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City Amends Land Use Bylaw in Bad Faith

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Cases Considered:

Airport Self Storage and R.V. Centre Ltd. v. Leduc (City), 2008 ABQB 12

Although municipal councils in Alberta are generally entitled to amend land use bylaws by following procedures set out in the *Municipal Government Act* (the "MGA"), R.S.A. 2000, c. M-26, this decision tells us that sometimes a council will have to go further in order to ensure procedural fairness. There are circumstances where personalized written notice of a hearing to consider a proposed land use amendment will be required. As always, the content of the duty of fairness varies according to the particular facts of each case. The facts here are lengthy, but they are critical.

The Applicant (Airport Self Storage and R.V. Centre Ltd.) owned and operated a facility providing outdoor access storage space to a variety of tenants. Its business was located across the street from another property on which another company (the "Developer") proposed to construct a new building for use as an enclosed self-storage building with office, surveillance suite and service vehicle parking. The Developer obtained a development permit from the City of Leduc for its proposed building ("Permit #1").

As an adjacent land owner, the Applicant received written notice of the issuance of Permit #1. The Applicant appealed its issuance to the City Subdivision and Development Appeal Board (the "SDAB") on the grounds that the proposed use was neither a permitted nor a discretionary use in the C-3 District, the relevant zoning category under the City's Land Use Bylaw (LUB). The SDAB upheld Permit #1 on the basis that the proposed use was sufficiently similar to the permitted and discretionary uses of the C-3 District and was in keeping with the general purpose of that district.

The Applicant sought leave to appeal the SDAB decision to the Court of Appeal. It was granted leave on two legal questions. This appeal had not yet been heard at the time the Applicant brought this application to the Court of Queen's Bench.

While the appeal was pending on Permit #1, Leduc City Council gave first reading to a bylaw ("Bylaw 681") to amend the LUB. The effect of Bylaw 681 was to establish a new land use category of "Commercial Storage Facility", which was defined in such a way as to encompass the storage use contemplated by the Developer in Permit #1. The Minutes of the Council Meeting at which Bylaw 681 was given first reading revealed that the request to add this new category as a permitted use in the C-3 district had come from the Developer. The Minutes also discussed the history of the Applicant's opposition to Permit #1 and the pending appeal.

Notice of a public hearing to be held in June 2007 in respect of Bylaw 681 was advertised in the local newspaper on three occasions. The Applicant did not receive written or oral notice of the proposed public hearing either from the City or any other person, and the Applicant did not appear at the hearing. The Minutes from the hearing referenced the issuance of Permit #1 and the Applicant's pending appeal. The Minutes also mentioned a question raised by a member of the public about the appropriateness of amending the LUB while the matter of Permit #1 was currently before the courts. Administrative officials advising Council dismissed this concern as groundless.

Shortly after the public hearing, City Council adopted and signed Bylaw 681 into law. Sixteen days after its passing, Permit #2 was issued to the Developer for a Commercial Warehouse with Surveillance Suite. The Applicant received written notice of the issuance of Permit #2 from the City by mail. Employees of the Applicant also brought to its attention a news article stating that a public hearing had been held regarding certain amendments to the LUB which had been applied for by the Developer.

Not surprisingly, the Applicant appealed the decision to issue Permit #2 to the SDAB. It argued a lack of notice of the public hearing on Bylaw 681. The SDAB denied the Applicant's appeal and upheld Permit #2. The Applicant then brought this application to the Court of Queen's Bench for judicial review on grounds of procedural fairness. Before the Court, the issue was whether the City of Leduc had breached its duty of fairness by failing to provide personalized written notice to the Applicant of the public hearing in respect of Bylaw 681.

Mr. Justice D.G. Thomas carefully considered the factors a court must look at to determine the content of the duty of procedural fairness in any given case. First, he considered the nature of the decision being challenged. The law is clear that where the decision amounts to an exercise of a policy or legislative function, there will be minimal (if any) procedural fairness requirements. By contrast, where the decision is judicial or quasi-judicial in nature, a much higher standard of fairness will be required.

According to the City, the enactment of Bylaw 681 (which added one discretionary use to the C-3 District) was a text amendment to the City's LUB that was of general application throughout the City. Text amendments involving broad policy considerations typically involve a purely legislative function. But here, according to the Court, there were unusual circumstances. These circumstances took this amendment out of the realm of a legislative decision and placed it in the realm of a judicial type of decision. The unusual circumstances included the following: (i) that the application for the amendment contained in Bylaw 681 had come from the Developer itself; (ii) that the Developer had complained to City Council about a six-month delay with respect to its proposed development; and (iii) that Council had before it information which should have alerted it to the ongoing dispute over the development proposal that was to be accommodated by the passage of Bylaw 681. In the court's view, the Developer was clearly proposing the adoption of Bylaw 681 in order to circumvent the ongoing challenge to Permit #1 by the Applicant. In these circumstances, a higher duty of procedural fairness was appropriate.

Other factors that, according to the Court, pointed to a fairly high duty of procedural fairness in this case included the following: (i) the fact that the decision of a municipal council in Alberta on a zoning amendment is final and binding with no right of appeal; (ii) the importance of the decision to the Applicant who had, from the outset, registered its concerns about the impacts from the proposed development (traffic congestion, negative property value impacts, etc.) and had launched expensive court actions to protect its interests; and (iii) the fact that the City had

conducted itself in a way that gave rise to a reasonable and legitimate expectation on the part of the Applicant that it would be informed if particular planning rules were to be changed to its detriment.

Lastly, the Court considered the level of deference that ought to be accorded to the procedures chosen by the City in amending its LUB. As the Court noted, considerable deference will normally be given to procedures selected by a municipal council for the giving of notice of public hearings. Here, Council had complied with the basic requirements of the MGA. Nonetheless, according to the Court, where there is evidence of a lack of good faith, very little deference (if any) should be paid to a municipal council when it has failed to select a procedure which would be fair to a person whom the council knows (or should know) has a legitimate interest in the particular changes to the land use bylaw.

In this case, Council knew or ought to have known that the passage of Bylaw 681 (and the issuance of Permit #2) could defeat the Applicant's appeal with respect to Permit #1. In all the circumstances of this case, Council should have gone further than the statutory notice requirements to ensure that the Applicant was fully aware of Council's intention to consider Bylaw 681. The Court held that the high duty of procedural fairness owed by the City in this case required it to give specific personalized written notice to the Applicant of the public hearing held in respect of Bylaw 681. Failure to give such notice rendered Bylaw 681 invalid; it also rendered Permit #2, which depended on the validity of Bylaw 681, invalid.

Given its peculiar facts, this case seems to fall more properly within those rare administrative law cases of "bad faith" rather than the more typical "lack of procedural fairness" category. Clearly there was much more going on here than the usual situation of a decision maker inadvertently failing to grant fair process. But proving bad faith can be difficult in practice. Either way, one is left wondering whether personalized notice to the Applicant will make a difference should this Council decide to consider another similar amendment to its LUB. If it has not already done so, one assumes that this Applicant will attempt to avail itself of some additional remedy to protect its pending appeal.