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Innovative but controversial municipal bylaws survive challenges

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Cases Considered:

Keller v. Municipal District of Bighorn No. 8, 2010 ABQB 362, http://www.albertacourts.ab.ca/jdb/2003-/qb/civil/2010/2010abqb0362.pdf

This case is significant in three regards. First it raises the thorny issue of standard of review regarding the reasonableness of a municipal bylaw under the *Municipal Government Act* (R.S.A. 2000, c. M-26) (*MGA*), given that the SCC in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (*Dunsmuir*) collapsed the previous standard of review categories of patent unreasonableness and reasonableness into one category, reasonableness, and section 539 of the *MGA* that states that no municipal bylaw (or resolution) may be challenged on the ground that it is unreasonable. Second, it considers the validity of an innovative municipal land use management tool that is not specifically authorized by the *MGA*, thus shedding light on the breadth of municipal authority in carrying out its land use and development functions. Third, it is the first decision to consider the effect of the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 (*ALSA*). The case considers who may bring a challenge regarding alleged non-compliance with the *ALSA*, and whether the *ALSA* is retroactive.

Facts and Background

In 1989 the Applicant, Rod Keller, acquired a 406-acre parcel of ranch land in the Bow River Corridor 20 kilometres west of Cochrane, Alberta (the "Keller lands"). Except for a residence, Keller maintained the lands as a nature preserve. In 2006 the Respondent Wild Buffalo Ranching Ltd. ("Wild Buffalo") purchased an adjacent 662-acre parcel of land (the "Carraig Ridge lands"). Wild Buffalo (or its principal) also owned lands north of the Carraig Ridge lands and Keller lands that Justice Sandra Hunt McDonald calls the "Jamison Road lands." Prior to June 2007, under the Municipal District of Bighorn No. 8's Municipal Development Plan ("MDP") all three lands were classified as "small holdings." This land use zone authorized subdivision into no less than 40-acre lots with a maximum one residence per lot.

Wild Buffalo's plan was to subdivide the Carraig lands into 45 lots, which was not permissible under the 40-acre minimum rules for small holdings. With this hope of carrying out its plan, in February 2007 Wild Buffalo applied to the Municipality for the enactment of three bylaws. These bylaws would put a municipal transfer of development credit ("TDC") program into effect that would enable Wild Buffalo to effect the proposed subdivision.

By way of background, as I put it in my 2004 article "The Potential for Municipal Transfer of Development Credit Programs in Canada" (15 Journal of Environmental Law and Practice 147), a typical TDC program involves transferring development potential from one parcel of land to

another parcel of land in accordance with municipal plans, policies and bylaws. "Development potential" means the difference between existing land use and potential land use as allowed by and set out in applicable land use bylaw ("LUB") and municipal plans. The parcel from which development potential is transferred is the "sending parcel." The parcel that receives the development potential is the "receiving parcel." For example if a LUB allows a single residence lot per 40 acres in the sending area, a TDC program might give a landowner who owns 160 undeveloped acres in the area four development credits. Under the program these credits are transferable to the receiving area to enable greater density (more residences, smaller lots) in that area. Appropriate legal instruments secure restrictions on development in the sending parcel, such as conservation easements or restrictive covenants. TDC programs give municipalities a new tool to restrict development where the municipality determines it is inappropriate, and to allow greater density where the municipality determines it is warranted. However, unlike traditional zoning, TDC programs may be designed to enable compensation for a landowner who legally restricts development in a sending area by giving the landowner an opportunity to sell development credits to those who want more density in a receiving area.

Back to the case, Wild Buffalo's proposed Bylaw 06/07 would (1) amend to MDP to enable the Municipality to apply innovative land use planning and environmental conservation techniques; and (2) add provisions to enable a "transfer of subdivision density" ("TSD") program (the same as a TDC program). Bylaw 07/07 would provide for the creation of an Area Structure Plan for the Carraig Ridge area (to be prepared by Wild Buffalo). Bylaw 08/Z/07 would amend the LUB to (1) add the necessary definitions relating to the TSD program, and (2) add the new districts for the TSD program. Together these bylaws would permit Wild Buffalo to transfer subdivision potential from the Jamison Road lands to the Carraig Ridge lands. Development restrictions on the Jamison Road lands were to be secured by a registered conservation easement. The conservation easement would prohibit further subdivision. The transfer of density potential to the Carraig Ridge lands would, under the MDP, ASP, and LUB, authorize subdivision of these lands into 45 lots.

Standard of Review

One of the Applicant's challenges was that if the Court found the bylaws to be *intra vires*, then, Council's decisions relating to the bylaws were unreasonable. The Applicant contended that the standard of review in this regard was patent unreasonableness, whereas the Respondent Municipality contended it was "reasonableness with a high degree of deference being afforded to the Council's decision" (at para. 16). The Court noted that both parties were aware of *Dunsmuir* and that the "confusion" regarding standard of review arose because of section 539 of the *MGA*, which, as noted, prohibits a bylaw or resolution challenge on the ground that it is unreasonable. By way of background, prior to *Dunsmuir* the accepted standard of review of a municipal council decision was patent unreasonableness (e.g. *Nanaimo (City) v. Rascal Trucking Ltd.,* [2000] 1 S.C.R. 342 at para. 38). There is pre-*Dunsmuir* Alberta authority that section 539 of the *MGA* does not prohibit a bylaw challenge on the basis that it is patently unreasonable (*Wood v. Wetaskiwin,* 2001 ABQB 681, aff'd 2003 ABCA 67). The *Keller* decision does not mention the *Wood* case. Instead it raised the question of whether the *Dunsmuir* collapse of patently unreasonable into reasonable rendered section 539 to effectively preclude judicial review, or whether section 539 could be interpreted as only a partial privative clause that allowed a reasonableness review with considerable deference to the decision maker? The Court avoided definitively speaking to this thorny issue on the basis that the Respondent Municipality itself contended that the standard of review was reasonableness with considerable deference. The Court thus seemed to reason that if the Respondent Municipality was willing to go with the

reasonable with considerable deference standard, whereas the Applicant was putting forth the lower standard of patent unreasonableness, the Court might as well go with the higher standard, notwithstanding section 539. Applying this standard, the Court found the decisions or bylaws to be reasonable.

In my view, notwithstanding the Court's claim that it did not have to resolve the issue, by finding that a reasonableness with a high degree of deference standard was applicable, the Court implicitly interpreted section 539 of the *MGA* in light of its presumed underlying intent -- that the provision is meant to partially but not completely preclude judicial review -- rather than by its express words. It will be interesting to see how future courts handle the interplay between *Dunsmuir* and section 539. We now have two QB interpretations of the appropriate standard of review, *Wood v. Wetaskiwin* (patent unreasonableness) and *Keller* (reasonableness with considerable deference to the decision maker).

In my view, there is much to be said in favor of what presumably was the Applicant's reasoning that given section 539 of the *MGA* patent unreasonableness is the appropriate standard. Section 539, after all, expressly prohibits review on the ground of unreasonableness and courts are loathe to ignore express words of statutes provided that they are interpreted within the modern approach. This approach requires that words be interpreted in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute and the intention of Parliament (e.g. *United Taxi Drivers Fellowship of Southern Alberta v. Calgary (City)*, 2004 S.C.C. 19). A future court might confine *Keller* to its unique facts (the Respondent putting forth a higher standard of review than the Applicant), and find that in the ordinary case the section 539 partial privative clause prohibits a review on the ground that a resolution or bylaw is not reasonable, but does not prohibit a review on the basis that it is patently unreasonable. The issue not discussed or resolved here is whether patent unreasonableness is still available after *Dunsmuir*.

The *vires* of the TDC program

The Applicant submitted that the TDC program was not authorized by the *MGA* and that therefore the bylaws amending the MDP, LUB, and ASP were invalid. The standard of review regarding this issue was correctness. In the course of their arguments both the Applicant and the Respondent Municipality referred to my TDC article from the J.E.L.P. noted above. The Court recounted my argument that on a broad and purposive approach the *MGA* likely provides implied authority to municipalities to develop TDC systems (para. 25). In the context of her discussion of *MGA* provisions regarding what may be included in an MDP and LUB, Justice McDonald concluded that "… in my view such a [TDC] scheme clearly falls within the broad powers of regulation and control provided to the municipality under these sections…" (para. 26).

This finding is significant it that confirms that the *MGA*, at least prior to the *ALSA* (discussed below), gave municipalities sufficient authority to develop a standard TDC program. It also is significant it that it demonstrates how a modern approach may be applied to the *MGA* Part 17 Planning and Development bylaw making authorities, which generally are more detailed than the broad, general bylaw making authorities found in the Part 2 of the MGA, General Jurisdiction. *Keller*, which considered Part 17 bylaw making powers, may be contrasted with the *United Taxi* case, noted above. In *United Taxi* the SCC applied a modern approach to Part 2 bylaw making powers.

The effect of the *Alberta Land Stewardship Act*

The *Alberta Land Stewardship Act* (*ALSA*) was proclaimed in October 2009. *ALSA* was designed to implement the Alberta Land-Use Framework (LUF), released in December 2008. The *ALSA* and the LUF together provide the provincial government with unprecedented legislative and policy tools to comprehensively plan and manage public and private lands and interests, including natural resources. The *ALSA* enables Cabinet to make approved regional plans that will bind the Crown, local governments, decision makers, regulated industry, and private individuals. The *ALSA* prevails over all other Alberta statutes and regulations. *ALSA* regional plans prevail over conflicting provisions in any Alberta regulations, and over regulatory instruments, including municipal bylaws, government policies, and codes of practices. In addition to its land management provisions, the *ALSA* authorizes new economic instruments and stewardship tools. These include agricultural easements that enable the permanent or temporary protection of agricultural land from inconsistent uses; TDC programs, and other conservation off-set opportunities.

The *Keller* decision raised two *ALSA* issues. First who may raise a challenge regarding alleged non-compliance with the *ALSA*, and second, is the *ALSA* retroactive so as to invalidate the Municipality's TDC program?

NON-COMPLIANCE WITH ALSA

As noted in the next section, the Applicant argued that the Municipality's TDC program did not comply with the *ALSA* since the Lieutenant Governor in Council did not approve it as required by section 49 of the *ALSA*. The Respondents argued that the Applicant did not have a legal right to bring an application for judicial review on the basis of non-compliance with the *ALSA*. The decision noted that section 13 of the *ALSA* expressly authorizes the Stewardship Commissioner (appointed in accordance with the *ALSA*) in certain situations to apply to the Court of Queen's Bench if the Commissioner is of the opinion that there is non-compliance with the *ALSA*. The Court agreed 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" (para. 52). The Court read section 13 in connection with subsection 15(3) of the *ALSA* which limits the ability to bring an action concerning compliance with a regional plan to the Stewardship Commissioner, and section 62 which limits individual recourse regarding non-compliance to registering a complaint with the Stewardship Commissioner. The Court found that *ALSA*'s limiting challenges of non-compliance with the Act to the Stewardship Commissioner was sufficient reason alone to conclude that the *ALSA* has "no impact on the disposition of this matter" (para. 53). Nevertheless, the Court found it to be appropriate to consider the issues of retroactivity and vested rights, since the parties addressed them.

To comment, the finding of the Court that an individual does not have the right to judicial review regarding an allegation of non-compliance is significant. *ALSA*'s numerous express and implied privative clauses make it no secret that the *ALSA* was designed to preclude all judicial review except as it expressly envisions. The *Keller* case shows that the Act is successful in this regard, so far. One wonders whether section 13 of the *ALSA* would preclude any challenge regarding the *vires* of a statutory delegate's action that boils down to an allegation of non-compliance with the *ALSA*, or whether, perhaps on more compelling facts than those found in *Keller*, a future court would allow an application for judicial review under the *Alberta Rules of Court*, Alta. Reg.

390/1968, Part 56.1 (Judicial Review in Civil Matters), for example, on the ground that a statutory delegate's action was a nullity since the delegate acted without statutory authorization.

ALSA, TDC PROGRAMS, AND RETROACTIVE/RETROSPECTIVE APPLICATION

ALSA sections 48 to 50 concern TDC schemes. In part they provide:

> Establishing a TDC scheme
>
> 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.
>
> Components of a TDC scheme
>
> 49(1) Unless regulations under section 50 provide otherwise, every TDC scheme must include the following components:
>
> (a) the designation of an area or areas of land as a conservation area with one or more of the following purposes:
>
> (i) the protection, conservation and enhancement of the environment;
>
> (ii) the protection, conservation and enhancement of natural scenic or esthetic values;
>
> (iii) the protection, conservation and enhancement of agricultural land or land for agricultural purposes …

Keller challenged the TDC program on two grounds: first that it was not a valid TDC scheme as it did not have the Lieutenant Governor in Council's approval as required under section 48 and that it not valid as it was not established for a conservation purpose.

Regarding both challenges the Court noted that the Municipality's TDC program was established prior to the *ALSA*'s coming into effect. According to the Court the TDC program could be invalid under the *ALSA* only if *ALSA* were retroactive. A retroactive statute changes the legal nature of a past event, in the past. The Court noted that there is a strong presumption against retroactive application of legislation and that the presumption is rebutted only by clear statutory language that legislation is meant to apply retroactively. Since there was no such language the Court concluded that the *ALSA*, or at least the TDC provisions, were not retroactive and that therefore the Municipality's TDC program was not subject to them. On the basis that the

legislation was not retroactive, the Court easily dismissed the Applicant's arguments that the Municipality's TDC program needed the approval of the Lieutenant Governor in Council or was not established for an *ALSA* conservation purpose. There were no such requirements in the *MGA* prior to the *ALSA*. As well the Court remarked that in any case, the Municipality's TDC program was aimed at conservation. It was aimed at conservation of the Jamison Road lands, and not the Carraig lands, as desired by the Applicant (para. 29).

Interestingly, the Court did not consider whether the *ALSA* is retrospective, in contrast to retroactive. A retrospective statute does not change the legal nature of an event in the past. Instead, it provides new consequences for a past event. (*See* for example *Dikranian v Attorney General of Quebec,* [2005] 3 S.C.R. 530). On a retrospective interpretation, it could be argued that although the Municipality's TDC program was valid when it was created, it became invalid once the *ALSA* came into effect since, for example, it did not have the approval of the Lieutenant Governor in Council. There is no presumption against retrospective application of a statute. However there is a presumption that Legislature does not intend to interfere with vested rights. The Respondent Wild Buffalo was ready to argue that it possessed vested rights as a result the passage of the bylaws. Mr. MacGregor, the principal of Wild Buffalo, provided an affidavit setting out land purchase expenses exceeding $11 million and development expenses of about $2.6 million in reliance on the bylaws. The Court did not find it necessary to pursue the Respondent's claim of vested right since it already had found that the TDC program was valid under the MGA and that *ALSA* did not operate retroactively to invalidate it. In fact, the Court found that nothing under the *ALSA* would limit Wild Buffalo's right to further pursue its development plans by, for example, applying for subdivision, "in the absence of a regional plan purporting to limit" (para. 62) subdivision.

If the Court had entertained the question of whether the legislation was retrospective, in my view, the TDC program likely still would have survived. To invalidate the TDC program on the basis of a retrospective application would at least blur the distinction between retroactive and retrospective application of the *ALSA*, if not reduce a retrospective application to a retroactive one. Such invalidation would not only modify the effects of a prior legal situation, it would nullify that situation. As well, there is the matter of Wild Buffalo's claim of vested rights. As state by Pierre-André Côté in *The Interpretation of Legislation in Canada* (3rd ed. Scarborough, Ont.: Carswell, 2000, at 160-161) there are two criteria for vested rights: "(1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement." On the facts given in the case (though undisclosed facts also may be relevant) there is a strong likelihood that Wild Buffalo's actions taken and expenditures made in reliance on the bylaws met these criteria and gave rise to vested rights. Since nothing in the *ALSA* appears to expressly or by necessary implication interfere with such rights, the TDC program would survive, at least as it applied to Wild Buffalo and its vested rights. In the special circumstances of the case, the program's application to Wild Buffalo seems to be all that matters, since Wild Buffalo or its principal own all of the land relevant to the TDC program.