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Zhuromsky v. Calgary (City)

The City of Calgary approved a development permit for the lot immediately to the east of Zhuromsky's lot. The proposed development was a five-unit rowhouse building with four suites below grade. Zhuromsky appealed to the Subdivision Development Appeal Board, arguing that the proposed development did not comply with the Municipal Development Plan, the Land Use Bylaw, or sound planning policy. Zhuromsky also expressed a number of other concerns with the proposed development, such as an inadequate consultation process, fire route and access concerns, drainage issues, shadowing on his property, interference with sight lines; street parking congestion, privacy concerns and others. The Subdivision Development Appeal Board found that overall, the evidence demonstrated that the proposed development was compliant with the requirements of the Municipal Development Plan, fit the context of the neighbourhood and was based on sound planning principles. The Board allowed the appeal in part. The development permit was upheld with some additional conditions related to the completion of the project in accordance with amended plans.

Zhuromsky applied to the Alberta Court of Appeal for permission to appeal the decision of the SDAB, arguing that the Board made three errors of law: 1) that the Board did not correctly interpret the definitions of "Rowhouse Building" and "Secondary Suite" from the Land Use Bylaw, and therefore improperly approved a permit for a use that was not permitted or discretionary under the applicable zoning; 2) the Board failed to take into consideration the relevant impacts to Zhuromsky's property, in particular the sight lines; and 3) the Board did not provide sufficient reasons for its decision.

HELD: Permission to appeal was granted.

DISCUSSION: Zhuromsky had raised concerns about the Board's interpretation of certain terms that were used in the Land Use Bylaw, specifically "Rowhouse Building" and "Secondary Suite", and whether the development complied with the Land Use Bylaw. The Court of Appeal found that Zhuromsky raised a genuine issue concerning the SDAB's application of law. The interpretive issue warranted a review by the Court of Appeal and was of importance not only to the parties but also to the general public. Intertwined with the interpretive issue, the Court of Appeal also accepted

Zhuromsky's argument that the SDAB did not provide sufficient reasons for its decision. The SDAB accepted the municipality's argument that the development was compliant with the bylaw, but there were limited or no submissions on the issue. Before the SDAB, Zhuromsky had raised concerns about the impact of the development on sight lines from his property. The SDAB commented that sight lines are not protected under planning legislation or the Bylaw and therefore are not a consideration in the decision. The Court of Appeal found that whether the SDAB should have considered sight lines was an arguable issue and should warrant review. Subsequent to Zhuromsky getting permission to appeal the SDAB decision in March 2025, he noticed that excavation had started on the property in April 2025. The development permit had been released by the municipality. Zhuromsky applied for a stay of the development permit pending the appeal of the SDAB decision. In that application, there was some question about the timing of the release of the development permit and whether or not it should have been stayed pursuant to the terms of the Bylaw. However, the Court of Appeal found that Zhuromsky had met the requirements of the *RJR MacDonald* test for issuance of a stay pursuant to the *Alberta Rules of Court* and *Judicature Act*. He had satisfied the court that there was a serious question to be determined on appeal, that he would suffer irreparable harm if the stay was not granted and that the balance of convenience favoured granting a stay.

Zhuromsky v. Calgary (City)

Canadian Constitution Foundation v. Calgary (City)

The Canadian Constitution Foundation, a national charity that defends the fundamental rights of Canadians, was contacted by citizens of Calgary who were concerned about the City's *Safe and Inclusive Access Bylaw* (the "Bylaw"). The Bylaw was passed in response to concerns about the growing unrest towards members of the Pride community at events hosted at City facilities. The Bylaw prohibited protests that expressed objection or disapproval related to various human rights grounds within 100 metres of the entrances to Calgary Public Library locations and city-operated recreation centres. The Foundation argued that the bylaw was unconstitutional due to its overbreadth and content-based restriction on freedom of expression and freedom of assembly under Section 2(b) of the Canadian Charter of Rights and Freedoms. The Foundation also argued that the City did not have jurisdiction to enact the Bylaw as it strayed into the federal government's jurisdiction over criminal law. The City argued that the Bylaw was at the "legislative end of the spectrum of municipal decision making" and that it was a necessary and justifiable measure to ensure that residents could access public services and facilities safely, without being subjected to harassment, intimidation or discriminatory messaging.

HELD: The Bylaw was upheld.

DISCUSSION: The Court found that the City had carefully drafted the Bylaw to balance the competing interests of its citizens; that City Council had reasonably followed the statutory provisions of the Municipal Government Act and natural justice when enacting the Bylaw; and that the City had acted within its scope of authority under the *Municipal Government Act.* As the authority to pass the Bylaw was of a general jurisdictional nature under Section 7 of the MGA, the City was not required to hold a public hearing to seek broader input. The Foundation had not met its burden of proving that the Bylaw was invalid or unconstitutional.

Canadian Constitution Foundation v. Calgary (City)

Rochelle v. St Clements (Rural Municipality of)

Rochelle owned a property in the Rural Municipality of St. Clements (the "RM"). Rochelle purchased the property in September of 2012, and applied to the Red River Planning District (the "RRPD") in October 2012 for approval to subdivide the lot into two relatively equal parcels, which he intended to sell thereafter. The RM provided conditional approval of the subdivision in November 2014, but the RRPD rejected the subdivision in December 2014. Rochelle appealed to the Manitoba Municipal Board and in June 2015, the Board ordered that the subdivision application be conditionally approved. The RRPD approved the subdivision in July 2015 but made it subject to a number of procedural conditions. Rochelle stated that he attempted to raise a formal objection to the procedural conditions but was advised that the limitation period to do so had expired. Eventually, he lost the property to foreclosure proceedings.
On April 4, 2022, Rochelle filed an application under the applicable *Limitation of Actions Act*, for an extension of time in which to bring a negligence claim against the RM and RRPD. The basis of the application was that he had discovered additional material facts that there had been an alternative, simpler procedure for dividing the parcel and that the RM and RRPD had breached a duty of care by failing to advise him of the simpler alternative. In order to be granted an extension of time to bring the claim, the additional material facts had to have been discovered within the 12 months prior to the application date, thus no earlier than April 1, 2021.

During cross-examination of Rochelle's affidavit, it became known that Rochelle had retained legal services regarding a possible negligence claim against the RM and RRPD in July 2020. Counsel for the RM and RRPD requested an undertaking relating to the extent to which Rochelle had engaged legal counsel for advice regarding a potential claim. Rochelle refused the undertaking based on solicitor-client privilege. The RM and RRPD filed a motion to compel Rochelle to reply to the undertaking. The Manitoba Court of King's Bench found that Rochelle had waived solicitor-client privilege, so he was compelled to respond to the undertaking. The Court noted that the remedy of an extension of time is discretionary, but the court may only exercise that discretion if it is satisfied that not more than 12 months has passed between when the applicant learned of the additional material facts and the filing of the application for leave. Rochelle's application for an extension of time to file a claim in negligence was dismissed. Rochelle appealed to the Manitoba Court of Appeal.

HELD: Appeal dismissed

DISCUSSION: The Court of Appeal found that the judge had not made any errors of law or palpable and overriding errors of fact or of mixed fact and law. Specifically, the Court of Appeal held that the judge had not erred in finding that Rochelle had knowledge of all material facts of a decisive character more than 12 months prior to filing his application. Further, the Court of Appeal did not find that the judge had erred in his alternative finding that the facts before him failed to support a claim in negligence against the RM and RRPD.

Rochelle v St Clements (Rural Municipality of)

West Creek Farms Ltd. v. Langley (Township)

West Creek Farms Ltd. ("West Creek") had operated a growing medium production facility (soilless mix/mulch used by commercial greenhouses) in the Township since 1986. The property on which the facility was located was zoned Rural Floodplain Zone RU-5 and was located within the Agricultural Land Reserve. The RU-5 Zone permitted agricultural uses. Prior to 2016, BC Assessment classified West Creek's operations as a farm for taxation purposes. In 2016, BC Assessment changed the taxation classification from farm to "light industry". This change put West

Creek's operation in conflict with the existing municipal zoning. West Creek began the process of seeking formal approvals to continue its operations on the property, successfully securing approval from the Agricultural Land Commission (ALC) for the non-farm use in 2023. Having achieved the approval from ALC, West Creek then sought a site-specific zoning amendment from the Township. In June 2024, the Township Council held a public hearing for the zoning amendment and the application failed. West Creek petitioned the B.C. Supreme Court for a judicial review to overturn Council's decision as unreasonable. West Creek made four arguments in support of setting aside Council's decision: a) the decision was reached in a procedurally unfair manner because one of the Councillors failed to declare his financial interest in a competitor business and his participation in the vote gave rise to a reasonable apprehension of bias; b) Council's decision was unreasonable in both process and outcome because it did not consider the impact on the agricultural industry; the failure to grant the rezoning would frustrate ALC's approval and there was an unreasonable focus on the perceived need to "level the playing field"; c) the Zoning Bylaw's prohibition on the facility's operations was inconsistent with the Agricultural Land Commission Act and the ALC decision; d) the facility was a permitted use under the Zoning Bylaw. The Township cross-petitioned for a declaration that the facility was not a permitted use under the Zoning bylaw and for an injunction preventing the continued operation of the facility on the property.

HELD: The decision to defeat the rezoning was deemed legally unreasonable, and the matter was sent back to the Township Council for a proper public hearing and reconsideration. The claim that one Councillor had a conflict of interest was dismissed. The Township's request for an injunction to shut down West Creek's operations was adjourned as the rezoning application was to be revisited.

DISCUSSION: The Court found that the reasons cited by the Councillors who voted against the rezoning lacked a rational foundation and were not supported by the evidence before Council. The Councillors who provided reasons for voting against the rezoning focused primarily on the need to have a level playing field for competitors and an unfair competitive advantage being given to West Creek if the rezoning were to be allowed. The Court found that such a conclusion was not supported by the evidence before Council. The Court found that at least two, and probably three, of the Councillors were relying on information from outside sources and not on the record in making their vote, and that the decision was not reasonable. On the conflict of interest issue, the Court found that the issue did not exist. While one of the Councillor's family owned a turf supply business that sold mulches and soils, that company was not a competitor to West Creek.

West Creek Farms Ltd. v. Langley (Township)

Bello v. Hamilton (City)

Bello had been part of a large group of cyclists who were intending to cycle the full length of two mixed-use recreational trails in the city. They had finished the first trail and were travelling to the second trail via a paved path parallel to Stone Church Road. At the end of the paved path, they had two options to get to the second trail: cycle on the bike lane of Stone Church Road (which was effectively the shoulder of the road) or follow a worn, dirt path just outside the guardrail of Stone Church Road. They chose the dirt path to avoid motor vehicle traffic. The dirt path crossed a culvert, and the ground around the culvert had eroded, creating a large hole. Neither the lead cyclist nor Bello, who was riding second, saw the hole until the last seconds. The grass around the culvert had been mowed 12 days earlier, but by the time of the accident, the hole was hidden by tall grass. Bello swerved to avoid the hole, fell and broke his neck, suffering complete tetraplegia. Bello sued the City of Hamilton, alleging negligence and, in the alternative, public nuisance for failure to maintain the road. The City brought a summary judgment motion to have the action dismissed, using section 44(8) of the *Municipal Act, 2001,* which barred actions for damages caused by defects on an

“untravelled portion of a highway”. The motion judge dismissed the action, finding that the dirt path was “untravelled” because there was no reasonable expectation that a cyclist would use it. Relevant to her conclusion was the fact that there was a bicycle path on Stone Church Road, which she found the cyclists ought to have used. She found that it was not reasonably foreseeable that cyclists would choose to reject using the bicycle lanes in favour of an unmarked, worn dirt path. Bello appealed.

HELD: Appeal allowed

DISCUSSION: The Court of Appeal noted that the correct interpretation of “untravelled portion of a highway” in section 44(8) of the *Municipal Act, 2001*, was a question of law, reviewable on a standard of correctness. The Court of Appeal held that the motion judge had applied the wrong legal test by focusing on foreseeability, rather than actual public use. The Court referred to the 1962 decision of the Ontario Court of Appeal in *MacDonald v. LeFebvre et al*. that considered the predecessor provision to s. 44(8) where it was found that the travelled portion of a highway comprises that part that is “limited to that portion that has been provided and is intended for ordinary and normal use for that purpose or which has in fact been commonly and habitually used by the public for that purpose.” The Court noted cases which suggested that the second branch of the *MacDonald* interpretation is not limited to travel by motor vehicles. The cases suggested that common and habitual use by the public for travel by other means, such as on foot or by bicycle, could render an area “travelled” and therefore outside the ambit of s. 44(8). The determination of how much use is needed to satisfy the “common and habitual use” branch of the *MacDonald* test, depends on the specific facts of each case. The Court of Appeal was satisfied that the evidence before it established that the accident occurred on a travelled portion of the highway and therefore section 44(8) did not apply. The matter was referred back to trial for a full hearing to determine the City’s negligence.

Bello v. Hamilton (City)