Court of Queen's Bench of Alberta

Citation: Three Sisters Mountain Village Properties Ltd v Canmore (Town), 2022 ABQB 511

Date: 20220727
Docket: 2101 07730
Registry: Calgary

Between:

Three Sisters Mountain Village Properties Ltd.

Applicant

- and -

Town of Canmore

Respondent

Reasons for Decision
of the
Honourable Mr. Justice G.H. Poelman

I. Introduction

[1] Three Sisters applies for relief against the Town of Canmore because its land use bylaw has designated part of its land as "Natural Park District," limiting its uses to open spaces in natural condition for recreation accessible to the general public. Provincial legislation provides that, in limited, specific cases, a designation restricting use of private land may trigger an obligation that the municipality purchase or redesignate the land.

[2] Three Sisters' application requires interpretation of a provision that has received almost no judicial consideration. It also requires determination of the meaning of Canmore's land use bylaw and how it relates to earlier land use bylaws also designating the subject land as Natural Park District, but with some differences in description of what that designation means.

[3] Three Sisters' application was initially filed June 17, 2021, with subsequent amendments.

II. Facts

[4] In October 2013, Three Sisters acquired approximately five hundred acres of land. They are referred to as "the Staircase Lands" because, as seen on a plan, they comprise three triangular areas of land adjoined one on top of the other in the shape of a staircase. The area in dispute between Three Sisters and Canmore is the upper triangular area, comprising about 8.5 acres of land.

[5] The Staircase Lands in their entirety form a parcel, coming under one certificate of title. However, they are zoned differently, known as "split zoning." There are three land use bylaws relevant to these proceedings:

a) *Land Use Bylaw 09-99* ("LUB 1999"), adopted December 7, 1999: upper triangular area designated as Natural Park District; remainder of Staircase Lands designated as Urban Reserve District;

b) *Land Use Bylaw 22-2010* ("LUB 2012"), adopted January 3, 2012: upper triangular area designated as Natural Park District; remainder designated as Urban Reserve District; and

c) *Land Use Bylaw 2018-22* ("LUB 2020"), adopted December 10, 2019, in force on April 1, 2020: upper triangular area designated as Natural Park District; remainder redesignated as Future Development District.

[6] LUB 2020 states the purpose of the Natural Park District as the following:

> To protect existing open spaces which are primarily in a natural condition for the purpose of recreation uses which do not require modifications to existing vegetation or terrain. The District is intended for non-intensive uses which utilize the existing terrain and vegetation present on the site.

There are five permitted uses: open space, trail, sign, wildlife habitat patch, and wildlife corridor. There is one discretionary use, namely accessory building.

[7] Finally, LUB 2020 has two regulations applicable to Natural Park District:

> 6.4.3.1 development that requires changes to existing grades over extensive areas for purposes other than trails, individual benches, picnic tables, or basic sanitary facilities shall not be located within this district.
>
> 6.4.3.2 any development, including an increase intensity of existing uses, shall be evaluated for potential impact on wildlife habitat and movement both within, and adjacent to, the proposed development.

[8] The upper triangular area is bordered by other lands owned by Canmore and also zoned Natural Park District. Canmore has created pathways through the area and across other nearby lands owned by Three Sisters.

III. Legislation

[9] Three Sisters' application is governed by the land use planning framework established in the *Municipal Government Act*, R.S.A. 2000 c. M-26. Part 17 of the *Act*, entitled "Planning Development," contains with amendments the former *Planning Act*, in its various enactments.

[10] The application seeks relief under section 644(1), which provides as follows:

> If land is designated under a land use bylaw for use or intended use as a municipal public building, school facility, park or recreation facility and the municipality does not own the land, the municipality must within 6 months from the date the land is designated do one of the following:
>
> (a) acquire the land or require the land to be provided as reserve land;
>
> (b) commence proceedings to acquire the land or to require the land to be provided as reserve land and then acquire that land within a reasonable time;
>
> (c) amend the land use bylaw to designate the land for another use or intended use.

[11] As with all sections in Part 17 of the *Act*, reference must be made to section 617 for the purpose of these planning provisions:

> 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.

IV. Designation as a Park

[12] In essence, section 644 requires a municipality to either purchase land or designate it for another use if the section applies. That occurs where:

a) the land is designated under a land use bylaw for use (or intended use),

b) as a municipal public building, school facility, park or recreation facility, and

c) the municipality does not own the land.

[13] The first and third elements are satisfied in this case. The designation is under a land use bylaw, currently LUB 2020. The upper triangular area is owned by Three Sisters, not Canmore. There is a dispute, however, over whether the land has been designated as a "park."

[14] There is no definition of "park" in the *Act* or any of Canmore's land use bylaws. There are, however, reasons why it might be said that when land is designated as Natural Park District (under section 6.4 of LUB 2020), it has been designated for use as a park within the meaning of section 644.

[15] As noted above, the stated purpose of the Natural Park District involves protecting open spaces in a natural condition for recreational use. Thus, the designated area of open space land, which may contain the permitted uses of trails, signs, and habitat and corridors for wildlife, is for recreational purposes.

[16] Apart from the title "Natural Park District," none of the land use bylaws uses the word "park" in their provisions. Use of "park" in the title may not be determinative, but is a relevant consideration in interpretation: Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022) § 14.02.

[17] It is also instructive that LUB 2020 defines "open space" as follows:

> **Open space** means land designated or reserve for active or passive recreational use by the general public, or to be left in a natural state, and includes all natural and man-made landscaping, facilities, playing fields, gardens, buildings and other structures that are consistent with the general purpose of parks and open space. Uses may include tot lots, picnic grounds, pedestrian pathways and trails, landscaped buffers and playgrounds.

This definition adds the elements of the land being "reserved for active or passive recreational use by the general public, or to be left in a natural state," and "man-made" modifications must be consistent with the general purpose of parks and open space.

[18] Finally, the permitted uses of open space, trail, sign, and habitat and corridors for wildlife fit the understanding of many types of park in common English usage. For example, the first three definitions of "park" in the *Canadian Oxford Dictionary*, 2nd ed. (2004), are:

> **park** *noun* **1** a piece of land usu. with lawns, gardens, etc. in a town or city, maintained at public expense for recreational use. **2** a large area of government land kept in its natural state for recreational use, wildlife conservation, etc. **3** a large enclosed area of land etc., either public or private, used to accommodate wild animals in captivity (*wildlife park*).

[19] Canmore submits that the descriptions of purpose, permitted uses and discretionary uses in the Natural Park District are not the same as a "park" or they at least enable uses other than a park. That is not its main argument, and I find it unpersuasive.

[20] In a related argument, Canmore submits that whether the "land is designated under a land use bylaw for use . . . as a . . . park" (section 644) should involve consideration of the entire parcel covered by the certificate of title. Because most of the parcel has been designated as "Future Development District" with allowable uses that go far beyond the common understanding of a park, Canmore says section 644 clearly has no application.

[21] In my view, such an approach would do violence to the plain meaning of section 644. It says nothing about a parcel. Rather, it says that "if *land* is designated" for certain uses and "the municipality does not own the *land*" the municipality must either acquire the *land* or designate the *land* for another purpose (emphasis added). Throughout, the section speaks of effects

following from designation of uses for particular land. If (as here) a municipality designates different uses for different portions of a parcel (split zoning) each designation must be considered on its own under section 644.

[22] I conclude that by designating the upper triangular area as Natural Park District the LUB 2020 designated the land as a park within the meaning of section 644(1). In my view, that is the only way properly to interpret the word "park" in the *Act*, according to its plain and ordinary meaning. Also, it is the best interpretation of what the LUB 2020 designation means, to take into account the title and contents of section 6.4, "Natural Park District"; along with the LUB 2020's definition of "open space"; and the attributes commonly associated with the notion of a park.

[23] A remaining question raised in Canmore's submissions is whether, if the designated use is a park, the bylaw makes that its exclusive use – because, according to Canmore, if there is any other possible use section 644 cannot apply.

[24] Canmore relies on *Hartel Holdings Co Ltd v Calgary (City)*, [1984] 1 S.C.R. 337 for this limitation, because of a statement by Wilson J. for the court that "the 1970 legislation applied only to zones in which the use or intended use of the land was only parks or other specified public purposes" (at 353, original emphasis). For various reasons, I do not find that *Hartel* assists Canmore in its position.

[25] A significant underlying fact in *Hartel* was that the city was maneuvering to purchase the subject land for a park but was not ready to make the purchase. Thus, it froze development by adoption of statutory plans that designated the land for a park to be owned by the city. However, its land use bylaw allowed a variety of other uses for the land under an "A-Agricultural" designation. Clearly this was done, said Wilson J., "because the predecessor of [current section 644] . . . provided that the municipality could not zone land exclusively for parks or recreational facilities unless it owned all the land in the zone or acquired it within six months from the date of establishment of the zone" (at 339, original emphasis), and the city was not ready to trigger that result.

[26] The passage in *Hartel* relied upon by Canmore as indicating that section 644 (at that time, section 70 of the *Planning Act*) was limited to designations for intended use of land "only for parks or other specified public purposes" (at 353, original emphasis) also applied to prior legislation. Wilson J. did not state that the current form of the legislation must be interpreted in that fashion.

[27] (The earlier legislation, on which *Hartel* commented as part of legislative history, stated that a zoning bylaw "shall not establish a zone in which the land therein is used or is intended to be used only for parks, playgrounds, schools, recreation grounds or public buildings" unless all of the land is owned by the municipality or acquired within six months. The principle is the same in the current section 644 and section 70 of the *Planning Act* considered by *Hartel*, except that the word "only" is missing from the phrase "if land is designated under a land use bylaw for use or intended use as a municipal public building, schools and facilities, park or recreational facility" in both of those versions.)

[28] Furthermore, *Hartel* concerned a situation where a city resolution and statutory plans showed a clear intention to develop the owner's land as a park but the land use bylaw allowed a number of uses (at 339). The case turned on the finding that a land use bylaw is the instrument to consider, because it is the mechanism by which policies in statutory plans are implemented (at

344); and the land use bylaw allowed uses other than a park, even though they were financially unattractive to the landowner (at 346-47, and 352-53).

[29] In short, because of its narrow *ratio* and the change in legislation (not specifically addressed), *Hartel* cannot be said to hold that a type of use described in section 644 must be exclusive.

[30] But this fine point of statutory interpretation is not significant here. As explained above, the name, purpose, permitted and discretionary uses of Natural Park District all limit use of Three Sisters' upper triangular area to a park as that term is meant in section 644.

V. Designated Use Can Be Exercised Only by Public Body

[31] Canmore submits that even if the land is designated for use as a park (or one of the other three specified uses), section 644 is not engaged unless that use can only be exercised by a public body such as would deprive the owner of all private use of the land. This further threshold is required, argues Canmore, to respect the policies of planning law as codified in Part 17 of the *Act*; and to recognize that section 644 must be given narrow scope, as an exception to the overriding presumption that downzoning is permissible and non-compensable. This principle is codified in section 621 of the *Act* which states that except as otherwise provided, "nothing in this Part or the regulations or bylaws under this Part gives a person a right to compensation." Thus, Canmore argues, section 644 must be reserved for significant infringement to a landowner's rights.

[32] The designation of the upper triangular area as Natural Park District means, according to Canmore's position, that Three Sisters may use the area only for park purposes, available to the general public for its recreation; but because this use can be provided by private ownership of the land, section 644 does not require Canmore to buy or redesignate the land. In addition, Canmore points out that because the other parts of the Staircase Lands are designated Future Development District, there are discretionary uses on them including athletic and recreational facility, outdoor, agricultural, campground, open space and public building. Thus, as Canmore submits, "one could easily envision a campground development on the balance of the Staircase Lands, complemented by open space and trails on the upper triangular portion of the lands" (brief, para 50).

[33] This argument is related to the one I addressed earlier, that whether section 644 is engaged with respect to the zoning of the upper triangular area must be considered with reference to the entire parcel, which includes other land designated for other uses. The argument has no more force in the present context, considering whether Three Sisters has private uses available for the upper triangular area because it also owns adjacent land. Section 644, read according to its plain meaning, speaks to the effect of a particular designation of use for a particular piece of land. It would broaden its meaning unduly to apply it in the context of other lands not affected by the designation.

[34] The only authority on how to interpret section 644 is *Hartel*, which has already been addressed. That case offers no guidance on whether Canmore's suggested threshold applies. It reinforces the deference our legal system gives to municipal planning decisions, even those which effectively freeze development. As observed in *Hartel*, "the legislation has gradually moved away from the situation in which the rights of the property owner were given paramount consideration towards the situation in which planning flexibility and the public interest are given

paramountcy" (at 353). Likewise, Canmore refers to *Canadian Pacific Railway Company v Vancouver (City)*, [2006] 1 S.C.R. 227, where the city had designated a corridor of land previously used for railway purposes as a "public thoroughfare" for the purpose of rail, transit, cyclist paths and pedestrian paths and, ultimately, the court rejected a claim for compensation based on grounds of *de facto* expropriation.

[35] Despite our law's deference to municipal planning, plainly section 644 of the *Act* imposes a limit on zoning restrictions a municipality may impose on private land before triggering purchase or redesignation obligations. As both parties recognize, it is a unique provision in the *Act*. However, its placement is informed by the purpose, set out in section 617, quoted earlier: the purpose of Part 17 and the regulations and bylaws implemented thereunder is to provide means whereby plans may be made for public interest objectives "without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest." In other words, section 644 embodies the principle of proportionality.

[36] Canmore's argument that section 644 is triggered only when there is an exclusive designation of one of the specified uses and then only when that use can be provided only by a municipality cannot, in my view, be supported by the plain meaning of the section. Further, such a limit cannot be justified as an infringement on a landowner's rights that is necessary in the public interest.

[37] I have found that the Natural Park District designation of the upper triangular area limits its use to a park that must remain mainly in natural condition and accessible to the public for recreation. In other words, Three Sisters is told that it may use its private land only for purposes of a public park. To use Canmore's phraseology, that constitutes a significant infringement of a landowner's rights. More importantly, it falls squarely within the plain words of section 644 and such an interpretation is consistent with the purpose of Part 17 as expressed in section 617.

VI. Designation Under Bylaw

[38] Section 644 applies only where the designation of use as, for example, a park is pursuant to a bylaw. *Hartel* rejected the argument that a designation of use in a statutory plan was sufficient to trigger the section.

[39] As noted above, three land use bylaws passed from 1999 to 2019 designated the upper triangular lands as Natural Park District. It is important to identify whether section 644 was engaged when LUB 2020 was adopted and made effective, because then Three Sisters brought this application within what the parties agree is the applicable limitation period: the general two-year period in section 3(1) of the *Limitations Act*, R.S.A. 2000, c. L-12, plus the six-month period within which the municipality must act in section 644.

[40] Canmore argues that the limitation period started to run when Three Sisters acquired the land in October 2013 (although it remains unclear why that is the operative triggering event, rather than one of the land use bylaws). Three Sisters submits that there is a new triggering event each time a land use bylaw is passed. It points to section 1.3 of LUB 2020, which expressly repealed LUB 2012. It provided further that "no provisions of any other Bylaw with respect to zoning, development control, development schemes and Uses shall hereafter apply to any parts of the town described in this Bylaw," subject only to provisions of the *Act* respecting non-conforming uses. Three Sisters further argues from *City Abattoir (Calgary) Ltd v Calgary (City)*, 1969 CanLII 768 (ABCA), that repeal of a bylaw means there is no regulation in place until a

new bylaw is passed. (There is an important distinction in this case from *City Abattoir*: here, the repeal of LUB 2012 is contained in LUB 2020, so that there is no development gap; whereas in *City Abattoir*, a land use bylaw had ceased to exist and at the material time had not been replaced.)

[41] These technical arguments are, in my view, of limited assistance. It is instructive, rather, to compare the land designations made by the three bylaws. Each designated the upper triangular land as Natural Park District, although the balance of the Staircase Lands were given different designations (in LUB 1999 and LUB 2012, Urban Reserve District; and in LUB 2020, Future Development District). However, other than bearing the same name, Natural Park District, there are subtle differences.

[42] The Natural Park District purpose is identical in LUB 1999 and LUB 2012. In LUB 2020, there are broad similarities but some differences. For example, the earlier purpose was "to protect existing open spaces which are primarily in a natural or natural-appearing condition" for certain purposes relating to wildlife and recreation; in LUB 2020, the inclusion of "natural-appearing" is removed. The purpose provisions in LUB 1999 and LUB 2012 contain the statement that "such developments and uses as playgrounds maintained playing fields, indoor facilities or shelters, and formally organized sporting events are not considered appropriate for the District"; this statement does not appear in LUB 2020.

[43] There are also changes to permitted uses. LUB 1999 and LUB 2012 contain three permitted uses for Natural Park District: wildlife corridors, wildlife habitat and vegetation management. LUB 2020 has five permitted uses: open space, trail, sign, wildlife habitat patch and wildlife corridor.

[44] The bylaws also contain different discretionary uses for Natural Park District. LUB 1999 lists six: uses approved prior to the third reading of the bylaw; uses deemed to be accessory to developments existing prior to the third reading; linear developments associated with public utilities; open space park facilities; and pathways for non-motorized uses. LUB 2012 has five discretionary uses, which are largely the same, with some modified wording – for example, instead of open space park facilities in LUB 1999, "public park" is used; and instead of "pathways" the word "trails" is used as applicable to non-motorized uses.

[45] LUB 2020, however, has only one discretionary use: "accessory building." According to the definition contained in section 13.2 of LUB 2020, this means "a building which is subordinate or incidental to the principal building on a site that is not a dwelling unit. It must be located on the same site as the principal use and it shall not precede the development of the principal building."

[46] It is an open question which land use bylaw offered the owner of the upper triangular area the best potential for private purposes. Partly that would depend on the development objectives of the landowner at various times. It would also depend on the likelihood of obtaining development approval for the varying range of discretionary uses.

[47] The main point, however, is that the meaning of Natural Park District changed in the different bylaws, particularly LUB 2020. Canmore chose to replace the prior land use designation, even though the district name remained the same. To use the terminology of statutory interpretation, it was not a mere re-enactment: Sullivan, § 24.05.

[48] In addition to this fundamental point, land use bylaws are compendious documents that include a broad range of substantive and procedural provisions and maps. Designation of a piece of land as a type of district does not stand alone, but operates in the context of the whole bylaw.

[49] I conclude, therefore, that the relevant bylaw designating the use of Three Sisters' land for purposes of section 644 of the *Act* was LUB 2020. Thus, Canmore was obligated to undertake the remedial steps of purchasing or redesignating the land within six months of the effective date of the bylaw. Based on that finding, it is clear that Three Sisters commenced its application for relief within the applicable limitation period.

VII. Conclusion

[50] For the reasons given, I find that the upper triangular area of the Staircase Lands has been designated under LUB 2020 for use or intended use as a park within the meaning of section 644(1) of the *Municipal Government Act*. Thus, I grant an order in the nature of mandamus requiring Canmore to acquire the upper triangular area or designate it for another use or intended use.

[51] Counsel may arrange a further attendance to address clarification or other matters arising from these reasons and costs.

Heard on the 30th day of June, 2022.
Dated at the City of Calgary, Alberta this 27th day of July, 2022.

G.H. Poelman
J.C.Q.B.A.

Appearances:

Tim Bardsley
for the Applicant

Kelsey Becker Brooks
for the Respondent