IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *McLean Lake Residents' Association v. City of Whitehorse and Yukon Government (Department of Energy, Mines and Resources)*, 2007 YKSC 44

Date: 20070817
S.C. No. 07-A0006
Registry: Whitehorse

Between:

MCLEAN LAKE RESIDENTS' ASSOCIATION

Petitioner

And

CITY OF WHITEHORSE

And

YUKON GOVERNMENT DEPARTMENT OF ENERGY, MINES AND RESOURCES, LANDS BRANCH, MANAGER OF LANDS CLIENT SERVICES

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Skeeter Miller-Wright	For the Petitioner
Lori Lavoie	Counsel for the Respondent, City of Whitehorse
Mike Winstanley	Counsel for the Respondent, Yukon Government

REASONS FOR JUDGMENT

INTRODUCTION

[1] Territorial Contracting Ltd. (Territorial) is building a batch plant and quarry operation with a 50-year life expectancy near McLean Lake, in the City of Whitehorse. The McLean Lake Residents' Association (the Association) has applied for an order to

set aside the Government of Yukon's approval of a Screening Report under the *Environmental Assessment Act*, S.Y. 2003, c. 2. The Association also applies for a declaration that the zoning bylaw amendment of the City of Whitehorse changing the zoning of the proposed development from Future Development to Quarries, is invalid for failure to comply with the Official City Plan (OCP). Territorial was served but did not participate in the proceeding.

Lands Branch Approval

[2] Territorial has been operating a batch plant at Ear Lake, in the City of Whitehorse. In May 2002, Territorial submitted an application to the Lands Branch of the Government of Yukon for a lease in order to relocate the batch plant and develop a quarry (the quarry development) near McLean Lake. Ear Lake is located near the Yukon River and McLean Lake is a distance of several kilometres to the west of Ear Lake. The Alaska Highway passes between the two locations. There are approximately eight other quarry locations presently operating in the McLean Lake area. There are no residential neighbourhoods near the Ear Lake quarry but the quarry development near McLean Lake has residents along what is called Squatters Row as well as some very well established planned neighbourhoods. However, the immediate adjacent areas are primarily those of the eight existing Quarry Leases on both sides of the McLean Lake Road. It is fair to categorize the immediate area around McLean Lake as industrial.

[3] The land in question, consisting of approximately 14 hectares, is owned by the Government of Yukon. Territorial has title to nearby Lot 1076 which is intended for the

residential use of the developer. Territorial's application was delayed until the City of Whitehorse adopted its Official City Plan by way of a bylaw in October 2002.

[4] A further delay occurred pending devolution of lands from Canada to the Yukon and the passage of the *Environmental Assessment Act* in April, 2003. The application of Territorial has proceeded under the *Environmental Assessment Act* with the Lands Branch of the Government of Yukon acting as the "responsible authority" charged with completing a Screening Report.

[5] In December 2003, Access Consulting Group submitted the Project Description and Environmental Assessment, McLean Lake Gravel Quarry and Batch Plant, to the Lands Branch on behalf of Territorial. This report was distributed to interested parties in January 2004. The consultation process proceeded before the Lands Application Review Committee (LARC), a government body that coordinates various government departments and intervenors to review land applications.

[6] LARC deferred a meeting until a draft Environmental Screening Report was prepared and circulated. The draft Screening Report dated July 8, 2004, concluded that the quarry development would not likely cause significant adverse environmental effects.

[7] The LARC meeting took place on December 9, 2004, and LARC recommended approval of the quarry development. On January 18, 2005, the Lands Branch considered the Screening Report and concluded that the quarry development was "not likely to cause significant adverse effects." It required Territorial to prepare an annual report of quarrying activities and record monthly levels of ground water. The Lands

Branch stated that if the quarry development was responsible for lowering the water table in the area, Territorial would be required to submit a plan to reduce water use or identify alternative sources.

[8] In February 2005, the Lands Branch advised Territorial that it could proceed to obtain the necessary zoning change and municipal approval from the City of Whitehorse before any land disposition would proceed.

The Zoning Approval

[9] On March 27, 2006, the City of Whitehorse passed Zoning Bylaw 2006-01 to implement the OCP. It sets out the detailed zoning categories that apply to land in the municipality. The OCP is a plan for future land use decisions in the City of Whitehorse. I will address the legal status of the OCP and the obligations of City Counsel below. Prior to passing Zoning Bylaw 2006-01, intensive public hearings were conducted and the Association and residents of McLean Lake participated in the consultations.

[10] Once Zoning Bylaw 2006-01 was passed, City Council prepared a Zoning Bylaw 2006-36 to amend the Zoning Bylaw 2006-01 to change the zoning of the Territorial quarry development land from Future Development to Quarries. Zoning Bylaw 2006-36 was given first reading on November 14, 2006, and the first public hearing took place on December 11, 2006. Eight delegates appeared, with seven opposed to the zoning change and one in favour of the change.

[11] I note that prior to this public meeting, City Council went to extraordinary lengths to ensure that the quarry development was thoroughly reviewed by an independent third

party, Gartner Lee Limited, to ensure that the assessment met all of the requirements under relevant municipal bylaws and that the assessment was complete and accurate.

[12] In September 2006, Gartner Lee Limited prepared an extensive report entitled *McLean Lake Process Review*. It considered the LARC process, the OCP and stakeholder issues and concluded that the LARC process and the Lands Branch considered issues in the OCP although they were not within the scope of the environmental assessment process. In other words, the LARC process was a thorough one.

[13] In a letter dated November 1, 2006, Phase II, Gartner Lee Limited reported on its meetings with stakeholders which included residents in the McLean Lake area and the Kwanlin Dun First Nation. With respect to McLean Lake residents, the specific issue of the "OCP conformance including, a hydrological/ hydrogeological assessment," among others, was discussed. Gartner Lee Limited again concluded that the Lands Branch of the Government of Yukon exercised its discretion appropriately. The Phase II report concluded with the following:

> Outstanding issues that may require further consideration during the rezoning process include conformance with the relevant Official Community Plan (OCP) policies related to development in the McLean Lake area, including a requirement for a detailed hydrological/ hydrogeological assessment (OCP Policies 8.2.1-8.2.8,8.6.2,11.2.1 and 11.2.4).

[14] I will address all these policies of the OCP below with special attention to section 11.2(4) which begins with the sentence:

> A detailed hydrological and hydrogeological assessment of the McLean Lake watershed shall be undertaken prior to any further gravel extraction.

[15] A second public hearing was held on January 29, 2007. Thirty-two submissions were received and 16 delegates appeared including the McLean Lake Residents' Association.

[16] On February 12, 2007, City Council completed the second and third reading and adopted Zoning Bylaw 2006-36.

[17] The City of Whitehorse is proceeding with the approval process for the proposed quarry development.

ISSUES

[18] There are three issues to be addressed.

1. What is the standard of review to be applied to the Yukon Government decision?
2. Did the Yukon Government in its Screening Report, fail to meet its responsibilities as the trustee of the public trust to protect the natural environment from actual or likely impairment?
3. Is the City of Whitehorse Zoning Bylaw 2006-36 invalid because council failed to comply with the OCP?

Issue 1: What is the standard of review to be applied to the Yukon Government decision?

The *Environment Act* And The *Environmental Assessment Act*

[19] The right of the McLean Lake Residents' Association to bring this action against the Yukon Government is set out in section 8(1)(b) of the *Environment Act*, R.S.Y. 2002, c. 76.

> *Right of Action*
>
> 8(1) Every adult or corporate person resident in the Yukon who has reasonable grounds to believe that
>
> > (a)a person has impaired or is likely to impair the natural environment; or
> >
> > (b)the Government of the Yukon has failed to meet its responsibilities as trustee of the public trust to protect the natural environment from actual or likely impairment
>
> may commence an action in the Supreme Court.

[20] The *Environment Act* is a substantive statute setting out environmental rights of Yukon citizens, remedies against the Yukon Government and obligations imposed upon the responsible Minister.

[21] The *Environment Act* was passed in 1991. It represents a very strong commitment by the Yukon Government to protect the environment. It is one of the few statutes in Canada to grant a right of action to residents against the government. Although there were fears of "opening the flood gates" to a plethora of litigation against the Yukon Government, this appears to be the first time that it has been utilized. The statute contains the following definitions:

> "environment" means
> (a) the air, land, and water,

> (b) all organic and inorganic matter and living organisms, including biodiversity within and among species,
> (c) the ecosystem and ecological relationships,
> (d) buildings, structures, roads, facilities, works, artifacts,
> (e) all social and economic conditions affecting community life, and
> (f) the inter-relationships between or among any of the factors in paragraph (a), (b), (c), (d), or (e)
>
> in the Yukon;
>
> "natural environment" means paragraphs (a), (b), and (c) of the definition of "environment" in the Yukon and includes the cultural and aesthetic values associated with it;"
>
> "public trust" means the collective interest of the people of the Yukon in the quality of the natural environment and the protection of the natural environment for the benefit of present and future generations;

[22] Section 4 of the *Act* contains a lengthy list of objectives and principles to be applied in the interpretation of the Act. The following give a sense of the objectives and principles:

> 5(1) The objectives of this *Act* are
>
> (a) to ensure the maintenance of essential ecological processes and the preservation of biological diversity;
> (b) to ensure the wise management of the environment of the Yukon;
> (c) to promote sustainable development in the Yukon;
> (d) to ensure comprehensive and integrated consideration of environmental and socioeconomic effects in public policy making in the Yukon;
>
> . . .
>
> 5(2) The following principles apply to the realization of the objectives of this Act
>
> (a) economic development and the health of the natural environment are interdependent;
> (b) environmental considerations must be integrated effectively into all public decision-making;

> (c) the Government of the Yukon must ensure that public policy reflects its responsibility for the protection of the global ecosystem;
> (d) the Government of the Yukon is responsible for the wise management of the environment on behalf of present and future generations; and
> . . .

[23] There are no specific defences for the Yukon Government set out in the statute. The Supreme Court is granted a wide variety of remedies in section 12, ranging from injunction and declarations to damages and costs as well as “any other remedy that the Supreme Court considers just.” The Court may also order the Minister to conduct a review of the environmental impact of a development.

[24] The *Environment Act* is silent on the standard of review to be applied by the court when reviewing a Screening Report. There are three standards of review: correctness, reasonableness and patent unreasonableness. The correctness standard is the least deferential and patent unreasonableness the most deferential of a decision under judicial review. The common law of judicial review provides for determining a standard of review based upon a functional and pragmatic approach considering four factors: any privative clause (a clause shielding the decision from judicial review); the expertise of the decision maker; the purpose of the provision and the legislation; and the nature of the question: *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

[25] The decision of the responsible authority (the Yukon Government) was made pursuant to a Screening Report under section 16 of the *Environmental Assessment Act*. Section 16(1)(a) states:

> The responsible authority shall take one of the following courses of action in respect to a project after taking into consideration the screening report and any comments filed pursuant to subsection 14(3)
>
> > (a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out and shall ensure that any mitigation measures that the responsible authority considers appropriate are implemented;
>
> . . .

[26] The Yukon Government submits that the standard of review should be applied to the decision of the Yukon Government under section 16(1)(a) that "the project is not likely to cause significant adverse environmental effects." The McLean Lake Residents' Association submits that there is a higher duty as trustee for the public trust to protect the natural environment from "actual or likely impairment" as required in section 8(1)(b) of the *Environment Act* and therefore the decision of the Yukon Government is subject to a higher level of scrutiny.

[27] In my view, it is conceivable that a project may not likely "cause significant adverse environmental effects" and yet fail to protect the natural environment from "likely impairment." In other words, the threshold for establishing "likely impairment" is a lower one than "not likely to cause significant adverse environmental effects." This could place the Yukon Government in the very difficult position of being held to a more stringent obligation under the *Environment Act* than under section 16(1)(a) of the *Environmental Assessment Act*. I am of the view that these different obligations of the

Yukon Government do not arise in the case at bar. This application is confined to the question of whether the Minister's decision under section 16(1)(a) (that the project will not likely cause significant adverse environmental effects) should be set aside rather than an action for damages, for example, that arise where it is alleged that the Minister has failed to protect the natural environment from "likely impairment." Thus, my analysis will be confined to a review the Yukon Government's decision under section 16(1)(a) of the *Environmental Assessment Act*.

[28] Under section 8(1)(b) of the *Environment Act*, the Yukon Government is described as "trustee of the public trust." This places the duties associated with a trustee at common law on the Yukon Government. In *Fales* v. *Canada Permanent Trust Co.,* [1977] 2 S.C.R 302 at 315, Dickson J. identified "the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs." This "ordinary prudence" test is appropriate for this statute.

ANALYSIS

[29] In applying the *Pushpanathan* test, there is no privative clause protecting the government decision from judicial review. In fact, it is precisely the opposite as the *Environment Act* provides a citizen or association in the Yukon with statutory standing to commence a judicial review action. This factor leans towards less deference being given by the court to the decision of the Yukon Government.

[30] The Lands Branch does have considerable expertise in assessing environmental issues as they relate to land dispositions. The Land Use Officers have personal expertise and the LARC process consults a wide variety of government departments as

well as intervenors before reaching its decision. This suggests more deference being given to the decision.

[31] As to the purpose of the provisions and the legislation, both the *Environment Act* and the *Environmental Ass*essment *Act* require “polycentric” decision making. *Pushpanathan*, at paragraph 36, describes this as a decision that involves a number of competing interests and calls for solutions that balance the costs and benefits to the various interests at play. See *Voice Construction Ltd.* v. *Construction & General Workers’ Union, Local 92,* 2004 SCC 23 at paragraph 28. Thus, these statutes empower the decision-maker to balance competing interests, albeit with a focus on the protection of the environment. This suggests a more deferential standard of review.

[32] The nature of the problem is one that involves a mixed question of fact and law. Deference should be given on questions of fact but questions of law require a standard of correctness.

[33] I conclude that, on balance, reasonableness is the appropriate standard of review.

[34] The standard of review of reasonableness was developed in the case of *Canada (Director of Investigation and Research, Competition Act)* v. *Southam Inc.* [1997] 1 S.C.R. 748*.* At paragraph 56, Iacobucci J. stated:

> . . . An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it . . .

ISSUE 2: Did the Yukon Government in its Screening Report, fail to meet its responsibilities as the trustee of the public trust to protect the natural environment from actual or likely impairment?

The Screening Report

[35] The Association alleges that the Screening Report is deficient in the areas of scope of the assessment, failure to consider the negative effects on property values, consideration of cumulative effects and the failure to consider alternatives sites.

[36] The Association acknowledges that the Yukon Government has followed the process required by the *Environmental Assessment Act*. However, it submits that the quality of the Screening Report is deficient and the exercise of discretion inadequate.

[37] The Association submits that the scope of the Screening Report is too narrow as it is confined to the McLean Creek watershed. It relies on the guidelines established for the *Canadian Environmental Assessment Act* and the *Environmental Assessment Act*. The Association submits that the scope should be broadened to include the entire McLean Lake watershed as it drains into the Yukon River, which would include the previous location of the batch plants at Ear Lake.

[38] The Yukon Government stated in the Screening Report that although property owners expressed the concern that the project could negatively affect property values, such an impact was outside the scope of the *Environmental Assessment Act*.

[39] The Association was very critical of the assessment of cumulative effects in the Screening Report. The Screening Report stated that there would not be any cumulative effects in moving the quarry development from its current location to McLean Lake

“because no new batch plant works are proposed within the watershed.” It stated that the water required for the new location would continue to be taken from the same watershed thereby not creating any additional cumulative effects. The Report concluded that there were no new residential developments identified in the OCP and considering the existing quarry use in the area, and the present residential and recreational uses, there would be no significant adverse environmental effects.

[40] The Association submits that the Screening Report failed in its statutory requirement to consider alternative sites for the project such as the Stevens area identified in the OCP.

ANALYSIS

[41] The Screening Report is well written and comprehensive. In the main, I find that the report provides logical reasons for the decision of the Yukon Government, although there is substantial room for disagreement. For example, the scope of the Screening Report may be narrower than the Association would have it. Nevertheless, the scope of the McLean Creek watershed is adequate to assess this proposed quarry development.

[42] I also find that the Screening Report was correct in its decision not to consider alternative sites. Under section 12(1)(e) of the *Environmental Assessment Act* that can only be done in a Screening Report if the Minister requires it.

[43] I do not necessarily agree with the statement in the Screening Report that property values are outside the scope of the *Environmental Assessment Act.* Surely, the definition of “environmental effect” is broad enough to include property values.

Obviously, if there was a significant negative impact on the property values, that would be a significant finding to be taken into consideration.

[44] The decision of the responsible authority is reason-based because the current quarry use of the area is not being changed so dramatically as to affect residential values. There is no evidence to support the allegation that residential values will be negatively affected. It is also not unreasonable to defer to the City of Whitehorse OCP to determine this impact when it is common knowledge that the proponent has to proceed through a second assessment process by the City based on the OCP before any approval is granted.

[45] The criticism of the cumulative effects analysis has some substance to it. It is not a simple process of the proponent moving his batch plant and quarry from one location in the watershed to another location in the same watershed. Clearly, the residential surroundings are substantially different and much more concentrated in the new location. There is also the possibility of additional residential development in the area surrounding McLean Lake. The cumulative effects analysis is undoubtedly the weakest part of the decision of the Lands Branch.

[46] Unfortunately for the Association, my task is not to favour one interpretation over another, but to consider whether the decision is supported by reasons based on the facts of the proposed assessment. On that basis, I conclude that the decision of the Lands Branch is reasonable, despite its somewhat simplistic approach to the concept of cumulative effects.

[47] In the result, I find that the Yukon Government acted reasonably in its decision that the quarry development "is not likely to cause significant adverse environmental effects." Thus, the Yukon Government met its responsibility as trustee of the public trust to protect the natural environment.

ISSUE 3: Is the City of Whitehorse Zoning Bylaw 2006-36 invalid because council failed to comply with the OCP?

THE LAW AND THE OCP

[48] Section 279(1)(c) of the *Municipal Act*, R.S.Y. 2002, c. 154 states that an OCP must address environmental matters in the municipality. It is for this reason that the OCP is replete with environmental policy issues.

[49] Under the heading "Effect of plans" the *Municipal Act* states:

> 283(1) Council shall not enact any provision or carry out any development contrary to or at variance with an official community plan.
>
> . . .
>
> (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.

[50] Section 283(1) is clear and concise in stating that Council shall not pass bylaws or carry out any development contrary to or at variance with an OCP.

[51] This statutory obligation is expressed again in section 289(2) relating specifically to zoning bylaws:

> The council of a municipality shall not pass a zoning bylaw or any amendment thereto that does not conform to the provisions of an existing official community plan.

[52] This is strong statutory language. Council is prohibited from acting “contrary to or at variance with an official community plan” and shall “conform to the provisions of an existing community plan.”

[53] The only exception to this mandatory direction to Council is that Council is not committed to undertake any of the “projects” outlined in the OCP. This exception makes sense as different projects have different timelines and the City can only proceed with “projects” in accordance with procedures set out in the *Municipal Act*. However, section 283(4) does not say that when the City does proceed with a project, it does not need to conform with the OCP.

[54] One of the governing principles of statutory interpretation is the presumption of coherence and avoidance of internal conflict. In *MacKeigan v. Hickman* [1989] S.C.J. No. 99, McLachlin J., as she then was, wrote at paragraph 53:

> I start from the fundamental principle of construction that provisions of a statute dealing with the same subject should be read together, where possible, so as to avoid conflict…In this way, the true intention of the Legislature is more likely to be ascertained.

[55] Driedger on the *Construction of Statutes,* 4th ed. (Ontario: Butterworths, 2002), also provides guidance for the coherent interpretation of section 283(4) and section 289(2) of the *Municipal Act* at page 264.

> When two provisions are applicable without conflict to the same facts, it is presumed that each is meant to operate fully according to its terms. So long as overlapping provisions *can* apply, it is presumed that they are meant to apply. The only issue for the court is whether the presumption is rebutted by evidence that one of the provisions was intended to provide an exhaustive declaration of the applicable law.
>
> . . .
>
> Normally, when overlapping provisions have different purposes or are concerned with different aspects of a matter, they are not found to conflict with one another.

[56] There is no conflict between section 283(4) and section 289(2). Both are found in the Official Community Plan division of the *Municipal Act*. In my interpretation, section 283(4) states that the City is not committed to undertake projects outlined in the Official Community Plan. Therefore, the City is not committed to undertaking a specific study set out in a policy of the OCP. That does not mean that the policy has no affect whatsoever as section 289(2) says that Council shall not pass a zoning bylaw or amendment that does not conform to the provisions of the OCP. The two statutory provisions address different aspects of a policy in the OCP. Thus, the City may not wish to carry out a specific project but that does not operate to relieve the City from conforming with the policy expressed when it does proceed.

[57] Furthermore, an OCP is not chipped in stone forever. The OCP itself may be amended by following the same procedure and approvals required for the preparation and adoption of the OCP. Notice of the amendment must be advertised, a public

hearing held, and before third reading the responsible Minister must approve the amendment. If the Minister does not approve within 45 days, the amendment is considered to be approved. The City always has the remedy of amending an OCP as an alternative to conforming to it.

[58] It is well established in case law that an OCP is not a statute or bylaw and should be given a liberal interpretation as a statement of policy. See *Rogers, Canadian Law of Planning and Zoning,* 2nd Edition, Volume 2 at page 3-1.

[59] A leading authority is the case of *Rogers* v. *Saanich (District)*, [1983] B.C.J. No. 1744 (S.C.). In that case, a developer applied to rezone two acres of land from rural to detached housing so that it could be subdivided. The land was in or near an Agricultural Land Reserve. Locke J. conducted an extensive review of the existing case law and summarized a common theme at paragraph 50:

> . . . the written efforts of planners are really objectives and unless there is an absolute and direct collision … they should be regarded generally speaking as statements of policy and not to be construed as would-be acts of Parliament.

[60] In the *Rogers* case, Locke J. found that there was no direct collision with the Official Community Plan. In saying so, he made this useful comment at paragraph 54:

> . . . The Plans have goals, objectives and policies but a reading of the Plans concerned and the authorities that I have cited does not convince me there is any head-on collision between the bylaw and any of these three categories. It was conceded by counsel for Saanich that the policies were intended to have legal effect insofar as the Official Community Plan was concerned but the Plaintiffs could not show any policy with which the rezoning was in direct collision which did not have a saving clause either

> embodied in the policy or else one which is generally applicable. Typical examples are words in the Official Community Plan in Policy 1.2 requiring the Council to establish buffers "where appropriate."

[61] Locke J. went on to say that he considered the rezoning of the two acres to be a "minor change".

[62] The approach proposed in *Rogers* was recently followed in *Miller* v. *Salmon Arm (District)*, 2004 BCSC 674. In that case, Miller argued that a road exchange bylaw was inconsistent with the Official Community Plan. Power J. adopted the approach used in *Rogers* to consider the wording of the policy to determine if the rezoning "was not in direct collision with any policy which did not have a saving clause" (paragraph 75 of *Miller*).

[63] Power J. stated at paragraph 84:

> I find that the Rogers decision supports that approach, and that the road network plan is simply a plan. The road network policies do provide sufficient flexibility to respond to changing needs including the present road exchange by-law. This road exchange by-law is a very minor change to the road network map and not inconsistent with the OCP. Therefore, I find that there is no absolute and direct collision between the road exchange by-law and the OCP.

[64] In my view, this is the appropriate way to interpret the policies of the Whitehorse OCP to determine if Zoning Bylaw 2006-36 conforms with the policies of the OCP.

[65] The grounds for challenging a bylaw is found in section 351 of the *Municipal Act*:

> 351(1) A person may make an application to the Supreme Court for a declaration that all or part of a bylaw is invalid on the following grounds

> (a) the council acted in excess of its jurisdiction;
>
> (b) the council acted in bad faith,
>
> (c) all or part of the bylaw is discriminatory; or
>
> (d) the council failed to comply with a requirement of this or any other Act or the municipality's procedures bylaw.
>
> . . .
>
> (3) On hearing an application under subsection (1), a judge may make the requested declaration and any other order the judge considers appropriate, but a bylaw shall not be declared invalid under paragraph (1)(d) unless the judge is satisfied that the council's failure to comply with the requirement likely affected the outcome of the vote on the bylaw.
>
> . . .

[66] The focus of my analysis shall be on whether the City Council, under section 351(d), failed to comply with a requirement of the *Municipal Act*, namely sections 283(1) or 289(2). The sections are somewhat similar. Section 283(1) prohibits the enactment of a provision or carrying out a development contrary to or at variance with an OCP. Section 289(2) prohibits the passing of a zoning bylaw or amendment that does not conform to the OCP. In both cases, the prohibited actions result in the declaration that the bylaw is invalid.

[67] However, section 351(3) qualifies section 351(1)(d) to the extent that the court cannot declare the bylaw to be invalid, unless the judge is satisfied that Council's failure to comply with the OCP likely affected the outcome of the vote on the bylaw.

The OCP and Mclean Lake

[68] As stated in the introduction, the OCP is a tool to document “broad objectives and land use policies of a community”. Its purpose is to outline where future development should occur.

[69] The OCP further states that once it 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”.

[70] The OCP is divided into 11 chapters which are subdivided into sections that contain general objectives and policies which range from general to very specific. The City adopted the OCP after a wide ranging public consultation which included consultation with residents of the McLean Lake area.

[71] In chapter 8 entitled Economic Development, the OCP addresses Natural Resource Designation under section 8.2. It indicates the importance of gravel extraction to the local economy and confirms that there is gravel potential at Sleeping Giant Hill, which is the same area as the proposed quarry development at McLean Lake. It also states that “the Stevens area has significant gravel resources that could serve the City of Whitehorse and the Yukon Government for up to 70 years.” The Stevens area is not located in the McLean Lake area.

[72] The policies that relate to the proposed quarry development are:

> 8.2(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. (my emphasis)

[73] The Association submits, with some validity, that the proposed quarry development has now been relocated from Ear Lake, which has almost no adjacent residential development, to McLean Lake which has considerably more residential development.

[74] The Association submits that Territorial owns the residential Lot 1076 that does not have the 300-metre vegetation buffer.

> 8.2(4) A vegetated buffer of approximately 300-metres shall be established between areas of resource extraction and existing development and proposed new development.

[75] The Association says that Policy 8.2(6) is a direction to locate future quarry development in the Stevens area.

> 8.2(6) Future quarries along the north-south ridge in the Stevens area shall be phased in based on demand for gravel resources.

[76] The Association submits that further environmental studies required in paragraph 8.2(8) did not consult the residents.

> 8.2(8) Further environmental studies, and management plans shall be conducted, in consultation with the local

> neighbourhood, prior to any gravel or mineral extraction on or around Sleeping Giant Hill.

[77] Section 8.6 is entitled Industrial – Service Designation. Policy 8.6(3) states:

> The operation of aggregate quarries in Industrial – Service areas with known deposits, particularly those along McLean Lake road may continue, but are expected to be redeveloped over time to other service industrial uses. As such, sand and gravel quarries are perceived mainly as interim uses.

[78] The relevance of this policy is that the proposed quarry development is demonstrably not an "interim use" as it has a life expectancy of 50 years.

[79] Under Chapter 11, entitled Infrastructure, section 11.2 discusses the Water System for the City of Whitehorse. Policies 11.2(1) and 11.2(4) respectively state:

> 11.2(1) The protection of Schwatka Lake and the surrounding watershed is of paramount importance. The City shall preserve, protect and enhance water supply areas by keeping recharge areas free from incompatible development and sources of contamination.
>
> 11.2(4) A detailed hydrological and hydrogeological assessment of the McLean Lake watershed shall be undertaken prior to any further gravel extraction. This study should explain how the watershed works, identifying the primary water source points, main run-off and infiltration characteristics and implications of water flow on the ecology of the watercourse. The impacts of possible gravel extraction, storm water run-off and sewage septic and/ or water well usage should be discussed. (my emphasis)

[80] The factual circumstances in the quarry development process pertaining to policy 11.2(4) require some explanation.

[81] In the December 2003 Project Description and Environmental Assessment prepared by Access Consulting Group, the Hydrogeology Assessment section 4.5

reviewed previous studies of the McLean Lake area while stating that “a number of the these reports were not available to the authors for review at time of writing.”

[82] Access Consulting Group also stated that a “review of the available literature indicates little is currently known of the groundwater regime within the McLean Creek watershed.” I understand that this constitutes a “desktop study” which is a review of the existing literature.

[83] The consultants nevertheless concluded that the quarry development “is not expected to have a significant impact on the total available water resources of the basin.”

[84] At the LARC meeting of September 9, 2004, the Association submitted that the “desktop study” was not detailed enough or sufficient to address the water concerns with the quarry development. At the same meeting the City, the Lands Branch and the developer agreed that a “desktop hydrology study would suffice for the proponent’s requirements.” The notes of the LARC meeting noted that “City Council could still require more information on the McLean Lake Watershed, who would be responsible for undertaking the studies and providing funding would have to be determined.”

[85] In the independent report requested by the City, Gartner Lee Limited stated at page 8:

> The adequacy of the hydrogeological assessment to effectively assess impacts to water levels within the McLean Lake watershed and down gradient water bodies was raised during the LARC review process. As a technical evaluation of the hydrological/ hydrogeological study is outside of the

> scope of this review, the issue is not addressed further in this report.

[86] As previously stated, the Gartner Lee Limited report concluded that the "requirement for a detailed hydrological/ hydrogeological assessment" is an outstanding issue that may require further consideration during the rezoning process.

[87] As far as I can discern the detailed assessment or study requirement in policy 11.2(4) has not been completed nor has it been addressed except as noted above.

ANALYSIS

[88] The issue in this case is not whether a proper and full consultation has taken place. I venture to say that this small area, the McLean Lake watershed, is one of the most highly consulted municipal areas in Canada. There have been consultations for the OCP, the Screening Report and the Zoning Bylaw amendment. The City engaged an independent third party to review the process to ensure that the assessment met all of the requirements under relevant municipal bylaws and that the assessment was complete and accurate, subject to the qualification stated in the report that outstanding issues as to conformance with OCP policies may require further consideration.

[89] The issue comes down to whether Zoning Bylaw 2006-36 is in conformance with the OCP and its policies related to the quarry development in the McLean Lake area.

[90] Counsel for the City submits Council is not obligated to follow the specific policies of the OCP since the OCP designated the Sleeping Giant (McLean Lake) area as "natural Resource with the estimated total granular resource of 2,500,00 m^3". According

to this submission, the Zoning Bylaw 2006-36 is in conformance with this general statement in the OCP.

[91] I disagree with the submission to the extent that it is only one part of the issue presented. The Association has not challenged the general nature of the Zoning Bylaw amendment to change the zoning from Future Development to Quarry but rather its failure to conform with the specific policies that are in the OCP pertaining to the McLean Lake area.

[92] Counsel for the City submitted, in the alternative, that if the City was obligated to follow the specific policies of the OCP on the McLean Lake area, there is no distinct or absolute collision between Zoning Bylaw 2006-36 and the specific policies of the OCP. Counsel added that if there was a collision, then the City had satisfied the specific policy.

[93] I am of the view that this is the correct approach to assess the validity of Zoning Bylaw 2006-36, with one exception. Counsel for the City suggested that the City could meet its OCP policy obligation through the subdivision approval process and a Development Agreement. I disagree with this proposal to the extent that it suggests the City can place conditions on the developer after the zoning bylaw approval to meet its OCP obligations. If the zoning bylaw amendment is not in conformance with the OCP, it cannot be validated after its passage. If that were the case, bylaws not in conformance with the OCP could be validated by some retroactive process, which the *Municipal Act* does not contemplate. In other words, it is the zoning bylaw amendment that is being reviewed for conformance with the OCP, not an unknown subsequent process or

afterthought that may be utilized for that purpose. On the facts of this case, it is the passage of the zoning bylaw amendment that triggers the quarry development.

[94] I propose to review each section of the OCP and its specific McLean Lake area policies to determine if the bylaw collides or fails to conform with the OCP.

8.2 Natural Resource Designation

[95] I do not find any collision or non-conformance with 8.2(1) which states a purpose of a Natural Resource designation is to keep resource extraction and related activities away from existing and future residential neighbourhoods. This policy is a general objective which arguably has been substantially achieved. The proposed quarry development, with the exception of the proponent's residential Lot 1076, respects all the buffers for residential development.

[96] There is a collision to the extent that the single residential Lot 1076 owned by the developer does not conform with the vegetated buffer of "approximately 300 metres" between the proposed quarry and the residential lot.

[97] In my view, it would be somewhat anomalous to reject a zoning bylaw amendment simply because of the sole issue of not being in conformance with the OCP related to a single residential lot owned by the developer. It would be more appropriate, in these particular circumstances, to give a narrow interpretation to this OCP policy which would suggest that a single residential lot is not an "existing development" in the sense of amounting to a residential neighbourhood. Thus, the proposal to enter into a

Development Agreement whereby the developer and future owners consent to the proximity of Lot 1076 to the proposed quarry development satisfies the policy.

[98] The reference in 8.2(6) to future quarries in the Stevens area does not apply to Zoning Bylaw 2006-36 and there is no collision with that policy. There is not a clear statement that all future quarry development shall be in the Stevens area.

[99] The requirement for further environmental studies and management plans to be conducted “in consultation with the local neighbourhood” has been met with the exception of section 11.2(4). The Association submits that the environmental studies were not conducted in consultation with them. I find this submission to be a rather narrow one. There is no suggestion that further environmental studies and management plans were not done but rather that there was a failure to consult. While it may be that specific individuals did not get consulted, I find that the residents have been consulted since the earlier discussions of the OCP, followed by the public hearings on the bylaw amendment. Those consultations gave rise to the areas to be studied. I conclude that the Zoning Bylaw is in conformance with this policy.

8.6 Industrial - Service Designation

[100] Policy 8.6(3) states that the aggregate quarries in the Industrial Service areas along McLean Lake Road may continue but they are over time to be redeveloped to other industrial uses, thereby being “perceived” as “interim uses.” If the proposed quarry development is captured by this policy it is clearly not in conformance as it has a 50-year life expectancy which is anything but an “interim use.”

[101] The first point is that the specific policy clearly applies only to the existing quarries on McLean Lake Road that are in zones designated Industrial – Services. Secondly, the fact that this proposed quarry development is in a Natural Resource designated extraction area suggests that the concept of “interim use” has no application to this Zoning Bylaw 2006-36 which establishes a Quarry zoning, not Industrial - Services.

11.2 Water System

[102] This policy states that the protection of Schwatka Lake and the surrounding watershed is of paramount importance for the reason that it is a water supply area for the City.

[103] The wording of policy 11.2(4) is clear and mandatory:

> A detailed hydrological and hydrogeological assessment of the McLean Lake watershed shall be undertaken prior to any further gravel extraction.

[104] There are no words like “shall consider”, “where possible”, “where appropriate” or other vague words that give the City some discretion not to proceed with the hydrological assessment if it wishes to proceed with further gravel extraction. It is, in a word, mandatory. It cannot be circumvented by agreement between the City, the Lands Branch and the developer without amending the OCP.

[105] The City submits that this is a “project” which does not commit the City or any other person to undertake the study. As I interpret section 283(4) of the *Municipal Act*, it is designed to ensure that the City and others have no financial obligation to undertake

a project. Section 283(4) does not absolve the City from conforming with the policy requiring a detailed hydrological and hydrogeological assessment if it wishes to permit further gravel extraction in the McLean Lake watershed. Zoning Bylaw 2006-36 comes into direct collision with policy 11.2(4) of the OCP. There has been no detailed hydrological and hydrogeological assessment of the McLean Lake watershed.

[106] I conclude that Zoning Bylaw 2006-36 is invalid pursuant to section 351(d) of the *Municipal Act* for failing to confirm with policy 11.2(4) of the OCP. I find that Council's failure to comply with the policy requiring a detailed hydrological and hydrogeological assessment likely affected the outcome of the vote on the bylaw. As a result, there is no authorization to proceed with the McLean Lake quarry development.

[107] The parties may speak to costs if necessary.

VEALE J.