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Peaks of Grassi Development in Canmore: Procedural Fairness and Municipal Bylaws?

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Case Commented On: *Gruman v Canmore (Town)*, [2018 ABQB 507 \(CanLII\)](#)

Municipal governance in the Town of Canmore is undoubtedly a challenging proposition. Canmore is a four-season tourism and recreation destination, which attracts a large range of visitors and inhabitants with diverse interests. The town is also situated at the mouth of the Bow Valley; it must be a constant struggle to achieve development goals while not spoiling the environmental riches which make Canmore the attractive destination that it is. This diverse range of interests and concerns results in relatively frequent municipal disputes in the town. The dispute in question here concerns a [proposed new residential development](#) in the Peaks of Grassi – a subdivision located on the west side of Canmore along the lower slopes of Ha Ling Peak. In 2015 Canmore council amended a bylaw to allow for residential development in what is currently an urban environmental reserve located in the Peaks of Grassi subdivision. The bylaw amendment was challenged in a judicial review application heard in March 2017, and in July 2018 Justice Gates allowed the application and quashed the bylaw amendment on procedural fairness grounds (see [here](#) for media coverage on this decision).

I have previously written on the judicial review of subordinate legislation (such as municipal bylaws). See for example my March 2016 [post](#) concerning subordinate legislation enacted by the Alberta College of Pharmacists wherein I argued that the Supreme Court’s 2013 decision in *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, [2013 SCC 64](#) (*Katz*) should be applied for a *vires* determination of all subordinate legislation – although in *Katz* the legislation in question was a regulation enacted by cabinet. Generally speaking there is some uncertainty over the framework to be applied in a review for *vires* of municipal bylaws, particularly whether judicial deference is owed in a *vires* review. The *Katz* decision set out the following considerations in a *vires* determination: (1) is the impugned regulation (subordinate legislation) consistent with the objective of its parent statute – in order to demonstrate invalidity a person must establish that the regulation is not consistent with such objective or that it addresses a matter which is not set out in the regulation-making provision of the parent statute; (2) if the parent statute has a process or prerequisite condition for the enactment of the regulation, was it followed or satisfied; (3) there is a presumption of validity such that the onus or burden is on the challenger to demonstrate that the regulation is *ultra vires* – so where possible a regulation will be read in a ‘broad and purposive’ manner to be consistent with its parent statute; (4) the inquiry into the *vires* of a regulation does not involve assessing the policy merits of the regulation, nor does the reviewing court assess whether the regulation will successfully meet its objective.

The challenge in *Gruman* to the bylaw amendment in Canmore was not based on the *Katz* principles, but rather strangely was made on the basis of procedural fairness. I say strangely because one would have thought procedural fairness is a difficult case to make in the context of challenging the enactment of legislation. The essence of the duty to afford procedural fairness in the exercise of public power is well summarized by the Supreme Court of Canada in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, [1985 CanLII 23 \(SCC\)](#) at paragraph 14:

This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.

The Supreme Court has consistently ruled that procedural fairness is not owed by a legislative body in the enactment of legislation (See *Knight v. Indian Head School Division No. 19*, [1990] 1 SCR 653, [1990 CanLII 138 \(SCC\)](#)). The exception to this is where it can be demonstrated that the legislative act is targeted at a specific individual or group, such as the case in *Homex Realty v. Wyoming*, [1980] 2 SCR 1011, [1980 CanLII 55 \(SCC\)](#) where a municipal land use bylaw was found to be targeted at a specific developer. *Homex*, of course, would have been applicable here in *Gruman* had the applicant been the developer who stood to benefit from the land use change in Grassi Peaks, but the developer would have no reason to challenge a bylaw giving it the green light to pursue its development!

The applicant in *Gruman* is successful in having the bylaw amendment quashed on the grounds that Canmore failed to require the submission of an environmental impact study (EIS) audited by a third party on the proposed development before passing the bylaw (at paras 78 - 89, 118 – 122). The requirement for an audited EIS is set out in Canmore's municipal development plan. Justice Gates frames this failure by Canmore as a breach of procedural fairness (at paras 121, 122), but it isn't clear from his ruling to whom the duty of fairness was owed. Presumably Justice Gates concluded that Canmore owed a duty of fairness to the applicant Gruman in passing the bylaw amendment, but this would be inconsistent with the authority noted above that a legislative act does not attract the duty of fairness unless it can be shown to be targeted at a specific person or group. There is no evidence of such targeting here. Canmore appears to have argued unsuccessfully that even if an EIS is required, the failure to provide one did not breach any procedural rights held by Gruman (at paras 81, 93).

Having framed the issue as a question of procedural fairness, Justice Gates runs thru the 5 *Baker* factors to assess the level of fairness owed to Gruman in the enactment of the bylaw amendment. This overall assessment is directed towards a determination of the extent to which Gruman ought to have been notified of the case against him and be given a chance to meet that case. With respect, this analysis of the *Baker* factors demonstrates why procedural fairness is an uncomfortable fit here. The bylaw amendment for Grassi Peaks has a general application to the community at large, and it is difficult from this case to see how the amendment was targeted at the applicant himself. Indeed, here it seems from media coverage that Canmore decided to change the zoning in this area and approved the residential development in order to help alleviate a shortage of affordable housing accommodation in the town.

The 5 factors from *Baker* are: (1) nature of the decision; (2) nature of the statutory scheme; (3) impact on the person(s) affected by the decision; (4) legitimate expectations (if any); and (5) deference to choice of procedure. On the higher end, procedural fairness will demand trial-like process by the decision-maker. On the lower end, procedural fairness might be satisfied simply with prior notice that a decision adverse to one's interests will be issued. Justice Gates applies the 5 *Baker* factors, and in what follows I outline his application along with my commentary.

Nature of the decision. This factor looks at the extent to which the decision-making process resembles that of the adversarial trial model: The closer it resembles the adversarial process, the more likely trial-like process will be required. Justice Gates notes the enactment of the bylaw amendment is more legislative than judicial (at paras 97, 98).

Nature of the statutory scheme. This factor looks to whether the impugned decision is final and not subject to internal review or appeal. The more the decision is final, the more process owed. Justice Gates does not address the finality of the decision here, but rather discusses how the Canmore municipal development plan requires an EIS (at paras 99 - 107).

Impact on the person(s) affected by the decision. This factor looks at the significance of the decision on the affected persons. The higher the significance, the more process owed. Justice Gates agrees with Canmore's submission that the bylaw amendment has a general impact on the community, rather than a specific impact on the applicant (at para 108 - 110).

Legitimate expectations (if any). This factor looks to see if the decision-maker gave an express and unequivocal promise of certain process. If so, the duty of procedural fairness will require the decision-maker to live up to that promise. The law in Canada is clear that there can be no legitimate expectation to a substantive outcome. Justice Gates concludes that the requirement in the municipal development plan established a legitimate expectation for Gruman that an audited EIS would be submitted to council (at paras 111 - 113). While it may be that the municipal development plan was not followed here, nothing is noted in this decision that the record contained any express or unequivocal promise by Canmore council to Gruman in this regard.

Deference to choice of procedure. This factor was not well developed by the Supreme Court in *Baker*, but nonetheless it has since evolved into the need to show deference to procedural choices made by decision-makers with expertise in making such choices. Justice Gates acknowledges the need to show deference to Canmore council, but he reiterates that such deference does not extend to cases where council fails to follow its own procedures (at paras 114 - 116).

Justice Gates concludes that Canmore council owed Gruman a moderate level of procedural fairness, and concludes it was a breach of fairness to pass the bylaw amendment without requiring an audited EIS be submitted for the development (at paras 117 - 122). The issue here was clearly the missing audited EIS, and council's decision to proceed with the bylaw amendment without one for the Grassi Peaks redevelopment. Nonetheless, I have a difficult time viewing this case as one that engages in procedural fairness owed to Gruman. There are many references in this decision to the legislative nature of the bylaw amendment and the fact that its impact is on the community generally. It is well settled law that the common law duty of

procedural fairness does not apply to decisions of a general and legislative nature because procedural entitlements in these decisions are presumed to be available in the democratic process. The exception is where the legislative decision can be shown to be targeted at a specific person or group. It is hard to decipher how Gruman himself was targeted here or treated unfairly by Canmore council, or what case he needed to make in order to oppose the bylaw amendment.

It seems that the essence of the issue here was whether Canmore council failed to adhere to its own procedures. Judicial remedies are typically hard to come by in these sort of instances. But perhaps if the decision by Canmore council had been assessed under the *Katz* principles, the requirement set out in the municipal development plan for an audited EIS may have been found to be a necessary pre-requisite for the proper enactment of the bylaw amendment such that its absence would be grounds to rule the bylaw amendment *ultra vires*.

This post may be cited as: Shaun Fluker, “Peaks of Grassi Development in Canmore: Procedural Fairness and Municipal Bylaws?” (August 15, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/08/Blog_SF_Gruman_August2018.pdf

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