisdictional one, it is instead a question that goes directly to the reasonableness of the Municipality's decision.

30 The reasonableness standard is described in *Dunsmuir*, at para.47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lent themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

31 The Applicant contends that the decision to implement the TDC scheme was unreasonable because no conservation group supported it, because the scheme failed to include the process by which sending and receiving lands would be assessed, and because it is "patently unreasonable to use a conservation tool for an anti-conservation purpose." In my view, there are any number of reasons why a municipality might consider a TDC scheme beyond conservation purposes, so long as the scheme fits municipal objectives and falls within the municipality's jurisdiction. Moreover, as noted above, the municipality has not implemented this particular TDC scheme wholly without regard to conservation. The scheme would significantly and perhaps permanently limit further development on the Jamison Road lands. Those lands are presently used for agricultural purposes and, on the Applicant's own submissions, the preservation of agricultural lands has been recognized as a valid objective for TDC schemes.

32 Nor am I satisfied that the decision made by the Municipality is unreasonable because, as the Applicant submits, it is missing the essential component of how to identify and assess the lands to be preserved and the capacity of the receiving parcel. As the Municipality points out, under the TDC scheme, the receiving lands must be suitable for the proposed density in order to be approved for subdivision, regardless of the TDC policy, and the criteria for suitability (which are set out in further detail below) are clearly established. Similarly, the lands to be preserved must meet the criteria established for a conservation easement, which are again discussed below but are clearly set out in legislation.

4. Are the Bylaws Void for Uncertainty?

33 The Applicant contends that Bylaw 06/07 is void for uncertainty because it fails to identify and rank the criteria used to assess what land is to be preserved and what land is to receive the transfer of subdivision density.

34 Uncertainty, in the context of a municipal bylaw, was addressed by Beetz J. in *Montreal (City) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, at para.87:

> Each case is practically unique, and the Courts have to determine each time whether the true

meaning of the by-law in question can be understood by the persons to whom it applies.

35 Difficulty in interpretation is not should not be confused with uncertainty to point of invalidity: *Montreal Amusements*, at para.83; *698114 Alberta Ltd.*, 2000 ABCA 237, [2000] A.J. No. 992, at para.30. In *698114 Alberta Ltd.* the Alberta Court of Appeal upheld an amendment to the Land Use Bylaw even where that amendment imposed a lottery scheme whereby a landowner could not predict when a proposed commercial development that was permitted could proceed. The Court of Appeal agreed with the Chambers Judge's conclusion that, "while the outcome of the random draw was uncertain, the machinery governing the lottery is understandable by those who are affected by it."

36 Bylaw 06/07 establishes the goal of promoting innovative land use planning and environmental conservation and proposes the TDC scheme as one means to do so. It requires the registration of a conservation easement upon the sending parcel. The conservation easement cannot be registered unless it meets the requirements of s.22 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.E-12, which means that protection of the sending parcel must meet the objectives of protecting, conserving or enhancing the environment or providing for, *inter alia*, recreational use or open space use in a manner that is consistent with the protection, conservation and enhancement of the environment. The Municipality further points out that the application of the TDC policy does not alleviate its statutory obligation under s.654 of the MGA to only approve a subdivision application where the proposed land is suitable for the intended purpose of the subdivision. At the time the application for subdivision is put to the Municipality for approval, the Municipality must consider, *inter alia*, the topography, soil characteristics, potential for flooding, subsidence or erosion, accessibility, availability of water supply and sewage disposal, and the use of land in the vicinity of the subject land. Consequently, I am satisfied that the bylaws are sufficiently certain to be understood by those who would be affected by them.

5. Were the Bylaws Conditional Upon Further Public Consultation?

37 The Applicant's claim that Bylaw 06/07 was conditional upon further public consultation was filed more than 60 days after Bylaw 06/07 was passed by Municipal Council and is out of time pursuant to s.537 of the MGA. The Applicant's challenge to Bylaws 08-Z/07 and 07/07 was brought within the period set out in s.537 and may be considered on the merits.

38 The statutory requirement for a public hearing is set out at s.692, and a public hearing to consider all three bylaws took place on April 19, 2007. The Applicant was present and made fulsome submissions. The Applicant points out that no environmental groups supported the three bylaws at the public hearing, and a number of residents in the vicinity of the Carraig Ridge lands attended and stated their objections. Some neighbours opposed the development proposal that would be facilitated by the bylaws, while others supported it.

39 The Applicant contends that the Municipality committed itself to further public consultation on June 12, 2007 when, in between second and third reading of Bylaw 06/07, Municipal Council passed the motion directing its staff to undertake a public consultation process "with the intention of seeking improvements to the policy as set out in draft Bylaw 06/07 by determining such things as the values that the community wants to protect and their ranking relative to one another." Municipal Council immediately thereafter proceeded to third reading and passage of Bylaw 06/07.

40 In my view, the motion passed on June 12, 2007 did not commit the Municipality to a course of public consultation upon which further passage of Bylaws 06/07, 08-Z/07 and 07/07 was conditional. While the Municipality was committed to implementing a process by which the policy might be improved, there is nothing in the language of the motion to suggest that passage of the Bylaws would be conditional upon such a process, or that further public consultation would necessarily result in a change to the Bylaws.

6. Are Bylaws 08-Z/07 and 07/07 invalid on the basis that the Applicant was not given prior notice of the Municipality's consideration of the Bylaws on August 14, 2007?

41 Section 692 requires a Municipality to hold a public hearing in accordance with s.230 of the MGA, after giving notice of it in accordance with s.606, prior to second reading. The Applicant has not challenged the sufficiency of the April, 2007 hearing, at which all three proposed bylaws were considered. There is no further statutory obligation imposed upon the Municipality to give further notice that it intends to consider and give third reading to a bylaw. The Municipality correctly complied with its statutory obligations.

7. Are Bylaws 08-Z/07 and 07/07 invalid on the basis that they are materially different from the bylaws presented for the public hearing?

42 The Applicant has challenged both bylaws on this basis, but in argument referred only to Bylaw 08-Z/07. The Applicant contends that the bylaw is invalid because as ultimately passed, it allows for freehold titles as well as bareland condominiums.

43 I agree with the Municipality that the addition of freehold titles does not constitute a material change to the bylaw, because it does not, in any way, impact the use of the Carraig Ridge lands. I further agree with the Municipality that s.230(5)(b) of the MGA permits the municipality to make any amendment to a bylaw or resolution it considers necessary to pass it, after second reading, without further advertisement or hearing.

8. ASP Compliance with sections 9.1.11, 3.3.1(XV), 15.6.14, 15.6.15, and 15.6.16 of the MDP., and Bylaw 08-Z/07.

44 The relevant portions of s3.3.1 and s.9.1.11 of the MDP provide:

> 3.3.1 The Mission Statement indicates, in a broad sense, the direction in which the residents of the MD of Bighorn want to see the municipality develop, and towards which Council will strive. The following goals are adopted in order to elaborate upon the Mission Statement and to clarify the MD of Bighorn's intentions:
>
> (xv) to provide opportunities to apply innovative land use planning and environmental conservation concepts that improve municipal efficiencies and reduce rural sprawl.
>
> 9.1.11 In some instances, before subdivision or development of land is allowed, the MD of Bighorn may require that the proponent of the subdivision or development prepare an Area Structure Plan (ASP), at the expense of the proponent. The ASP will normally include the following:
>
> Generally required for large parcels of land on which little or no development has taken place, this plan will provide direction for the MD of Bighorn to guide how subdivision and development of these lands might occur.

i) site suitability;
v) impact on adjacent uses;
vi) location of utilities.

45 As the Municipality points out, the language of s.9.1.11 of the MDP is discretionary. There is no mandatory requirement that a developer provide an ASP, nor any mandatory components for an ASP set out in the MDP. I further agree with the Municipality that site suitability, impact on adjacent uses and location of utilities are all expressly addressed in the ASP in any event. Moreover, in my view the TDC scheme implemented by the Municipality by way of the three bylaws is "innovative land use planning" per s.3.3.1, and though it has regard to "environmental conservation concepts" that the Applicant does not share (ie. the preservation of the Jamison Road lands), it falls squarely within that section of the MDP.

46 With respect to Bylaw 08-Z/07 and sections 15.6.14 and 15.6.15, the Applicant argues that the ASP fails to comply because it would increase fragmentation and fails to properly identify sending and receiving parcels.

47 With respect to s.15.6.14, the Applicant's contention notwithstanding, the ASP does not increase fragmentation in the Small Holdings Area on the whole; it concentrates fragmentation into a relatively small area at Carraig Ridge and reduces the fragmentation that might otherwise occur on the Jamison Road lands. Though the Applicant argues that s.15.6.15 requires the developer to specifically identify the sending parcels, there is no such requirement in the language of s.15.6.15 itself. Instead, it is necessary only that the sending and receiving parcels both be located in the Small Holdings Area. The Applicant further argues that the ASP does not comply with s.15.6.16, but that section mandates the filing of a conservation easement at the time of subdivision approval. Until that time, I do not see how the ASP can be said to violate s.15.6.16.

9. The Effect of the Alberta Land Stewardship Act

48 On June 4, 2009, the Legislature enacted *the Alberta Land Stewardship Act*, S.A. 2009, c.A-26.8 ("ALSA"). ALSA, which was proclaimed in force on October 1, 2009, establishes a legal framework for increased Provincial oversight of land use planning and development. It provides for the development, by the Province of regional plans, described at s.13 as "expressions of the public policy of the Government" and binding upon municipalities, that would address planning and development in seven planning regions within the Province. Sections 48 to 50 of ALSA provide for a Transfer of Development Credits scheme. Section 48 provides:

> 48(1) A TDC scheme may be established only in accordance with this Division.
>
> (2) A TDC scheme may be established by
>
> (a) a regional plan,
> (b) a local authority if the scheme is first approved by the Lieutenant Governor in Council, or
> (c) 2 or more local authorities in accordance with an agreement or arrangement among them, with or without other persons, if the agreement or arrangement is first approved by the Lieutenant Governor in Council.

49 Section 49 sets out a list of components which every TDC scheme must include. A TDC scheme must designate an area of land as a conservation area, for environmental, scenic, aesthetic, agricultural or historic purposes and it must designate an area of land as a development area, and any terms and conditions of that designation. The Lieutenant Governor in Council is given broad regulatory power over TDC schemes under s.50.

50 The Applicant contends that Bylaws 06/07, 08-Z/07 and 07/07 are of no effect because the TSD scheme they implement has not been approved by the Lieutenant Governor in Council. Section 13 of ALSA provides:

> 13 If there is an inconsistency between a Bylaw and this or another enactment, the Bylaw is of no effect to the extent of the inconsistency.

51 It is important to consider s.13 in the context of a number of other provisions in ALSA. Section 18 provides:

> 18(1) The stewardship commissioner may apply to the Court of Queen's Bench for an order under this section if, in the opinion of the stewardship commissioner, non-compliance with this Act, a regulation under this Act or a regional plan cannot be remedied or rectified under another enactment.
>
> (2) On application by the stewardship commissioner, if the Court is satisfied that this Act, a regulation under this Act or a regional plan has not been or is not being complied with, the Court may make an order to remedy or rectify the non-compliance.
>
> (3) The Court may make any interim or final order it thinks fit, including, without limitation, any or all of the following orders:
>
> (a) to stop something being done, to require something to be done or to change the way in which something is being done;
> (b) to manage the conduct of a person who is non-compliant;
> (c) declaring that any regulatory instrument of a local government body does or does not comply with a regional plan and, if necessary, ordering compliance;
> (d) to take any action or measure necessary to remedy or rectify non-compliance with a regional plan and, if necessary, an order to prevent a reoccurrence of the contravention;
> (e) to amend or repeal a regulatory instrument of a local government body that does not comply with a regional plan.

52 I agree with the Municipality that, by excluding references to individuals or persons other than the Stewardship Commissioner, the Legislature intended to exclude anyone other than the Stewardship Commissioner from bringing an application for judicial review on the basis of non-compliance with ALSA. This interpretation is consistent with s.15(3) of the Act, which expressly limits the ability to bring any action concerning compliance with a Provincial Regional Plan to the Stewardship Commissioner, and s. 62 of the Act, which provides the mechanism by which individuals may make a written complaint to the Stewardship Commissioner. In short, ALSA taken as a whole implements a scheme whereby the Province assumes a greater role in local planning and the power to determine whether there has been compliance with the Act and with Provincial dictates as expressed in regional plans. Individual recourse is limited to the complaint provision at s.62.

53 This is sufficient reason to conclude that ALSA has no impact upon the disposition of this matter. However, the parties have also addressed the issues of retroactivity and vested rights, and in my view it is appropriate to address these issues briefly.

(a) Retroactive Effect

54 Section 5 of the *Interpretation Act*, R.S.A. 2000, c.I-8 provides:

> 5(1) An enactment has effect immediately at the beginning of the day on which it comes into force.

55 In *Sullivan and Driedger on the Construction of Statutes*, 4th.ed., at p.546, the presumption with regard to the retroactive application of statutes is described as follows:

> It is presumed that the legislature does not intend new legislation to be given a retroactive application - that is, to be applied so as to change the past legal effect of a past situation.
>
> This presumption is strong. Normally it can be rebutted only if the statute or regulation in question contains language clearly indicating that it, or some part of it, is meant to apply retroactively.

56 ALSA was not in effect at the time the Bylaws were passed by the Municipality. Absent express language to the effect that the Legislature intended the provisions of ALSA to apply to a TDC scheme implemented prior to the ALSA coming into force, the presumption that ALSA does not operate so as to retroactively invalidate an existing TDC scheme applies.

(b) The Impact of ALSA Upon the Existing TDC Scheme

57 The Municipality contends that the use of the term "may" in s.48(2) of ALSA suggests that the list of ways to establish TDC schemes is not exhaustive. Because "may' is to be interpreted as "permissive and empowering" while "must" is to be interpreted as "imperative", per s.28 of the *Interpretation Act*, the Municipality suggests that it is reasonable to interpret the "may" as referencing any TDC schemes established prior to ALSA.

58 I am not convinced that this is the proper interpretation of s.48(2). That section provides that a local authority may implement a TDC scheme if the scheme is first approved by the Lieutenant Governor in Council. It is not imperative insofar as municipalities are not compelled to implement TDC schemes, but it is clear from the language of s.48(2) that a municipality may implement a TDC scheme *only if* it has the approval of the Lieutenant Governor in Council. To put the matter another way, had the Legislature included express language to the effect that ALSA would retroactively impact an existing TDC scheme, it is clear to me that s.48 would apply and the Municipality's TDC scheme would be rendered invalid. It is because the Legislature did not do so that it does not.

(c) Vested Rights

59 Mr. MacGregor provided an affidavit setting out Wild Buffalo's expenses in respect of the Carraig Ridge development. The affidavit indicates that land purchase expenses exceeded $11 million. An accounting printout provided at the cross examination on this affidavit indicates that development costs are in the range of $2.6 million. The Applicant has taken issue with a number of the expenses, but for the purposes of this decision it is necessary to find only that, at a minimum, costs associated with the development of the Carraig Ridge lands, after the passage of the bylaws, exceeds $1 million.

60 Wild Buffalo argues that it has acquired vested rights as a result of the passage of the bylaws. It is important to distinguish this issue from the question of the retroactivity of ALSA. In *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530, Bastarache J. pointed out, at para.30, that "In general it will be purely prospective statutes that will threaten the future exercise of rights that were vested before their commencement."

61 The issue, therefore, is not whether the s.13 of ALSA would adversely affect Wild Buffalo's rights by retroactively invalidating the bylaws in question, but whether the provisions of ALSA would negatively affect Wild Buffalo's right to pursue subdivision on the Carraig Ridge lands going forward. In my view, in the absence of a regional plan purporting to limit the right to subdivide, there is no provision in ALSA that would have this effect. There is, in short, nothing in ALSA that purports to limit Wild Buffalo's right to apply for subdivision under the existing TDC scheme. Consequently, it is not necessary to determine whether the rights acquired by Wild Buffalo are vested because they are not effected by ALSA in any event.

Conclusion

62 Bylaws 06/07, 07/07 and 08-Z/07 were intra vires, reasonable, and passed after the Municipality followed the proper procedures and are therefore valid. The *Alberta Land Stewardship Act* does not retroactively invalidate these bylaws, and in any event, only the Stewardship Commissioner, and not the Applicant, may challenge the bylaws on the basis of inconsistency with that Act. The application to declare the bylaws invalid is dismissed.

63 If the parties are unable to agree in respect of costs, they may bring the issue before me within 60 days of this Judgment.

S.L. HUNT McDONALD J.

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