COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***McLean Lake Residents' Assn. v. Whitehorse (City)*** Citation number: 2009 YKCA 11
No.: YU0612

McLean Lake Residents' Association

v.

City of Whitehorse

JUDGES:	Donald J.A. Frankel J.A. D. Smith J.A.
JUDGMENT GIVEN BY:	Frankel J.A.
JUDGMENT RELEASED:	August 21, 2009
NUMBER OF PAGES:	16
WRITTEN/ORAL:	Written
APPEALED FROM:	Gower J.

SUMMARY:

The City of Whitehorse adopted a zoning bylaw permitting the construction and operation of a standalone cement plant in an area designated Natural Resource in the City's Official Community Plan ("OCP"). The OCP provides that gravel quarrying and related activities are permitted on land designated Natural Resource. A challenge to the bylaw brought by the McLean Lake Residents' Association was dismissed, and the Association appealed. The Association submitted that city council acted contrary to its "good government" obligations in adopting the bylaw and that, in any event, the bylaw contravened s. 283 of the *Municipal Act*, which provides that a bylaw cannot be "contrary to or at variance with" an OCP. Held: Appeal allowed; bylaw declared invalid. The Association's contention that city council acted contrary to its "good government" obligations because the bylaw was opposed by a large number of residents was dismissed. City councilors are entitled to exercise their own judgment in deciding what is in the best interests of the community as a whole. However, the bylaw is invalid because it is incompatible with the OCP. It does not contain a temporal limitation that requires the plant to cease operations once all gravel quarrying activity in its area has stopped.

COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***McLean Lake Residents' Assn. v. Whitehorse (City)***, 2009 YKCA 11

Date: 20090821
Docket: YU0612

Between:

McLean Lake Residents' Association

Appellant
(Petitioner)

And

City of Whitehorse

Respondent
(Respondent)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Frankel
The Honourable Madam Justice D. Smith

On appeal from: the Supreme Court of the Yukon Territory, June 3, 2008
(*McLean Lake Residents' Assn. v. Whitehorse (City)*, 2008 YKSC 46,
Docket No. 07-A0104)

Acting on behalf of the Appellant:	S. Miller-Wright
Counsel for the Respondent:	D.R. Bennett
Place and Date of Hearing:	Whitehorse, Yukon Territory May 25, 2009
Place and Date of Judgment:	Vancouver, British Columbia August 21, 2009

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] Residents of the City of Whitehorse who live near McLean Lake actively oppose any industrial development in that area. To that end, they seek, through the McLean Lake Residents' Association, to have a zoning bylaw permitting the construction and operation of a concrete plant on a four-hectare parcel of land declared invalid. Their position is that city council acted contrary to its "good government" obligations in adopting the bylaw and that, in any event, the bylaw is inconsistent with the City's Official Community Plan ("OCP"). A judge of the Supreme Court of the Yukon Territory dismissed the Residents' Association's petition challenging the bylaw: 2008 YKSC 46, 47 M.P.L.R. (4th) 225. This appeal is from that judgment.

[2] For the reasons that follow I would allow the appeal, and declare the impugned bylaw invalid on the basis that it is inconsistent with the City's OCP.

Factual Background

[3] By virtue of s. 278 of the *Municipal Act*, R.S.Y. 2002, c. 154, municipalities are required to have an OCP. That *Act* sets out, in some detail, the procedures to be followed in developing and adopting an OCP. Section 279(1) stipulates that:

> An official community plan must address
>
> (a) the future development and use of land in the municipality;
>
> (b) the provision of municipal services and facilities;
>
> (c) environmental matters in the municipality;
>
> (d) the development of utility and transportation systems; and
>
> (e) provisions for the regular review of the official community plan and zoning bylaw with each review to be held within a reasonable period of time.

[4] The effect of an OCP is set out in s. 283 of the *Municipal Act*:

> (1) Council shall not enact any provision or carry out any development contrary to or at variance with an official community plan.

> (2) No person shall carry out any development that is contrary to or at variance with an official community plan.
>
> (3) Despite subsection (2), council is not empowered to impair the rights and privileges to which an owner of land is otherwise lawfully entitled.
>
> (4) The adoption of an official community plan shall not commit the council or any other person, association, organisation, or any department or agency of other governments to undertake any of the projects outlined in the official community plan.
>
> (5) The adoption of an official community plan does not authorize council to proceed with the undertaking of any project except in accordance with the procedures and restrictions under this or any other relevant Act.

[5] Whitehorse adopted its current OCP on October 15, 2002: Bylaw 2002-01. The "Introduction" at the beginning of Chapter 1 states:

> An Official Community Plan (OCP) is a tool used by local government to document the broad objectives and land use policies of a community. The intent of an OCP is to guide decisions in relation to policies for residential and commercial development, industrial activity, transportation infrastructure, and environmental considerations. Furthermore, the OCP outlines where future development should occur, including utility servicing, and overall considerations for implementation of the plan. Adoption of this Plan does not commit Council or any other agency to undertake any projects suggested in this document. Also, Land Claim agreements and settlements supersede policies from an OCP.

[6] Part 1.1 is entitled "Purpose of an OCP". After setting out s. 279 of the *Municipal Act*, it continues as follows:

> Once an OCP is adopted as a bylaw, all future land use decisions made by Council must be consistent with the objectives and policies outlined in the Plan. An OCP, however, is not intended to be a static document, but should adapt to new trends within society and respond to changing circumstances. As such, following careful consideration by Council, policies and land use designations in the Plan may be revised by an amending bylaw pursuant to provisions outlined within the Municipal Act.

[7] The McLean Lake area is designated "Natural Resource" in the OCP. This designation is described as follows:

> 8.2 Natural Resource Designation
>
> The Natural Resource designation recognizes the potential for the extraction and management of mineral and gravel deposits. Gravel extraction is fundamental to the local economy as it supplies the foundation for new construction such as buildings and roadways. There is some mineral and

> gravel potential along the Whitehorse Copper Belt, Sleeping Giant Hill and in the northwest corner of the city limits known as Stevens.
>
> It has been documented that the Stevens area has significant gravel resources that could serve the City of Whitehorse and the Yukon Government for up to 70 years. Most of the gravel within this area can supply pit run, crushed basecourse, sub-base, asphalt & concrete aggregate, concrete & bedding sand, and drain rock. These materials are typically used for road and highway development, building foundations, and other forms of construction. It is an essential asset for any community to have significant gravel reserves rather than importing them from other communities or rural areas at great expense.

[8] Section 8.2 of the OCP contains the following "Policies" with respect to land that has been designated Natural Resource:

> 1. Quarry activity, including the extraction, crushing and hauling of gravel or minerals may be permitted in areas designated as Natural Resource. In addition, the remediation of soil, water and other media may be permitted in areas with this designation subject to all Municipal, Territorial and Federal regulations. The purpose of this designation is to allow resource extraction and related activities away from existing and future residential neighbourhoods. Uses shall be compatible with other Municipal, Territorial and Federal regulatory requirements in relation to approvals and licensing, including applicable impact and environmental assessment requirements.
> 2. Resource extraction within a Natural Resource designation shall be subject to a Plan of Restoration, review of ecosystem mapping and an environmental review. Management of gravel resources shall include time frames for phases of extraction.
> 3. A separate, hard surface haul road, complete with turning lanes at a highway intersection shall be required to access new quarries. Dust abatement practices are required.
> 4. A vegetated buffer of approximately 300-metres shall be established between areas of resource extraction and existing development and proposed new development.
> 5. Upon abandonment or termination of resource extraction operations, the remaining redevelopment and reclamation of the site shall begin immediately and be carried out in cooperation with the appropriate authorities. These areas shall be reclaimed to as natural a state as possible through slope grading, landscaping, and reforestation.

[9] The four-hectare parcel of land at issue was initially zoned "Future Development", as provided for in s. 13.1 of the City of Whitehorse Zoning Bylaw 2006-01. That bylaw contains two zoning categories that specifically permit the building of concrete plants:

11.2 IH Heavy Industrial

11.2.1 Purpose

To provide for large-scale industrial uses and other uses that may have large land requirements and potentially pose some nuisance effects on adjacent uses.

11.2.2 Principal Uses

a) bulk fuel depots

b) concrete and asphalt plants

c) industrial, general

d) industrial, heavy

e) industrial, salvage

. . .

11.3 IQ Quarries

11.3.1 Purpose

To provide a site for the on-site removal, extraction, and primary processing of soil and aggregate materials found on or under the site.

11.3.2 Principal Uses

a) concrete plants

b) natural resource extraction

. . .

[10] Territorial Contracting Ltd. operates a concrete batch plant at Ear Lake, in Whitehorse, several kilometres east of McLean Lake. Access to gravel in the Ear Lake area is limited, as the quarry there is nearing the end of its life. In 2002, Territorial Contracting sought to establish a quarry on a ten-hectare parcel of leased Crown land in the McLean Lake area, and to build a concrete plant on an adjacent four-hectare parcel of land that it proposed to purchase. After the OCP came into effect, and following considerable discussion and debate, city council adopted Zoning Bylaw 2006-36, to change the zoning of those 14 hectares from Future Development to Quarries. The Residents' Association challenged Bylaw 2006-36 on the basis that the City had failed to comply with Policy 11.2(4) of the OCP, which requires a detailed hydrological and hydrogeological assessment be undertaken prior to any new gravel extraction undertakings in the McLean Lake watershed. That challenge was successful, and resulted in Bylaw 2006-36 being declared invalid:

McLean Lake Residents' Assn. v. Whitehorse (City), 2007 YKSC 44, 38 M.P.L.R. (4th) 246.

[11] On September 5, 2007, Territorial Contracting applied to rezone only the four-hectare parcel from Future Development to Quarries, to permit the construction and operation of a concrete plant. The application did not seek permission to operate a quarry. Territorial Contracting intends to operate the concrete plant using gravel from several quarries currently active in the McLean Lake area.

[12] City council held a public hearing with respect to Territorial Contracting's application at its regular meeting on October 22, 2007. Three persons appeared to speak against the proposal, and a representative of a consulting group hired by Territorial Contracting appeared to speak in favour of it. Council also received two written submissions against the proposal, and one in favour. Following this hearing city staff prepared a report for the planning committee. That report recommended that the four-hectare parcel be rezoned IQx, with a restriction that concrete plants are the only permitted principal use. This recommendation was accepted by the planning committee at its meeting on November 5, 2007. On November 13, 2007, city council unanimously approved the recommendation, and adopted Bylaw 2007-39, which amended Bylaw 2006-01 by adding the following to s. 11.3.6 ("Other Regulations"):

> e) A four-hectare parcel in the McLean Lake area is hereby designated IQx with the restriction being that only concrete plants are permitted as a principal use.

Chambers Judge's Reasons

[13] The Residents' Association challenged Bylaw 2007-39 on a number of bases. Those relevant to this appeal are that (a) the bylaw is in conflict with the OCP, and (b) that in adopting the bylaw, city council violated the "good government" provisions of the *Municipal Act.*

[14] With respect to the first issue, the chambers judge, Mr. Justice Gower, found that the bylaw did not conflict with the OCP. In this regard he said (at 231 M.P.L.R.):

> I would like to dispose of a preliminary point before proceeding with this part of my analysis. I acknowledge that Council is prohibited, under ss. 283(1) and 289(2) of the *Municipal Act*, from enacting any provision or carrying out any development contrary to or at variance with the OCP. Therefore, on receipt of a zoning application, Council must look first to the OCP and secondly to Zoning Bylaw 2006-01. In that regard, the IQ-Quarries zone designation is consistent with the "Natural Resource" land use designation for the subject lands as set out in the OCP, namely "to allow resource extraction and related activities". Concrete plants would be considered an activity "related" to resource (i.e. sand and gravel) extraction. Therefore, Bylaw 2007-39 does not contravene the OCP.

[15] With respect to the "good government" issue, the Residents' Association relied on the preamble and various provisions of the *Municipal Act* in support of its position that a municipal council is statutorily obligated to act in a manner that is responsive to the wishes and interests of residents. Amongst others, the Residents' Association referred to the following provisions of the *Act*:

> Preamble
>
> . . .
>
> AND WHEREAS it is desirable to establish a framework for local government which provides for the development of safe, healthy, and orderly communities founded on the following principles:
>
> That the Government of the Yukon recognizes municipalities as a responsible and accountable level of government;
>
> That Yukon municipal governments are created by the Government of the Yukon and are responsible and accountable to the citizens they serve and to the Government of the Yukon;
>
> That the primary responsibilities of Yukon municipal governments are services to property and good government to their residents and taxpayers;
>
> That public participation is fundamental to good local government;
>
> ...
>
> Purposes of this Act
>
> 2 Recognising that local government is an accountable level of government, the purposes of this Act are
>
> (a) to provide a legal framework and foundation for the establishment and continuation of local governments to represent the interests and respond to the needs of their communities;
>
> ...
>
> Purposes of local governments

> 3 The purposes of a local government include
>
> (a) providing within its jurisdiction good government for its community;
>
> ...

[16] In addressing this argument, the chambers judge first noted that much of the material relied on by the Residents' Association as evidence of public opposition to Bylaw 2007-39 related to the zoning application that resulted in adoption of Bylaw 2006-36, a bylaw that had already been declared invalid. He then continued:

> [39] In his outline, Mr. Miller-Wright wrote as follows (at para. 30):
>
> > ... when constituents in significantly large numbers make it clear to the [municipal] government that they have well reasoned, well substantiated concerns about a proposed development, it is government's mandate to reflect those concerns in its decisions. That is the role of a representative government...
>
> The problem with this submission is that it seems to suggest that Council has an obligation to *expressly* address the "concerns" of those opposing a bylaw by some form of justification or reasons for its decision. However, there is nothing in any of the provisions of the *Municipal Act* relied upon by Mr. Miller-Wright, or indeed elsewhere in the *Act*, to support this contention. Further, Mr. Miller-Wright's submission is untenable in any event, because it does not specify what number of opponents to a particular proposed development would be considered "significant", in order to trigger the implied obligation "reflect" their concerns. Is five the threshold? or 50? or 500?
>
> [40] As I held in *36041 Yukon Inc. v. Whitehorse (City)*, 2005 YKSC 37 (Y.T.S.C.), the test is not whether Council should have counted the opinions for or against the application, but rather whether it fully and fairly considered the public input and made its decision without an improper motive for the good of the community at large, and in the greater public interest. This is what the Mayor and Councillors are elected to do in our representative municipal democracy. Further, Council is *presumed* to have acted in exactly that fashion. It is up to those challenging the bylaw to prove otherwise.
>
> [41] As for Mr. Miller-Wright's views on representative government, I can do no better than quote Lord Russell at Killowen, C.J., in *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Eng. Div. Ct.), at p. 100 (see *Glover*, cited above, at para. 7 [*Glover v. Kee* (1914), 22 C.C.C. 297, 20 B.C.R. 219 (S.C.)]):
>
> > In matters which directly and mainly concern the people ... who have the right to choose those whom they think best fitted to represent them in their local government bodies, **such representatives may be trusted to understand their own requirements better than [some] judges**.
>
> [42] Ian Rogers, Q.C., in his text, cited above [*The Law of Canadian Municipal Corporations*, 2d ed. (Toronto: Carswell, 2003)], at pp. 406.1 and

406.2, discussed the extent and limits of the exercise of municipal powers and, with reference to the case of *Haggerty v. Victoria* (City) (1895), 4 B.C.R. 163 (B.C.S.C.), he concludes that:

> ... in determining whether it is properly exercising a power **the presumption is in favour of the [municipal] corporation** and, to enjoin it from doing so, **it must be demonstrated that there has been an abuse of discretion**.

And further, at p. 406.6:

> ... the court has no right to impose its views as to whether a particular bylaw is in the public interest. **The onus is on the person attacking a by-law** for illegality **to show** that **improper motives** were behind its adoption and, without such proof, the discretion of the council as to what is in the public interest is to prevail....

[43] The Residents' Assn. has not met its onus in persuading me that the Council's decision to approve Bylaw 2007-39 was made with any improper motive or through an abuse of discretion.

[Italics and bolding by chambers judge]

Analysis

Did City Council Violate Its "Good Government" Obligations?

[17] The Residents' Association's argument that city council failed to meet its obligations to provide the residents of Whitehorse with "good government" can be disposed of shortly. At its core, the Residents' Association's position is that a municipal council exceeds its jurisdiction when it acts in a manner that is opposed by a large number of residents.

[18] Accepting, for the purposes of this appeal, that a large number of residents were opposed to the construction and operation of a concrete plant in the McLean Lake area, city council was not required to give effect to their views. As the chambers judge correctly held, what a city council is required to do is to follow the requisite procedures and make a decision that, in its collective view, is in the best interest of all residents. A decision otherwise properly taken is not invalid simply because it is not supported by a large number of residents, or even a majority of them. If residents believe that city councillors have not acted in their best interests, then their remedy is to seek to elect councillors whose views are more in accord with

their own. As Mr. Justice Major observed in *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342, "[municipal] councillors are accountable at the ballot box": para. 33.

[19] It is beyond question that councillors are entitled to exercise their own judgment in deciding what is in the interests of their community as a whole. Apt in this regard is the following from *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 39 D.L.R. (3d) 188 (Ont. H.C.J.), which was quoted with approval in *Re McGill and City of Brantford* (1980), 111 D.L.R. (3d) 405 at 413 (Ont. Div. Ct.):

> A municipal council is an elected body having a legislative function within a limited and delegated jurisdiction. Under the democratic process the elected representatives are expected to form views as to matters of public policy affecting the municipality. Indeed, they will have been elected in order to give effect to public views as to important policies to be effected in the community. . . . [I]n considering a by-law to amend the Official Plan it must give notice to those affected and an opportunity to objectors to be heard before making its decision. In so doing it must act fairly and honestly, but this is in the context of the representative and legislative character of the Council. They are not Judges, but legislators from whom the ultimate recourse is to the electorate. Once having given notice and fairly heard the objections, the Council is of course free to decide as it sees fit in the public interest.
>
> [Emphasis added]

Does Bylaw 2007-39 Conflict With The OCP?

[20] An OCP is a forward-looking document setting out, in general terms, the long-term vision for a municipality. As Madam Justice D. Smith stated in *Whitehorse (City) v. Darragh*, 2009 YKCA 10 (a judgment released contemporaneously with this one):

> [15] The OCP is a document that outlines the community's broad objectives relating to land use. Its purpose is to provide guidance to the City in its decisions on residential and commercial development, industrial activity, transportation infrastructure, and environmental considerations. It also outlines where future development should occur.

[21] The *Municipal Act* sets out different procedures with respect to the adoption of OCPs as compared to other bylaws. It is apparent from s. 283(1) of the *Act* that an OCP operates as a constraint on the ability of a municipal council to deal with

land-use matters, as it precludes a council from enacting any provision that is "contrary to or at variance with" an OCP. The French version of this provision, which is equally authoritative, is the same: "qui sont contraires ... ou qui sont incompatibles avec".

[22] The City's position is that before a zoning bylaw can be said to be inconsistent or incompatible with an OCP it must be shown that the two are in "absolute and direct collision". It says that such a "collision" does not exist here as the OCP contemplates both quarrying and related activities in the McLean Lake area, and a concrete plant is a related activity. The Residents' Association disagrees. Although it accepts that a concrete plant is a "related activity", its position is that the Natural Resource designation only permits a plant to be operated in conjunction with quarrying activity that is taking place on the same parcel of land.

[23] The City relies on a line of authority beginning with *Re Rogers and District of Saanich* (1983), 146 D.L.R. (3d) 475 (B.C.S.C.). In that case, a bylaw rezoning two acres of land from "A-1 (Rural)" to "RS-4 (Detached housing)" was challenged on the basis that it was contrary to what was then s. 712(1) of the *Municipal Act*, R.S.B.C. 1979, c. 290 (now titled the *Local Government Act*: see S.B.C. 2000, c. 7, s. 1)), which read:

> The council or the trustees of an improvement district shall not enact a provision or undertake a work contrary to, or at variance with, an official community plan.

In dismissing that challenge, Mr. Justice Locke, as he then was, said (at 491):

> [T]he written efforts of planners are really objectives and unless there is an absolute and direct collision such as there was in the *Cal Investments* case [*Re Cal Investments Ltd. and Capital Regional District* (1980), 117 D.L.R. (3d) 491 (B.C.S.C.)], they should be regarded, generally speaking, as statements of policy and not to be construed as would-be acts of Parliament. [Emphasis added]

[24] The "absolute and direct collision" test was applied by Mr. Justice Powers in *Miller v. Salmon Arm (District)*, 2004 BCSC 674, 48 M.P.L.R. (3d) 105 at paras. 68 -

76. In that case, a road exchange bylaw was unsuccessfully challenged under s. 884(2) of the present *Local Government Act*, R.S.B.C. 1996, c. 323, which reads:

> All bylaws enacted or works undertaken by a council, board or greater board, or by the trustees of an improvement district, after the adoption of
>
> (a) an official community plan, ...
>
> must be consistent with the relevant plan.

[25] The City also referred to *Brooks v. Courtenay (City)* (1991), 78 D.L.R. (4th) 662 (B.C.C.A.), which dealt with what was then s. 949(2) of the 1979 *Municipal Act* (B.C.), which required that all bylaws "shall be consistent with the relevant [official community] plan". In dismissing a challenge to a rezoning bylaw the chambers judge applied the "absolute and direct collision" test from *Re Rogers and District of Saanich*. That decision was upheld on appeal, wherein Mr. Justice Taylor stated (at 666):

> It seems to me that the relevant section of the community plan by-law, as it stood before amendment, amounted to no more than an expression of objectives which should be had in mind, and did not seek to limit the development which might be allowed in the affected area. There was nothing in the impugned rezoning by-law which collided with these objectives, and the by-law did not in fact authorize any specific plan of development.
>
> I find nothing in the impugned by-law which conflicted with the city's community plan.
>
> [Emphasis added]

[26] Two other decisions of the Court of Appeal for British Columbia that were not cited by either party should also be mentioned. The first is *Western ARP Services Ltd. v. Capital (Regional Dist.)* (1986), 10 B.C.L.R. (2d) 63 (C.A.). That case involved what was then s. 809(7) of the 1979 *Municipal Act* (B.C.), which precluded the adoption of a bylaw "contrary to or at variance with an official settlement plan". Mr. Justice Taggart affirmed a declaration that a rezoning bylaw was invalid. In so doing he said the bylaw was "clearly in conflict" with the plan: at 69. More recently, in *Shell Canada Ltd. v. British Columbia Transit*, 2007 BCCA 64, 65 B.C.L.R. (4th) 99, Madam Justice Newbury, in dealing with s. 884(2) of the *Local Government Act* (B.C.) — "must be consistent with the relevant plan" — applied the "direct collision"

test in finding no "conflict" between the applicable official community plan and an existing commercial zoning bylaw: para. 14.

[27] In the case at bar, what must be ascertained is what the Legislative Assembly intended when it enacted s. 283(1) of the *Municipal Act*. This engages the modern approach to statutory interpretation, namely, that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87, cited in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at para. 37. In addition, s. 10 of the *Interpretation Act*, R.S.Y. 2002, c. 125, directs that, "[e]very enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects."

[28] By virtue of s. 283(1), a municipality cannot adopt a bylaw that is either "contrary to" or "at variance with" an OCP. The following definitions from the *Concise Oxford English Dictionary*, 11th ed. (Oxford University Press: 2004) are pertinent:

> **contrary** ■ adj. **1** (often **contrary to**) opposite in nature, direction, or meaning. **2** (of two or more statements, beliefs, etc.) opposed to one another.
>
> **variance** ■ n. **1** (usu. in phr. **at variance with**) the fact or quality of being different or inconsistent.

[29] Reading s. 283(1) in the context of the *Municipal Act* as a whole, I see nothing that warrants giving the expressions "contrary to" and "at variance with" any meanings other than their ordinary meanings. As mentioned, an OCP is a forward-looking planning document, setting out broad and general land-use objectives and policies. How these objectives and policies are implemented and/or met is left to municipal councils. One of the ways in which a council may act is through the exercise of its zoning powers. However, what council cannot do is authorize land-use that is incompatible with an OCP's long-term vision for that land. To determine

whether council has exceeded the scope of its zoning powers requires an examination of the impugned bylaw against the background of the OCP.

[30] In giving effect to s. 283(1), it is, with respect, unhelpful to use terminology such as "absolute and direct collision". Such terminology suggests that the line a municipal council cannot cross is higher than it actually is, as it implies that a council is authorized to act in a manner that is incompatible with an OCP, provided what it does is not too incompatible. This is not to suggest that a finding of incompatibility should be readily made. To the contrary, such a conclusion can only be reached after the impugned bylaw (or action) and the OCP have been subjected to careful scrutiny.

[31] In saying that I find the "absolute and direct collision" test unhelpful, I am not saying that I disagree with the result in any of the cases in which that and similar expressions have been used. The correctness of those decisions was not in issue on this appeal, and I, accordingly, express no opinion on their merits.

[32] This brings me to the issue of whether Bylaw 2007-39 is "contrary to or at variance with" the City's OCP. More specifically, the question is whether permitting a standalone concrete plant on land that has been designated Natural Resource through the current IQx zoning is compatible with the OCP. In my opinion, it is not. However, as I will explain, I do not agree with the Residents' Association's position that both the quarrying and any related activities must take place on the same parcel of land.

[33] The City contends, correctly, that the OCP contemplates both quarrying and related activities on land designated Natural Resource. It further contends, and this is accepted by the Residents' Association, that a concrete plant is a related activity. Given this, and given that the plant will be using gravel from quarries that are already operating in the McLean Lake area, the City says that permitting the building and operation of a standalone concrete plant is compatible with the OCP.

[34] To the extent that the City's position is that there is no requirement that a quarry and activities related to that particular quarry be carried out on the same property, I agree with it. The OCP permits both quarrying and related activities within areas designated as Natural Resource. There is nothing in the OCP to suggest that within such a designated area both the quarrying and the related activity must take place on the same property, i.e., parcel of land. For example, I do not think it would be incompatible with the OCP for a zoning bylaw to permit gravel extracted from several quarries each situated on a separate property within a designated area to be processed at a facility located on another property within the designated area.

[35] What the City's submission does not fully take into account, however, is that the Natural Resource designation in the OCP is concerned primarily with the extraction of gravel, a non-renewable resource. Gravel extraction is, by its very nature, a time-limited activity. Although related activities are permitted, those activities are tied to the primary activity. The OCP's long-term vision for land from which gravel is extracted is that that land be returned to its natural state once the gravel has been depleted, or the quarrying has been terminated for some other reason. This is clear from Policy 8.2(5), which states:

> Upon abandonment or termination of resource extraction operations, the remaining redevelopment and reclamation of the site shall begin immediately and be carried out in cooperation with the appropriate authorities. These areas shall be reclaimed to as natural a state as possible through slope grading, landscaping, and reforestation.

[36] The OCP contemplates that when gravel extraction comes to an end in an area designated Natural Resource, so too will the related activities. What is not contemplated is the continuation of related activities unconnected to any gravel extraction in the area. In other words, the related activities must stop when the quarrying stops.

[37] The reason why Bylaw 2007-39 does not conform with the OCP is that it does not contain a temporal limitation that requires the concrete plant to cease operations

once all quarrying activity in its area has stopped. Under the current IQx zoning the plant could continue to operate long after all quarrying activity in the McLean Lake area has come to an end. Indeed, in light of the "Non-Conforming Uses" provisions of the *Municipal Act* (Part 7, Division 4), city council could not, in the future, affect the removal of the plant by rezoning the four hectares of land in question. If the owner of the plant found it economically feasible to operate the plant notwithstanding the lack of a gravel source in the immediate area, then it would be entitled to do so.

[38] By authorizing a concrete plant to operate on a permanent standalone basis within an area designated Natural Resource, city council acted "contrary to" and "at variance with" the OCP. Bylaw 2007-39 is, therefore, invalid.

Conclusion

[39] I would allow this appeal, set aside the order dismissing the petition, and declare Bylaw 2007-39 invalid.

[40] Costs ordinarily follow the event. Accordingly, unless the parties wish to make written submissions in this regard, I would order that the Residents' Association is entitled to costs both in this Court and in the Supreme Court.

S.D. Frankel J.A.
The Honourable Mr. Justice Frankel

I AGREE:

Ian Donald J.A.
The Honourable Mr. Justice Donald

I AGREE:

"D. Smith J.A."
per S.D. Frankel J.A.
The Honourable Madam Justice D. Smith