Court of Queen's Bench of Alberta

Citation: Gruman v Canmore (Town), 2018 ABQB 507

Date: 20180703
Docket: 1601 01690
Registry: Calgary

Between:

Mark W. Gruman

Applicant

- and -

The Town of Canmore

Respondent

Reasons for Decision
of the
Honourable Mr. Justice M. David Gates

I. Introduction and Overview

[1] The rezoning of part of the Peaks of Grassi area (the "Lands") located in Canmore is a matter of interest to many citizens of Canmore, as evidenced by the number of people who attended the hearing of this Court application on March 14, 2017. The rezoning may lead to an increase in residential units being built in an area where it is not previously permitted. The strong opposition to the rezoning expressed by certain citizens, notably the Applicant, is not, however, sufficient to grant the application. In this matter, I need to determine if the amendment to the zoning bylaw, approved by a majority of the Town of Canmore Council, is invalid.

[2] This is a judicial review application relating to a Canmore rezoning bylaw that is applicable to the Lands which consists of three lots. The Applicant, Mark W. Gruman, is opposed to the rezoning and seeks an order invalidating Bylaw 2015-19, *Peaks of Grassi Direct Control District Bylaw* (the "Grassi Bylaw Amendment") enacted by the Town of Canmore ("Town" or "Canmore"). Prior to the amendment, the lands were zoned as Urban Reserve. The

third lot ("Site 3") is adjacent to an environmental reserve. The Applicant is one of the owners of land adjacent to the lands sought to be rezoned and he lives in the neighbourhood where the lands are located.

[3] The issue in this case is whether the Grassi Bylaw Amendment is invalid for reasons of unreasonableness or lack of procedural fairness in the process leading up to its passage. During oral submissions, Counsel for the Applicant specified that his main concerns relate to the procedural defaults.

[4] The Applicant questions the nature, appropriateness, accuracy and completeness of the information given by the Town's administrative employees ("Administration") to Council when the majority voted in favour of the Grassi Bylaw Amendment. Specifically, the Applicant submits that the Town Administration misinformed or misled Council with respect to the flood risk analysis, the geotechnical screening reports, as well as the environmental impact statement ("EIS") which led to a breach of the Applicant's right to procedural fairness as well as rendered Council's decision unreasonable.

[5] The Applicant also questions whether Council complied with the prescribed procedure mandated by the legislative scheme. First, he submits that Council considered input following the public hearing, thereby violating Council's procedural bylaw. Second, he submits that the Town of Canmore failed to meet the Municipal Development Plan ("*MDP*") mandatory requirements for an independent, and professional third party review of the EIS.

[6] The Town of Canmore's position is that the Grassi Bylaw Amendment should be upheld, because the procedure that was adopted met the applicable standard of procedural fairness and involved no breaches of administrative law principles.

[7] This application for judicial review of the Grassi Bylaw Amendment was heard by me on March 14, 2017. At the conclusion of oral argument, the parties were invited to file supplementary written arguments on the question relating to the EIS. The Town filed supplemental written submissions on March 21, 2017, while the Applicant filed supplemental written submissions on March 29, 2017.

[8] Before I determine the issues as to whether there was a breach of procedural fairness and whether Council's decision was reasonable, I will first briefly review the procedural history of this case. Second, I will review the facts that are relevant to all issues raised in this Application, and third, I will determine the applicable standards of review. I will then turn to each issue raised by the Applicant.

[9] These are my reasons for decision.

II. History of the Proceedings

[10] The Originating Application was filed on February 26, 2016, following a decision made by the Council on January 19, 2016, to change the zoning of the lands from Urban Reserve District to DC-Direct Control District, PD-Public Use District, and R1B-Residential Single–Family Detached Plus District. This change permits different types of development uses to be considered on the Lands in the future, including the development of residential units which use was not permitted, and could not be considered, under the Urban Reserve District designation.

[11] The Amended Originating Application ("the Amended Application") was filed on March 17, 2016. The Amended Application added four new grounds for relief in addition to those advanced in the Originating Application.

[12] On March 31, 2016, McCarthy J. granted an initial interim stay. On July 21, 2016, Rawlins J. heard an application for an extension of the interim stay of the operation of Grassi Bylaw Amendment as well as a cross-application brought by Canmore to strike the Amended Application on the basis that the Applicant could not show a triable issue. On August 12, 2016, Rawlins J. granted the stay pending the judicial review application. At the same time, she struck four of the grounds of requested relief. On December 7, 2016, the Court of Appeal restored the four grounds for judicial review previously struck by Rawlins J.: 2016 ABCA 392.

III. Facts

[13] The Lands form part of the Peaks of Grassi neighbourhood and consist of 44.99 acres excepting two parcels of 21.2 and 19.79 acres (subdivision numbers 9711290 and 9813578), respectively. The Lands include three lots: Site 1 (the most westerly parcel), Site 2 and Site 3 (the East parcel).

[14] The Lands were purchased by 1861523 Alberta Ltd., Hillcroft Developments Ltd. and 1457115 Ontario Limited ("the Developer") on March 11, 2015. The Lands consist of an undeveloped mixed coniferous forest with a limestone outcrop in one area and were designated Urban Reserve prior to the March 2015 purchase.

[15] The purpose of the "Urban Reserve" is "[t]o protect land that is potentially suited for urban uses from premature subdivision and development": *Town of Canmore Land Use Bylaw* 22-2010, s 2.61.1. Urban Reserve lands receive preliminary screening only and may require environmental, geotechnical and other screening in order to determine their potential suitability for any development: *Town of Canmore Land Use Bylaw* 22-2010, s 2.61.1.

[16] The permitted uses and discretionary uses of an urban reserve are enumerated under 2.61.2 and 2.61.3 of the *Town of Canmore Land Use Bylaw* 22-2010 as follows: public utilities, campgrounds, cemeteries, cultural establishments, extensive agricultural pursuits, intensive agricultural pursuits, kennels, outdoor athletic and recreational activities, parks and playgrounds, public and quasi-public buildings and uses and signs. In other words, under the Urban Reserve zoning, the Lands could have been developed, although only in accordance with the permitted or discretionary uses specified under 2.61.2 and 2.61.3.

[17] In 1998, the Town of Canmore and the prior owners of the Lands entered a non-legally binding Settlement Agreement according to which building within the Peaks of Grassi neighbourhood was capped at 45 acres with residential units not to exceed 404: Affidavit of Mr. Gruman, filed February 26, 2016, tab 3 at para 4.1.

[18] In 2014, the Developer sought to rezone the Lands from Urban Reserve to Direct Control and Public Use District which would have permitted the development of residential units. This type of development was not permitted under the Urban Reserve designation. This first application to rezone a part of the Peaks of Grassi, which is not at issue in the Application before this Court, was rejected by Council in February 2015.

[19] A second bylaw application, the subject of this Application, was submitted on August 25, 2015. It included a proposal to allow for affordable housing to be built perpetually affordable

housing ("PAH") and market affordable housing. The application was considered by Council and given a first reading. It was then set down for a Public Hearing in accordance with section 230 of the *Municipal Government Act*, RSA 2000, c M-26 ("*MGA*") (as it read at that time). The Public Hearing was held on November 24, 2015, and adjourned at the close of the hearing. It is not disputed that the majority of the submissions made by members of the public opposed the application for rezoning.

[20] Following the conclusion of the Public Hearing, the Developer and the Canmore Community Housing Corporation ("CCHC"), a corporation with 100% of its shares owned by the Town of Canmore, worked on several draft agreements specifically contemplating perpetually affordable housing on Site 1. On January 19, 2016, CCHC entered into a purchase and option agreement with the Developer ("CCHC Agreement"). I note that CCHC's mandate includes the provision of perpetually affordable housing.

[21] On January 19, 2016, Town Council approved the second bylaw application, the Grassi Bylaw Amendment, for a re-designation of the Lands, effectively opening them up for residential development. The Applicant now seeks an order invalidating the bylaw resulting from the second bylaw application – the Grassi Bylaw Amendment.

IV. Standard of Review

[22] The Applicant submits that the standard of review for questions of procedural fairness is correctness. The Applicant also says that the decision of a municipal council is reviewable on a reasonableness standard.

[23] The Town agrees with these standards, but adds that the reasonableness of municipal bylaws must be assessed in the context of the particular type of decision-making involved in this case, and all other relevant factors. Citing ***Catalyst Paper Corp v North Cowichan (District)***, [2012] 1 SCR 5, the Town argues that bylaws are not quasi-judicial decisions, but rather are legislative (as opposed to adjudicative) in nature.

[24] The applicable standard of review with respect to issues of procedural fairness is correctness: see, for example, ***Eagles Nest Youth Ranch Inc v Corman Park (Rural Municipality #344)***, 2016 SKCA 20 at paras 20-25. The content of the duty varies according to the following five factors:

a) the nature of the decision and the decision making process employed in making it;

b) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates;

c) the importance of the decision to the individuals affected;

d) the legitimate expectations of the party challenging the decision; and

e) the nature of the deference accorded to the body.

See ***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817 at paras 21 ff. See also ***Campbell v Edmonton (City)***, 2014 ABQB 742.

[25] In this case the Town argues that it was required to afford a low to a moderate degree of procedural fairness. The Applicant argues that a high degree of procedural fairness must be afforded.

[26] As more fully explained below, I find the Town was required to afford a moderate amount of procedural fairness.

[27] A municipal council's decision is generally reviewable on the reasonableness standard: ***Catalyst Paper Corp.*** at paras 18-20. The test is, as stated in ***Catalyst Paper Corp.*** at paras 24 and 36, that a bylaw will be set aside only if the bylaw is one that no reasonable body could have adopted. The reasonableness standard is a flexible standard that varies in light of the context and nature of the challenged administrative act: at para 23. McLachlin CJC, as she then was, writing for the Court explains at para 25 how this standard restricts municipal councils:

> Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.

[28] Section 539 of the *MGA* provides that "[n]o bylaw may be challenged on the ground that it is unreasonable", which has been interpreted in some cases as equating to a higher level than that of reasonableness. For example, in ***Nor Chris Holdings Inc. v Sturgeon County***, 2013 ABQB 184, the Court held that a municipal council's decision is reviewable on the standard of "patent unreasonableness".

[29] According to the Applicant, this provision does not foreclose judicial review of municipal decisions.

[30] In my view, the standard of reasonableness applicable in this case must be informed by the wording provided under s. 539, and interpreted in light of the context of the particular type of decision-making involved here, as well as all other relevant factors.

V. Issues

[31] The issues for consideration in this case are as follows:

A. i. Was there a violation of section 12.7 of the Town of Canmore *Procedural Bylaw*?

ii. If so, did it result in a breach of the Applicant's right to procedural fairness?

B. i. Did the Town Administration mislead or otherwise misinform Council as to the Flood Risk Analysis?
ii. If so, did it lead to a failure of Council to properly consider that risk in determining that the subject parcel was suitable for development?
iii. If so, did it result in a breach of the Applicant's right to procedural fairness?

C. i. Did the Town Administration mislead or otherwise misinform Council as to the geotechnical screening reports in regards to building on the rock outcrop (Site 3)?
ii. If so, did it result in a breach of the Applicant's right to procedural fairness?

D. i. Did the Town Administration mislead or otherwise misinform Council as to the need for a third party EIS in the determination that the subject parcel was suitable for development?

ii. If so, was the failure to provide such a statement result in a breach of the Applicant's right to procedural fairness?

E. Was Council's decision unreasonable because it considered what was to be built on the subject lands rather than the land's suitability for development?

F. Was Council's decision unreasonable because it was based on incomplete, inaccurate and faulty evidence with respect to flood risk, geotechnical screening and environmental screening?

[32] During oral submissions, the Applicant specifically abandoned the issues raised in his Amended Application with respect to the alleged reasonable apprehension of bias, as well as issues related to the *Water Act*, RSA 2000, W-3.

[33] I will now turn to each issue.

VI. Analysis

A. Section 12.7 of the Town of Canmore *Procedural Bylaw*

[34] Section 12.7 of the *Procedural Bylaw* 04-2013, amended June 17, 2015, provides that "Council shall not discuss or consider any input from the applicant or members of the public regarding a matter under consideration that is received after the adjournment of the public hearing held to hear that matter."

[35] The Applicant says that there was a violation of the *Procedural Bylaw* in this case, because Council received information relevant to the affordable housing consideration from the Developer before the final vote on the Grassi Bylaw Amendment, but after the Public Hearing. The Applicant contends that the violation resulted in a breach of his right to procedural fairness. More specifically, the Applicant maintains that, following the adjournment of the Public Hearing, Councillor McCallum, who also chairs the CCHC, met with the Developer. According to the Applicant, Councillor McCallum wrote to the CCHC Board of Directors to petition the Board, on behalf of the Developer, to enter into an agreement relating to the Peaks of Grassi. The Applicant's argument is that, as a result of meetings and negotiations between CCHC and the Developer, the parties entered into the CCHC Agreement. Moreover, the Applicant describes as significant the fact that Councillor McCallum executed the agreement on behalf of CCHC, and that the Mayor of Canmore, John Borrowman, is also a member of the CCHC Board.

[36] The Applicant argues that the Developer was not permitted to provide private incentives to councillors to vote in favour of the Grassi Bylaw Amendment given the "tremendous negative feedback" that was heard at the Public Hearing. Further, the public had no opportunity to provide input on the content of the CCHC Agreement at the Public Hearing or at any point thereafter. In the Applicant's view, the violation of s. 12.7 of the *Procedural Bylaw* is especially egregious because of the blatant way in which the CCHC Agreement was utilized to promote the Grassi Bylaw Amendment.

[37] The Town argues that there is no evidence that any discussions occurred between any member of Council *qua* councillor and the Developer. It adds that the evidence indicates that several drafts of the CCHC Agreement were circulated between legal counsel at the direction of Town Administration before being presented to the CCHC Board, but that nothing indicates that

Councillor McCallum had any involvement in the negotiations or had a meeting with the Developer related to the CCHC Agreement, whether as a Chair or as a Councillor.

[38] The CCHC Agreement was signed after the Public Hearing. It was presented to Council prior to the third reading of the Grassi Bylaw Amendment. During the January 19, 2016 meeting, Council was to first consider the Grassi Bylaw Amendment, followed by the CCHC Agreement between the Developer and the CCHC. In fact, after the CCHC Agreement was signed, the agenda for the meeting was altered so that a Town of Canmore Briefing on the Agreement was addressed first, followed by the consideration of the Grassi Bylaw Amendment.

[39] The CCHC Agreement included the option that if the perpetually affordable housing units are not under construction by a specific date, the CCHC had the option to acquire Site 1 for a nominal price. The possibility that perpetually affordable housing would never be built was a concern that was raised at the Public Hearing: see for example Record of Respondent at 496, 642, 647, 667, 685, 774, 777, 826 and 859.

[40] In his affidavit, Steven Hrudey, co-owner of a home in the Peaks of Grassi neighbourhood, and President of the Peaks of Grassi Community Association, states that there was a meeting after the Public Hearing between the CCHC and the Developer regarding public affordable housing. He contends that this discussion or input violates s. 12.9 of the *Procedural Bylaw*. He also refers to meetings and to "Confidential Briefing" notes to the CCHC Board of Directors in support of a proposed CCHC agreement and which preceded the CCHC Agreement as defined above.

[41] I note that the affiant, Mr. Hrudey, was not at the alleged meetings and has no personal knowledge that these meetings occurred, let alone what was discussed at the meetings. The notes were posted on the CCHC website and were available for public download despite their "confidential" designation.

[42] In the CCHC Confidential Briefing dated January 14, 2016, the authors, Mr. Sorfleet and Ms. McCallum (Chair) explain why an agreement was important in the circumstances:

> What is the rush?
>
> In order to provide some certainty to Council that if the bylaw amendment is approved the PAH [perpetually affordable housing] units would be built, the desire is to have this offer and option executed prior to Council considering third reading of the Peaks Landing bylaw amendment. The reason for this is that if the lands were zoned already and such an agreement and option were not in place, the developers would be able to renege on their commitment to provide 7 PAH units.

[43] Counsel for the Applicant acknowledged during oral submissions that the question as to whether Council can receive information from a party after a public hearing on an informal basis has been considered in the common law context and found to not necessarily create an unfair process: ***Atkins v Calgary (City)*** (1994), 162 AR 97 (CA) at para 14. In this instance, he contends that if affordable housing was thought to be a desirable goal, the fact that more information in that regard was received after the public hearing is inconsistent with s. 12.7 in that there should be no discussions behind closed doors where public input and scrutiny is precluded.

[44] I am not persuaded that the CCHC Agreement is input from the Developer. Rather, it is properly characterized as reassurance from the Developer of its commitment to perpetually affordable housing. The reassurance was given because the application contemplated affordable

housing, despite the fact that it was a rezoning application and not a development application. As previously noted, this issue was specifically raised at the Public Hearing. Indeed, the Applicant questioned whether the Developer would even proceed with the promised perpetually affordable housing. The Applicant had the right to be heard and was in fact heard at the Public Hearing. In the circumstances of this case, the CCHC Agreement is not input under s. 12.7; it was not a new issue and it addressed one of the concerns specifically raised at the Public Hearing as to how the creation of the perpetually affordable housing would actually be ensured or promoted.

[45] Even if I am wrong and the CCHC Agreement is input under s. 12.7, there is no evidence of prejudice arising from the violation of s. 12.7 in this instance given that the purpose of the CCHC Agreement was to ensure that the concerns raised at the Public Hearing were addressed.

[46] In ***Campbell***, the Court of Appeal addressed the issue of prejudice in the following terms, at para 41:

> With regard to prejudice, our Court of Appeal in *Keefe* at para 29 stated as follows:
>
> > Absent an express statutory statement, no procedural defect should vitiate a proceedings [sic] unless a real possibility of prejudice can be shown or unless the procedure followed is so devoid of the appearance of fairness that the administration of justice would be brought into disrepute: *Bridgeland Riverside Community Association v. Calgary* (1982), 37 A.R. 26 at para. 28 (C.A.).

[47] It follows, in my view, that the Grassi Bylaw Amendment should not be invalidated on this ground in any event.

[48] The purpose of the CCHC Agreement was to address the concerns already raised at the Public Hearing. (See, for example, ***PSD Enterprises Ltd v New Westminster (City)***, 2012 BCCA 319.) In fact, had the CCHC Agreement been entered after the approval of the Grassi Bylaw Amendment, there would have been no arguable breach of procedural fairness under s. 12.7.

[49] In summary, this argument fails on two grounds. First, I find that there was no violation of s. 12.7 because the CCHC Agreement did not amount to input. Second, even if the CCHC Agreement were input, there is no prejudice. Thus, there was no breach of the Applicant's right to procedural fairness.

B. Flood Risk Analysis

[50] The second argument relied upon by the Applicant to invalidate the Grassi Bylaw Amendment relates to the accuracy of the information relayed to Council by the Town Administration and whether it misled or misinformed Council as to the Flood Risk Analysis.

[51] The Applicant argues that procedural fairness was violated because some information regarding the flood risk presented to Council was inaccurate. As such, the Applicant relies on the affidavit of Dr. Boone, a professional engineer who owns a home beside one of the parcels that was rezoned for development. Relying on Dr. Boone's affidavit, the Applicant argues that the flood risk report, the BCG Report, presented during the Grassi Bylaw Amendment process was incomplete and faulty, did not address the risks from all the creeks that might affect the area (i.e. that might flood into the Peaks of Grassi), and that it appears that Council mistakenly thought that the flood question had been answered in the materials submitted.

[52] Specifically, the Applicant contends that the BGC Report assessed the risk from Stones Canyon Creek only and failed to consider the risk from two additional creeks. The report was focused on debris flow risk, not overland water flow flood risk. The Applicant adds that even without considering this additional flow from these other creeks, the BGC Report clearly places all of Site 1 at risk for overland flow flooding.

[53] The BGC draft report is a risk assessment that was conducted in support of the proposed development. BCG was retrained by the Developer to complete the assessment looking at whether it would be affected by debris flow and flooding in the area of the development located on the Stones Canyon Creek Fan. It was provided by the Developer to the Town in advance of the Public Hearing. It was part of the application package given for the Town of Canmore Request for Decision dated October 20, 2015. A final version was attached to the January 5, 2016 Request for Decision meeting.

[54] In his affidavit, Dr. Boone states that the BGC assessment only considered debris flow from Stones Canyon Creek and does not consider Creeks 'Y' and 'Z'. He refers to an email dated July 2, 2015, from Town official Julia Eisl which states that Creek Z and Stones Canyon Creek appear to be relevant: Tab 3 of Dr. Boone's Affidavit. However, the BGC draft report of September 23, 2015, only assesses Stones Canyon Creek.

[55] The Town of Canmore argues that not only is the Applicant incorrect, but his submissions are made without any expert evidence. The Town submits that the reason that the BGC Report only dealt with Stones Canyon Creek, and no other creeks, was because the BGC Report only dealt with actual flood risk to the development.

[56] The 2013 BGC Report was in front of Council nine months earlier in the context of the first application where the Developer sought to rezone a part of the Peaks of Grassi but, as mentioned above, the application was ultimately rejected by Council. The Report was not, however, before Council in January 2016, in conjunction with the rezoning application at issue in this case. The 2013 BGC Report provided that the distal fan margins of the Y and Z Creeks were mapped as encroaching on existing housing. When reaching the Peaks of Grassi subdivision, the Report indicated that flows were believed to be very thin and largely unchannelized. Given the lack of damage following the 2013 events, it did not propose any short-term recommendations for X, Y and Z Creeks at that time.

[57] The 2013 BGC report was accurately summarized to Council in February 2015 in the context of the first application to amend the zoning bylaw:

> 5.e **Mountain Creek Flood Hazard** – BGC Engineering Inc. have provided a Project Memorandum (Forensic analysis), dated December 2, 2013 on X, Y and Z creeks, which are upslope from the Peaks of Grassi development. This Project Memorandum examined what occurred and the impacts on the Peaks area of the June, 2013 flood event. The conclusion from this analysis was that the June 2013 event resulted in an 'overland flow' through the Peaks area (versus a sediment/debris flow as occurred on many of the other creeks in Canmore). BGC have noted that more detailed hazard investigations are required to more clearly establish the potential for severe debris flows. However, based on their preliminary investigation, '...flows are believed to be very thin (less than 30 cm) and largely unchannelized'. The existing development has wooden diversion structures and riprapped channels to mitigate these overland flow impacts on the

> existing development. The increased risk to property with the proposed development due to Y and Z creeks is deemed insignificant.

[58] As noted in the January 2016 Request for Decision, reference is made to steep creek hazards and indicates that Site 1 is subject to a low hazard, which means that there is slow flowing shallow and deep water with little or no debris. The low hazard designation also means that there is a high likelihood of water damage and potentially dangerous to people in buildings, on foot or vehicles in areas with higher water depths.

[59] This information corresponds to what is found in the BGC draft report dated September 23, 2015, where it also indicates that the proposed development is situated in the lowest hazard zone categories depicted on the map: Stones Canyon Creek Development Level 2 Debris-Flow Risk Assessment.

[60] Council was advised by some citizens of Canmore, including Dr. Boone, of the alleged inadequacies in the report and asked to delay the Public Hearing until the inadequacies could be addressed. However, the Public Hearing went ahead as scheduled: Affidavit of Mr. Gruman at para 12.

[61] I place little weight on the contents of Dr. Boone's affidavit. First, given the location of his own home, he clearly has a person interest in this matter. Second, while he is an engineer by training and profession, there is nothing in his affidavit that speaks to any particular or specialized knowledge with respect to hydrotechnical analysis. As such, I am left in some doubt as to his qualifications to provide the opinions set forth in his affidavit.

[62] The Town concedes that the proposed overland flood mitigation solutions have not yet been adequately studied. However, this issue has not been ignored as evidenced by the Request for Decision of January 2016, wherein it states that the "[s]pecific design and location of mitigation will need to be determined at subdivision or development stage" and goes on to refer to the next potential steps.

[63] During the Council meeting held on January 19, 2016, Councillor Russell expressed his concern regarding the fact that the flood mitigation would only be handled at the subdivision stage. Ultimately, he voted against the Bylaw Amendment, but his intervention during the Council meeting confirms, in my view, that Council was in no way misled or provided with inaccurate information:

> One, from the experts telling us one thing, ah, we've gone from, we've gone through, we have flood, we need flood mitigation in the wildlife corridor, we need it there. You know and now we've got engineering telling that we'll handle it at subdivision and the geotechnical experts would like a little more, but it's not required. That leaves me scout, that leaves leery.

[64] In this case, the Applicant and Dr. Boone are of the opinion that the information relating to the flood risk should have been more comprehensive. An assessment that considered risk scenarios involving all the creeks would, they contend, have been more helpful and, as such, have led to a more comprehensive report. While I accept this general proposition, it does not follow that the information regarding the flood risk was misleading or that it amounted to misinformation.

[65] The evidence is that the potential risk with respect to other creeks was known and thought to be very low. It was, accordingly, not the subject of further investigation at the time.

Both the 2013 BGC report and the draft report dated September 23, 2015 stated that the risk of debris flow was unlikely, but that there was a risk for overland flooding. The risk of loss of life was negligible. In fact, a significant flood had fairly recently occurred in Canmore and the issues arising out of that flood were common knowledge.

[66] The Applicant relies on ***Simonelli v Rocky View (Municipal District No. 44)***, 2004 ABQB 45. In ***Simonelli***, the applicant for judicial review brought an application to amend the *Land Use Bylaw* to change selective areas of his land designated as floodway to flood fringe. Following a public hearing, the application was ultimately refused. Justice Park found that the evidence showed that Council was misdirected as to the correct facts. Justice Park was of the opinion that he could not determine what weight, if any, was given to the inaccurate evidence and concluded that the decision could not be upheld as reasonable considering the inaccuracies and irrelevant material and considerations provided to Council. In that instance, there were also some highly prejudicial misstatements which created procedural unfairness. He concluded that the only way the matter could be resolved was to provide the Applicant with a new public hearing for his redesignation application.

[67] The Applicant contends that ***Simonelli*** establishes that when Council considers irrelevant or inaccurate information, this results in a breach of procedural fairness which vitiates the proceedings, or at least makes them vulnerable to being set aside on judicial review. The Applicant argues that in light of ***Simonelli***, breach of procedural fairness occurs if inaccurate evidence is presented to Council at the hearing. In other words, the Applicant contends that misleading data or evidence presented to Council can create procedural unfairness.

[68] In this case, there is no evidence that Council was misled, misinformed or that the information conveyed was irrelevant. BGC was of the opinion that risks with respect to other creeks are not significant. The risk of overland flooding was clearly identified to Council. Moreover, I am satisfied that Council was aware that flood mitigation measures would need to be considered in the future. In my view, this case is distinguishable from ***Simonelli*.** There is no evidence, expert or otherwise, in this instance that substantiates the Applicant's assertion that Council acted on misleading or inaccurate information, thereby giving rise to a breach of procedural fairness.

C. Geotechnical Screening Reports

[69] The third ground relied upon by the Applicant to invalidate the Grassi Bylaw Amendment relates to the accuracy of the information conveyed by the Town Administration with respect to a geotechnical screening report.

[70] The Developer's application submitted in August 2015 refers to the fact that engineering and geotechnical reports will be required should the proposal proceed to subdivision approval and offers a preliminary comments regarding the exposed bedrock in the area.

[71] Dr. Boone's affidavit refers to an email dated December 23, 2014, which pre-dates the second application filed in August 2015. The geotechnical report is dated January 16, 2015.

[72] The Applicant argues that the Town Administration misled, or otherwise misinformed, Council as to the geotechnical screening reports in regard to building on a rock outcrop and that this action resulted in a breach of procedural fairness.

[73] The Applicant agrees that the provision of a geotechnical screening report was not mandatory in this case, but argues that if Council relied on inaccurate information, this can lead

to breach of procedural fairness. The Applicant argues that Administration represented to Council that it had relied on a geotechnical report to recommend the approval of the rezoning.

[74] The Town maintains that Council did not receive the geotechnical report until sometime in March 2016, well after the Grassi Bylaw Amendment had already been approved. It submits that, in any event, a complete answer to this question is that any decision regarding building on rock outcrops is a consideration at the development stage and, as such, is not relevant to the Grassi Bylaw Amendment relating to rezoning.

[75] There is no evidence that Council considered in any way the report which is date-stamped March 2016. I am satisfied that it was received after the Grassi Bylaw Amendment had already been approved.

[76] I agree with the Town of Canmore that even if Mr. Boone's position is correct in stating that the report is deficient, there is no evidence that the Council reviewed it before March 2016, or that that it relied on it in reaching its decision to pass the Grassi Bylaw Amendment.

[77] In the result, I am not persuaded that there was a breach of the Applicant's right to procedural fairness on this basis.

D. Environmental Impact Statement (EIS)

[78] The provisions of the *MDP* appear to require that an EIS be submitted with a rezoning application where a development proposal is within or adjacent to Environmentally Sensitive Areas. In such instances, the *MDP* requires an independent third party professional to evaluate the EIS.

[79] The lands sought to be rezoned in this case are clearly adjacent to an Environmentally Sensitive Area. In this case, the Developer submitted as part of its application an environmental brief, later supplemented by a series of updates, entitled Environmental Study for Peaks Landing. This document was prepared by Corvidae Environmental Consulting Inc. ("Corivadae Report"), though no specific author was identified. On the evidence before me, it is clear that there was no third party review of the Corvidae report

[80] The Applicant argues that the Administration misled or otherwise misinformed Council as to the need for a third party EIS. He argues that the failure to provide such a statement was necessary in determining that the subject parcel was suitable for development and that this failure resulted in a breach of the Applicant's right to procedural fairness. More specifically, the Applicant submits the Town of Canmore failed to perform the environmental screening required by sections 8.4 and 8.5 of the *MDP* to effect the rezoning, which led to a breach of procedural fairness.

[81] The Town does not dispute that an EIS, as mandated by the *MDP* , was required, but argues that the Applicant had no procedural right to have an EIS before Council. Thus, there was no breach of procedural fairness.

[82] In 2014, when the Developer filed a first application to rezone the Lands from Urban Reserve to Direct Control and Public Use District, the Administration's recommendation was that Council consider giving a second and third reading of Bylaw-2014-18. In submitting the matter to Council for a decision, the Administration took the position at that time that a more detailed EIS was not required for the land use amendment application prior to the Council decision, considering the location of the project in relation to the wildlife corridors and habitat

patches identified in the Town's *MDP*. The Request for Decision addressed the issue of the East parcel:

> However, as presented at the public hearing in a statement by Corvidae, they are confident that a more detailed EIS based on the development proposal would not change the recommendations or proposed mitigations in the study. Corvidae explained that the Environmental Brief is, in essence, a summary of what a more detailed EIS would contain and that the existing issue of human use in wildlife corridors is a more significant issue than the anticipated impacts of this development application. Additionally, ESRD did not require a more detailed report to be submitted or formulate their response.

[83] In the Request for Decision, the Administration stated that the *MDP* should not be interpreted literally because it would mean that any and all development in the valley bottom or adjacent to an Environmental Reserve would require an EIS (e.g. internal renovations to an existing building, or even a garden shed). The Administration was also of the opinion that and EIS would not be useful in the circumstances because the Environment Reserve dedication was due to the steep slopes and, in any event, it was not intended to protect wildlife corridors, sensitive areas or rare species:

> In this case specifically, the boundaries of the Environmental Reserve (ER) in question were defined based on a geotechnical investigation (Appendix 4). The purpose of the ER dedication was due to steep slopes greater than 35%. The preparation of an EIS to evaluate the impact of the development on the adjacent steep slopes is not, in Administration's opinion, useful information to evaluate the impacts of this application. The purpose of ER as regulated in the MGA pursuant to Section 664(1) is to protect undevelopable land due to concerns with steep slopes, gullies, swamps, flooding, or to prevent pollution. Under the current Provincial legislation ER is not intended to protect, for example, wildlife corridors, sensitive habitat, or rare species.

[84] The Administration also noted that the public had expressed concern that the Town was not using the new boundaries as shown in the 2012 Bow Corridor Ecosystem Advisory Group guideline document and, further, that an EIS should have been required. Administration commented that the updated boundaries had not yet been incorporated into the *MDP* thus, in its opinion, an EIS was not required. It also stated that had the boundaries been updated in the *MDP*, Administration would have required an EIS to be submitted with the application.

[85] The Council rejected this first application which contemplated the development of 23 dwelling units. The subsequent rezoning application at issue before this Court was made a few months later, which led to subsequent Requests for Decision (for first reading, a public hearing, as well as for second and third readings).

[86] The third attachment to the Request for Decision dated October 20, 2015 is the Corvidae Report. It suggests that no EIS is required because the project complied with the current *MDP* and was included in the Natural Resources Conservation Board decision for land use approval in 1992. As part of the NRCB process, a full Environmental Impact Assessment covering the project site was submitted for review and was accepted. In addition the document indicates that Corvidae Environmental Consulting Inc. was advised by the Town that due to the project area not being considered adjacent to wildlife corridors or habitat patches, as outlined within the

MDP, no EIS is required under the *MDP*. Corvidae received confirmation of this information through communication with the Town of Canmore planners in August 2014 and September 2015.

[87] The August 2015 Application which was reviewed for second and third reading in January 2016, and led to the adoption of the Grassi Bylaw Amendment, contemplates between 35 and 40 new dwelling units on 1.83 acres.

[88] In addition to the environmental study, the Developer also provided a letter dated October 20, 2014 from Environment and Sustainable Resource Development (ESRD) which was addressed to Ms. Woltenko (development planner of Canmore) and was in response to an email request asking for comments and recommendation in the context of the first bylaw amendment application. The ESRD commented and made some recommendations with respect to a number of issues including the impact of the development on the level of conflict between human and wildlife.

[89] In summary, the evidence is that the Corvidae Report (including its updates), as well as the letter from ESRD, addressed related environmental issues, but no formal EIS was provided. Moreover, there was no independent review of the Corvidae Report.

i. Procedural Fairness

[90] The Applicant submits that the Town of Canmore had an obligation to act in accordance with the provisions of the *MDP* as well as with the *MGA*. He says that this manifests as a duty of procedural fairness which the Town was obligated to follow. The Applicant argues that by failing to abide by its own bylaw, the Town of Canmore breached its duty of procedural fairness to the Applicant and that the Applicant has suffered prejudice as a result of the breach.

[91] In this case, the Lands bordering an Environmental Reserve are being rezoned. The Applicant maintains that an EIS is therefore required. He adds that the requirement for an EIS can only be met if the EIS is subject to an independent third party review, performed by a professional selected by the Town.

[92] The Applicant argues that the required EIS and third party review was a condition precedent to rezoning the Peaks of Grassi. In the absence of the required EIS and third party review, the Applicant maintains that the Town did not have the authority to consider and pass the Grassi Bylaw Amendment without breaching the Applicant's right to procedural fairness. The Applicant submits that the failure to follow the requirements of its own *MDP* prevents Council from doing what is required of it to determine whether the Peaks of Grassi are suitable for rezoning. He adds that when the Town failed to comply with its *MDP*, it acted contrary to its duty to accord the Applicant procedural fairness. According to the Applicant, he relied on the Town to comply with its own bylaw.

[93] The Town says that Administration did not mislead Council regarding the need for an EIS. The Town further submits that the lack of an EIS with respect to the Grassi Bylaw Amendment application did not result in a breach of the Applicant`s right to natural justice and procedural fairness, because he had no procedural right to have an EIS before Council. The Town submits that, in any event, there is no evidence that the Applicant suffered any prejudice as a result of the lack of an EIS.

[94] It is not disputed that an EIS as mandated by the *MDP* was required, but the issue in this case is whether the fact that it was not obtained led to a breach of procedural fairness.

[95] In ***Keefe v Clifton Corporation***, 2005 ABCA 144 at para 15, the Court discussed what should be considered when determining the content of procedural fairness:

> The central issue in this case concerns the content of City Council's duty of procedural fairness. The relevant considerations to be considered in determining the content of procedural fairness articulated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 were recently reiterated by McLachlin C.J.C. in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité)* (2004), 323 N.R. 1, 2004 SCC 48. There she stated at para. 5:
>
> > The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body.

[96] I will consider these five factors in relation to the specific facts of this case to determine the extent of the duty of procedural fairness owed in this instance.

a) Nature of the decision

[97] I am satisfied that the nature of the decision then before Council was an important one. As stated in ***Atkins*** at para 20:

> The dividing line, I suggest, may be the nature of the issues before a council. When the proposed re-designation is about one parcel, and the dispute is between two citizens, and when no larger question of public policy is engaged, I would expect that, in the absence of some special reason, the hearing would be inclusive and decisive. In other cases, especially when larger political questions arise, the role of a council is much more legislative than judicial and the hearing should be seen by all as nothing more than one aspect of the decision process.

[98] In this case, the decision to pass a bylaw was a decision that obviously rested with the elected Town Council. The issues identified by citizens at the Public Hearing, including the question of affordable housing, are illustrative of the broader policy questions raised in this case. This was not simply a dispute between two citizens, but rather an issue that had broader, more wide-spread ramification. While the issue of the rezoning will clearly affect the Developer and other citizens directly impacted, the issue raises other public policy considerations requiring Council to exercise a legislative role in the process. This same distinction was described by Nielsen J in ***Campbell*** (at para 27):

> The matter being considered by City Council in this case was not a dispute between two citizens. Rather, it involved larger political questions such as the overall development of the Molson Site, ramifications for several surrounding communities and ramifications for future LRT development. That this is so is evident from the fact that notice of the Rezoning Application was circulated to 1,111 individuals and organizations and from the wide consultation that was undertaken by the Sustainable Development Department in its review

of the Rezoning Application. Although the rezoning will ultimately affect the Developer and other citizens impacted by it, the decision is more legislative in nature than judicial considering the broader nature of the question here**.**

b) The Nature of the Statutory Scheme

[99] As mentioned above, in this case there was a public hearing before the second reading of the Grassi Bylaw Amendment, allowing interested parties to make representations and to ask questions.

[100] Section 632 of the *MGA*, as it read at the time of the application, provides that a council of a municipality with a population of over 3500 must adopt a municipal development plan. The *MGA* refers to what can and must be addressed in a municipal development plan.

[101] Although not a mandatory requirement, the *MDP* addresses environmental matters as follows:

> **8.4 Environmentally Sensitive Area Policies**
>
> a) Environmentally Sensitive Areas within the Urban Growth Boundary will include all lands illustrated in Map 4 Wildlife Habitat and Movement Corridors and Map 5 Flood Risk Areas. Development on those lands contained within the proposed Wellhead protection Area will not be treated as environmentally Sensitive Areas, but will be governed through the requirements of the Land Use Bylaw. In addition, all lands that qualify as Environmental Reserve under the Municipal Government Act will be treated as Environmentally Sensitive Areas. The specific boundaries of Environmentally Sensitive Areas within the Urban Growth Boundary shall be defined at the Area Structure Plan or Conceptual Scheme of Subdivision stage.
>
> [...]
>
> c) Development proposals within or adjacent to Environmentally Sensitive Areas shall include an Environmental Impact Statement pursuant to Section 8.5(a) which shall identify the boundaries of the natural area and evaluate the impact of the proposed development.
>
> [...]

[102] Section 8.5 outlines the requirements of an EIS, including a requirement for a referral to an independent and professional third party review.

[103] The Applicant maintains that the Town of Canmore failed to provide an EIS in conjunction with the rezoning application, as required by sections 8.4 and 8.5 of the MDP. According to the Applicant, this failure amounts to a breach of procedural fairness. On the other hand, the Town contends that the procedures mandated by the *MGA* were generally followed in this instance. Specifically, a Public Hearing was held before the second reading of the Bylaw. Moreover, the Town says that the Applicant is in error to suggest that the *MDP* provides him with additional rights i.e. the failure to follow the provisions regarding the EIS is a breach of his right to procedural fairness.

[104] The Town acknowledges that the *MDP* is a mandatory document required by every municipality with a population 3,500 or more, but that the *MDP* is intended to be a guiding

document, advisory in nature only, and does not create any substantive rights for the residents of Canmore. In other words, the Town says that the content of the *MDP* is not relevant to defining the scope of procedural fairness owed to the Applicant in this instance. Moreover, the Town contends that Council has a discretion as to which, if any, of the requirements of the *MDP* will apply in any given situation. As such, it was open to Council in this instance to determine that for budgetary or other considerations the procedure mandated under the *MDP* with respect to an independently reviewed EIS would not apply.

[105] The *MDP* states that its role is "to provide the policies and guidelines that will direct the future growth and development of the Town of Canmore. " The Town suggests that the *MDP* should be regarded as "the principle long-range land use planning instrument of the municipality": Town of Canmore, *Municipal Development Plan, Bylaw 30-98*, s. 2.0. The attainment of the *MDP's* goals is subject to budgetary considerations. As such, the Town's planned and/or proposed policies and programs must be considered in light of the availability of funds: *Municipal Development Plan, Bylaw 30-98*, s. 4.0.

[106] In certain circumstances, environmental assessments are not required. For example, section 5.0 of the *MDP* provides that there will no longer be a requirement to prepare an environmental assessment or studies for the Town of Canmore in circumstances where an environmental impact statement has been prepared and approved by the NRCB, and no significant or relevant change has occurred. Section 5.0 goes on to say that the Town may still require an additional environmental impact assessment in such circumstances "where necessary".

[107] In this case it was not mandatory to address environmental matters, but the MDP in this case specifically addressed the procedure regarding development proposals adjacent to environmentally sensitive areas which includes the provision of an EIS.

c) Importance of the decision to the individuals affected

[108] The Applicant submits that development will clearly disrupt the neighbourhood while construction is proceeding and will ultimately lead to an increase in density and traffic. As such, he maintains that this development will have significant impact on him.

[109] The Town of Canmore, on the other hand, submits that the impact of development on the environment is a larger societal and political question. It argues that Council has jurisdiction over all of the lands within its boundaries and it must balance the interests of development with the interests of environmental stewardship, specifically the impact of development on the environment.

[110] In general, I accept the Town's submission that it must consider not only how the rezoning will affect the Applicant, but also the overall public interest. The Town must balance the interests of the Applicant with the competing interests associated with the provision of affordable public housing presented by this proposed development. In addition, the Town must balance those interests with the impact of development on the environment. I would refer again to the decision of Nielsen J in ***Campbell*** in this regard. In my view, Justice Nielsen's description of this factor is very helpful. At para 29, he stated:

> The third factor requires that consideration be given to the importance of the decision of City Council to Mr. Campbell and the Community League. The Supreme Court of Canada in *Baker* indicated that the more important the decision is to the life of the individual affected and the greater its impact on that person, the more stringent will be

> the mandated procedural protections. In this case, the development of the Molson Site, no doubt, would have an impact on residents in the Oliver community, being a community relatively contiguous to the Molson Site. Therefore, Mr. Campbell, as an individual residing within that community, as well as other members of the Community League would be affected by any decision of City Council with respect to the development of the Molson Site. Having said that, any decision with respect to the development of the Molson Site would not, in my view, be said to be an extremely important decision affecting the lives of individuals residing in the Oliver Community. City Council must, of course, balance any impacts on individuals against the overall public interest.

d) The legitimate expectations of the party challenging the decision

[111] The Applicant submits that he had a legitimate expectation that the Town would follow its own bylaws and that certain procedures would be followed. He says that his legitimate expectations in this regard forms the content of the Town's duty of procedural fairness to him and to all citizens who are impacted by the decision. He maintains that the requirement to obtain an EIS reviewed by an independent and professional third party is one element of the Town's duty of procedural fairness.

[112] The Town of Canmore acknowledges that the Applicant is entitled to be assured that the Town has discharged its duty to assess the environmental impact of the development on the Lands and the surrounding lands. According to the Town, the Applicant is not entitled, however, to dictate or require the Town to consider the environment in a specific way. The Town says that the level of procedural fairness arising from the legitimate expectations of the Applicant is low, and all that is required is that the Town consider the environmental impact of the development.

[113] The *MDP* requirement for an independent third party review cannot, in my view, be lightly disregarded. One would expect that a certain minimum level of compliance with this process would be followed. In this case, the report by Corvidae does not identify the expert or the members of the expert team who prepared the report. On the evidence before me, it is clear that it was submitted by the Developer as part of its application and did not involve any third-party assessment or review. The report does not comply, in my view, with the *MDP* requirements. In fact, the report specifically refers to the fact that compliance with the MDP was not required. I am satisfied that the Applicant had a legitimate expectation that this required assessment and independent review, and that the specified procedures would be completed before the Grassi Bylaw amendment was submitted to Council for approval.

e) The Nature of the deference accorded to the body

[114] The Council consists of elected officials. The decisions of elected officials are generally accorded a high level of deference. Section 539 of the *MGA* is clear in this regard.

[115] In ***Keefe***, the issue was whether the reviewing judge erred when she concluded that there was a breach of procedural fairness because the City Council did not allow the respondent's consultant – whose credibility was challenged - to make submissions by telephone. While the facts in ***Keefe*** are readily distinguishable from the within matter, the decision is persuasive in that it confirms that a municipal council enjoys a large degree of procedural autonomy. At para 21, the Court of Appeal held:

> The fifth factor to consider in determining the content of City Council's duty of fairness is the nature of the deference owed to its procedural choices. The

> reviewing judge expressly acknowledged that municipal councils enjoy a large degree of procedural autonomy regarding the conduct of their hearings. However, she concluded that the issue in this case was "closer to an inter-party dispute than a policy decision" from which we infer that she concluded less deference was required. We see no error in such a conclusion. Council's discretion to determine its own procedure is subject to compliance with its own legislative scheme and procedural fairness.

[116] The Council exercised its discretion in accordance with the *MGA* and chose to address environmental matters in its *MDP*. It also exercised its discretion by adopting a specific process in circumstances where a proposal is located within, or adjacent to, an environmentally sensitive area. Although Council enjoys a significant degree of procedural autonomy, Council is not free to disregard its own legislative scheme.

f) Conclusion

[117] The extent of procedural fairness that must be afforded by a town council with respect to a rezoning application varies according to the factors enumerated in ***Baker***. After considering the five factors, I find that the Town Council's role was more legislative than quasi-judicial in nature. The rezoning decision affects the Applicant, but there are also broader considerations at play impacting the public, generally. Of particular importance here is that Council opted to establish a process in cases where a development proposal lay within, or adjacent to, Environmentally Sensitive Areas. It is part of the legislative scheme and the Applicant had a reasonable expectation that Council would follow its own procedures. Accordingly, I find that the Council was obliged to afford a moderate level of procedural fairness in this instance.

ii. Was there a breach of procedural fairness?

[118] In this case Council was aware of the stated requirements of the *MDP* with respect to an EIS. However, it was told by Administration in the Request for Decision dated February 3, 2015 that the Administration did not recommend it. During oral submissions, the Town conceded that a strict interpretation of the *MDP* did, indeed, impose such a requirement on the Town.

[119] The latest Corvidae Report dated November 2015 is unsigned. It was submitted by the Developer with no third party audit. It refers to the *MDP*, but only to state that it was advised that an EIS was not required. Therefore, it obviously does not comply with the *MDP* requirements. The Administration wrote "as presented at the public hearing in a statement by Corvidae, they are confident that a more detailed EIS based on the development proposal would not change the recommendations or proposed mitigations in the study." This statement was no doubt meant to be reassuring. However, I find that it was actually misleading considering that no proper EIS - detailed or otherwise - was prepared so as to be available to Council prior to making its decision.

[120] A breach of procedural fairness does not automatically vitiate a proceeding without evidence of prejudice, or circumstances in which the breach would bring the administration of justice into disrepute: ***Campbell*** at paras 41-42; ***Keefe*** at para 29.

[121] In my view, the duty of procedural fairness owed by the Town of Canmore in this instance was moderate. Here, the Town not only disregarded the requirement for an EIS, but also other requirements, including a mandatory third party review. The procedural safeguard that was in place was lightly discarded. It is difficult to even assess the prejudice considering that the

process in place with respect to the EIS was not followed at all. I cannot accept the Town's contention that no prejudice has been established given that, according to the Town, the outcome would necessarily have been the same. Under the circumstances, it is not possible to know the outcome if this important additional information had been available for Council's consideration. In my view, it would be speculative to conclude that the outcome would necessarily have been the same if these requirements had been met.

[122] Accordingly, I find the manner the EIS requirement was dealt with was so "devoid of the appearance of fairness that the administration of justice is brought into disrepute." On this basis, I find that the Grassi Bylaw Amendment must be invalidated.

E. Was Council's decision unreasonable because it considered what was to be built on the subject lands rather than the land's suitability for development?

[123] In view of my finding that the Town of Canmore breached its duty of fairness in failing to comply with the EIS requirements as mandated by the *MDP*, it is not necessary for me to determine this issue.

[124] I would note, however, that the *MDP* objectives include the provision of a "well-balanced mix of housing types, tenure options and prices that meet the household accommodation needs of a full range of socio-economic groups and maintain the current demographic diversity of the community". A municipal council has latitude when passing a bylaw. Council may consider "broader social, economic and political factors that are relevant to the electorate": ***Catalyst Paper Corp.*** at para 30.Given the content of ss 617 and 539 of the *MGA*, and the objectives of the *MDP*, I would have found that the reliance on the interest of affordable housing in the adoption of the Grassi Bylaw Amendment was reasonable under the circumstances.

F. Was Council's decision unreasonable because it was based on incomplete, inaccurate and faulty evidence with respect to flood risk, geotechnical screening and environmental screening?

[125] In view of my finding that the Town of Canmore breached its duty of fairness in failing to comply with the EIS requirements as mandated by the *MDP*, it is not necessary for me to determine this issue.

VI. Conclusion

[126] I conclude that the Town of Canmore Bylaw 2015-19 is invalid.

[127] The Applicant is entitled to his costs given his success in this Application. If the parties are unable to reach an agreement on the issue of the appropriate costs in this instance, they may seek direction from the Court within 30 days of the date of the filing of this decision.

Heard on the 14th day of March, 2017 with additional written submissions filed on March 21st and March 29th, 2017.
Dated at the City of Calgary, Alberta this 3rd day of July, 2018.

M. David. Gates
J.C.Q.B.A.

Appearances:

James B. Laycraft, Q.C. and Richard E. Harrison
for the Applicant

Michael D. Aasen
for the Respondent