IN THE SUPREME COURT OF YUKON

Citation: *McLean Lake Residents' Assn.* v. *City of Whitehorse,* 2008 YKSC 46

Date: 20080603
S.C. No. 07-A0104
Registry: Whitehorse

Between:

MCLEAN LAKE RESIDENTS' ASSOCIATION

Petitioner

And

CITY OF WHITEHORSE

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Skeeter Miller-Wright — Appearing on behalf of the Petitioner
Lori Lavoie — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a petition by the McLean Lake Residents' Association (the "Residents' Assn.") to have City of Whitehorse Bylaw 2007-39 declared invalid. That bylaw amended the City's Zoning Bylaw, 2006-01, by changing the zoning of a four hectare parcel of vacant Commissioner's land in the McLean Lake area from "Future Development (FD)" status to "Quarries Restricted (IQx)", with the restriction being that only concrete plants are permitted as a principal use.

[2] The Residents' Assn. attacks the validity of Bylaw 2007-39 on two grounds:

(1) The permitted principal use of a concrete plant on the lands will be for the purposes of processing aggregate materials which have not been extracted from those lands, but rather from other locations. The petitioner says that is contrary to the stated purpose of the "IQ-Quarries" zoning designation in Zoning Bylaw 2006-01. Therefore, Bylaw 2007-39 is either "contrary to or at variance with" the City's Zoning Bylaw and in breach of s. 297(1) of the *Municipal Act,* R.S.Y. 2002 c.154.

(2) The passage of Bylaw 2007-39 violates the obligations of City Council under the *Municipal Act* to provide a responsible, accountable and good government for the City of Whitehorse. In particular, the petitioner says that the Council violated its "mandate" to reflect the concerns of a significantly large number of City constituents in its decision to enact the bylaw.

BACKGROUND

[3] Territorial Contracting Ltd. has operated a concrete plant at Ear Lake, in the City of Whitehorse, for several years. Access to aggregate material, mainly sand and gravel, is fundamental to the production of concrete. The quarry deposit at Ear Lake is nearing the end of its life and Territorial Contracting is desirous of moving its operations elsewhere.

[4] Territorial Contracting initially proposed a 14 hectare development in the McLean Lake area, comprised of two separate parcels of land. It received approval from the Yukon Government to enter into a lease agreement for a gravel quarry on the 10 hectare parcel and a purchase agreement for a concrete plant and related structures on the four

hectare parcel. A screening report had been previously prepared under the Yukon *Environmental Assessment Act* in 2005, which concluded that the project was not likely to cause significant adverse affects.

[5] In 2006, Territorial Contracting applied to rezone the 14 hectare area to allow for the development of both the quarry and concrete plant. Bylaw 2006-36 was enacted, allowing this zoning amendment. In April 2007, the Residents' Assn., represented by Mr. Miller-Wright, filed a petition in this Court challenging the validity of that bylaw. In *McLean Lake Residents' Assn*. v *Whitehorse (City)*, 2007 YKSC 44, Veale J. concluded that Bylaw 2006-36 was invalid because it failed to comply with the *Official Community Plan* ("*OCP*") adopted October 15, 2002, and in particular, policy 11.2(4) which required a "detailed hydrological and hydrogeological assessment" prior to any new gravel extraction undertakings in the McLean Lake water shed. As that assessment had not been done, and as Bylaw 2006-36 purported to permit both a quarry and a concrete plant on the subject lands, Veale J. held it was in violation of the *OCP* and thus the *Municipal Act*.

[6] On September 5, 2007, Territorial Contracting submitted a second application to the City to rezone the same four hectare parcel in the previous application, from "FD – Future Development" to "IQ – Quarries", to permit the construction and operation of a concrete plant on the land. This application did not seek permission to undertake any quarrying activities on the parcel.

[7] On September 17, 2007, City administration staff submitted an administrative report to the City Council's Planning Committee, which summarized the history of Territorial Contracting's previous application, as well as the current rezoning application,

within the context of the *OCP*. It noted in particular that the *OCP* designated the lands (on which the four hectare parcel is situated) as "NR – Natural Resource". That designation allows for the extraction of gravel and the construction and operation of concrete plants under policy 8.2(1), which reads in part:

> "Quarry activity, including the extraction, crushing and hauling of gravel or minerals may be permitted in areas designated as Natural Resource….The purpose of this designation is to allow resource extraction and ***related activities*** away from existing and future residential neighbourhoods…" . (my emphasis)

City administration also acknowledged that a detailed hydrological and hydrogeological assessment was not required for the current application, as it did not propose any gravel extraction on the land.

[8] On September 24, 2007, Council gave first reading to proposed Bylaw 2007-39.

[9] On September 28 and October 5, 2007, the City published notices in local newspapers respecting the upcoming public hearing to debate the proposed bylaw. In addition, the City sent a total of 18 letters to property owners within one kilometre of the subject area.

[10] On October 22, 2007, a public hearing was held at a regularly scheduled Council meeting to hear from interested parties regarding the proposed rezoning of the land. Council received three written submissions on the issue, with two against and one in favour of the proposed bylaw. Three people appeared before Council to speak against the proposal, one of whom was Mr. Miller-Wright. Council also heard from a representative of a consulting group hired by Territorial Contracting to speak in favour of the zoning amendment. A number of issues were raised at that hearing. Those were

summarized in a subsequent administrative report prepared for the Planning Committee, dated November 5, 2007, as follows:

> " • Rezoning cannot occur until *OCP* requirements are fulfilled
> • Resource extraction is inevitable if a concrete plant is built
> • IQ zoning is the wrong choice for a concrete plant
> • Area is more suitable as a wildlife sanctuary/recreation area
> • Quarrying-related development is not suitable and quarrying is an interim use
> • Impacts on air quality in Copper Ridge need to be studied
> • Requirements for hydrology study"

[11] The City administrative report then went on to detail the nature of the discussion under each of the stated issues. The following comments are of particular relevance:

1) Under the "Resource extraction" issue, the report states:

> "Even with IQ zoning in place, on the subject property, Administration would not issue a development permit for resource extraction until *OCP* policies have been met. In order to ensure that no application for resource extraction can subsequently be made (prior to detailed hydrogeological studies being done), re-zoning to IQx, with a restriction that concrete plants are the only permitted principal use, could be considered."

2) Under the "IQ zoning" issue:

> "The purpose of the IQ zone is for "on-site removal, extraction and primary processing of soil and aggregate materials found on or under the site." The proponents have indicated that they do not intend to extract aggregate on site, but instead will only operate a concrete plant. The *OCP* clearly supports aggregate-related activities and support businesses in Natural Resource extraction areas, so concrete plants have been included as a principal use in this zone. It is appropriate to have these processing uses close to gravel sources to reduce haul costs and impacts."

[12] The administrative report also suggested that there were three options for the Planning Committee. The first was to proceed to second and third reading of the existing

proposed bylaw; the second was to deny the zoning amendment; and the third was to revise the proposed bylaw to restrict principal uses under an “IQx” designation. In conclusion, the City administration recommended that Council amend proposed Bylaw 2007-39 with the restriction that concrete plants are permitted as a principal use.

[13] On November 5, 2007, the City’s Planning Committee met. The minutes of that meeting indicate that the Mayor and all the City Councillors were present, along with four managers from City administration. The minutes also confirm that the Planning Committee (in effect City Council) considered all the matters raised in the administration report. Administration confirmed that there were no further legal impediments to the application, because it did not contemplate gravel extraction. The minutes also indicate that there was some discussion about the possibility of creating a park status around McLean Lake following public consultation and a Zoning Bylaw change, which could be undertaken at the time of an upcoming review of the *OCP*. The Committee recommended that Bylaw 2007-39 be duly considered with the restriction that only concrete plants are permitted as a principal use.

[14] On November 13, 2007, City Council amended proposed Bylaw 2007-39 to include reference to the stated restriction and then gave the amended bylaw second and third readings. The Mayor and all six Councillors voted unanimously to approve its passage.

POSITION OF THE RESIDENTS’ ASSN.

[15] In putting forward its two grounds of attack , the Residents’ Assn. has pled reliance upon paras. (a),(b) and (d) of s. 351(1) of the *Municipal Act*. Those paragraphs read as follows:

> "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,
>
> …
>
> (d) the council failed to comply with a requirement of this or any other Act or the municipality's procedures bylaw."

Thus, the Residents' Assn., in challenging the validity of Bylaw 2007-39, claims to rely upon grounds of excess of jurisdiction, bad faith and failing to comply with the *Municipal Act*. However, Mr. Miller-Wright has provided no evidence in his supporting affidavit of any bad faith on the part of City Council, nor did he make any specific submissions to that effect at the hearing, other than to suggest council had exceeded its jurisdiction or failed to fulfill its "mandate" under the *Act*. Therefore, I have assumed in these reasons that the Residents' Assn. has abandoned bad faith as an issue on this application.

[16] Further, to the extent that Mr. Miller-Wright made submissions on the issue of excess of jurisdiction, those related more to his second ground for attacking the validity of Bylaw 2007-39, as stated above, in relation of the question of "good government". Therefore, I will address "jurisdiction" (under s. 351(1)(a) of the *Act*) in that context later in these reasons.

[17] I should also clarify that, at the outset of hearing, Mr. Miller-Wright expressly abandoned the argument in the Residents' Assn's. outline that City Council acted contrary to the decision of Mr. Justice Veale, in which he quashed the previous Bylaw 2006-36.

ANALYSIS

1. Did Council violate s. 297 (1) of the Municipal Act by enacting bylaw 2007-39?

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.*

[18] Section 297(1) of the *Municipal Act* states: " Council shall not enact any provision or carry out any development contrary to or at variance with a zoning bylaw." The Residents' Assn. submits that the operation of a concrete plant on lands zoned IQx-Quarries is contrary to the City's Zoning Bylaw 2006-01, because the "Purpose" statement for the "IQ-Quarries" zone in s. 11.3 of the bylaw is "To provide a site for the on-site removal, extraction, and primary processing of soil and aggregate materials found on or under the site." Because the application by Territorial Contracting did not contemplate gravel extraction from the subject parcel, the Residents' Assn. says the land can not be zoned for "Quarries". Rather, it submits that the appropriate zoning for such use would have been "IH-Heavy Industrial", under s. 11.2 of the Zoning Bylaw, the stated purpose of which is "To provide for large-scale industrial uses and other uses [such as

bulk fuel depots and salvage yards] that may have large land requirements and potentially pose some nuisance effects on adjacent uses." Although concrete plants are identified as a permitted "Principal Use" under each of these zoning designations, the Residents' Assn. submits that when a concrete plant is proposed for a plot of land where the aggregate materials to be processed by that plant will be extracted from other lands *off* the site, then the appropriate designation should be IH-Heavy Industrial and not IQ-Quarries. As a result, it says that City Council acted contrary to or at variance with Zoning Bylaw 2006-01 in enacting Bylaw 2007-39, thereby contravening s. 297(1) of the *Municipal Act*. On that basis, it seeks to have Bylaw 2007-39 declared invalid pursuant to s. 351(1)(d) of the *Municipal Act*.

[19] To be clear, the Residents' Assn. did not suggest that the more appropriate zoning for the subject parcel would have been IH-Heavy Industrial. Rather, Mr. Miller-Wright seemed to argue that Council should have simply denied the application because IQ-Quarries zoning was inappropriate, implying that such an outcome might have forced Territorial Contracting to apply to move its concrete plant to another location entirely.

[20] The essence of the Residents' Assn's. argument on this point is that the "Purpose" statements heading each of the zoning designations in Zoning Bylaw 2006-01 are effectively binding upon Council. Indeed, as Mr. Miller-Wright wrote in his response to the City's outline, "There is no indication in the [Zoning Bylaw 2006-01] that Purpose is a discretionary matter or open to interpretation." For the following reasons, I disagree.

[21] First, one of the principal objectives of Zoning Bylaw 2006-01, as set out in s. 1.2(a), is to implement the *Official Community Plan*. The purpose of the *OCP*, in turn, is set out in s. 279 of the *Municipal Act* and includes addressing "…the future development

and use of land in the municipality…". The land use designations set out in the *OCP*, at pp. 16 and 17, "provide a guide to the type of activities that would be permitted" in a given location. It is noteworthy that the *OCP* does *not* say the land use designations are inviolable rules, but rather that they are to serve as a *guide* to the *types* of land use which will be permitted. I suggest that the same can be said about the purpose statements in the Zoning Bylaw.

[22] Second, nowhere in the Zoning Bylaw is there any express reference to the impact or import of the purpose statements heading each of the various zoning designations. Thus, there is nothing within the Zoning Bylaw itself to indicate that these purpose statements were intended to have a binding effect and would not be subject to discretion or interpretation.

[23] Third, the focus of the Zoning Bylaw, is upon the land *uses* permitted therein. As Ian Rogers, Q.C. says, in his text, *The Law of Canadian Municipal Corporations* (2nd) (Thomson Carswell: 2003), at p. 4.2.1: "Broadly stated, zoning power enables local governments to control *the use of land*…" (my emphasis). Therefore, it is not surprising that s.1.6.1 of Zoning Bylaw 2006-01 states:

> "Except as otherwise allowed by this bylaw, ***use and development*** in each zone shall be in accordance with the ***uses*** listed for the zone and all appropriate requirements of this bylaw." (my emphasis)

And further, s. 2.1 sets out the rules of interpretation for the Zoning Bylaw and s. 2.1.1 states:

> "***Typical uses listed*** as examples in the definitions ***are not intended to be exclusive or restrictive***. Reference should be made to the intent, impact and definition of the use in determining

> whether or not a use is included within a particular use." (my emphasis)

If the typical land *uses* set out in the various land designation zones are not intended to be exclusive or restrictive, then it is difficult to accept the argument of the Residents' Assn. that the City would have intended that the *purpose statements* for each of those zones were intended to be exclusive or restrictive.

[24] Fourth, the Zoning Bylaw, both expressly and implicitly, refers to the need for discretion in land use determinations and applications. For example, s. 2.1.2 states:

> "Where a specific use does not conform to the wording of any use definition or generally conforms to the wording of two or more definitions, ***a Development Officer may use discretion to deem that the use conforms to and is included in that use which is considered to be most appropriate in character and purpose****."* (my emphasis)

A "Development Officer" means a city official appointed by Council to "interpret, administer and enforce" the provisions of the Zoning Bylaw. Where such an officer is faced with a particular land use which might fall within the wording of two or more land use definitions, as set out in the various zone designations, the officer has "discretion to deem" that the subject land use conforms to and is included in a stated use which is considered to be most appropriate. If that is the case, then again it is difficult to accept the Residents' Assn's. argument that a development officer, or indeed Council, would *not* have discretion to decide that a purpose statement for a particular zone designation should or should not apply when a given land use might conform to the wording of two or more purpose statements. That, of course, was the case in the matter of Bylaw 2007-39, as the use applied for (concrete plant) is permitted in both "IQ-Quarries" and "IH-Heavy Industrial" zones.

[25] Also, the definition of “Principal Use” in s. 2 of the Zoning Bylaw is:

> “…the use of land, buildings or structures that is provided for in the schedule of zones of this bylaw for which a permit when applied for, shall be granted with or without conditions, where the use applied for conforms to the requirement of this bylaw. ***As the context requires*****,** it means the main purpose for which land, buildings or structures are ordinarily used.” (my emphasis)

In my view, the reference to “context” here implies a degree of interpretation and discretion in determining what the main use of a parcel of land might be.

[26] In addition, the process for amendments to the Zoning Bylaw contemplates the exercise of discretion by City administration and, arguably, also by City Council. Section 15 states that once the development officer is in receipt of a completed application for rezoning, he or she is required to initiate an analysis of the potential impacts of development under the proposed zone. Pursuant to s.15.3(2), the criteria which must be considered in that analysis include, in para. (h), the “necessity and ***appropriateness of the proposed*** text amendment or ***zone*** in view of the stated intentions of the applicant.” (my emphasis). Upon the completion of this analysis, the development officer provides a report to the Planning Committee which reviews the application and forwards it to Council with its recommendations and comments. The reference in the analysis phase of the process to determining the “appropriateness” of the zone in a given application suggests the development officer has discretion in that regard. Logically, that discretion should flow through to the Planning Committee and Council in their respective subsequent considerations of the application.

[27] Fifth, there are a number of particular zone designations where the permitted uses either contradict the purpose statement for a given zone, or are inconsistent with that purpose statement. A few examples are:

1. *Section 9.2 "RC1-Country Residential 1"*

The stated purpose here is "To provide a single detached housing zone for a rural lifestyle of a permanent nature on larger parcels, often without the provision of the full range of urban utility services." One of the permitted uses is "manufactured homes" and the definition of manufactured home includes mobile homes. However, "single detached housing" is also defined and expressly *excludes* mobile homes.

2. *Section 10.7 "CMW-Mixed Use Waterfront/Motorways"*

The stated purpose of this zone is to "provide a density zone for a compatible mix of *low intensity* commercial, cultural and *residential uses* that are appropriate for the proposed Waterfront/Motorways site." However, one of the permitted conditional uses is "multiple housing", which could be considered *high intensity residential* use, and therefore inconsistent with the stated purpose.

3. *Section 10.8 "CN-Neighbourhood Commercial"*

The stated purpose here is "To provide a zone for convenience, retail commercial and personal service uses intended to service the day-to-day needs of residents living in general proximity of the site." However, one of the permitted secondary uses is, again, "multiple housing", which is arguably inconsistent with the purpose statement insofar as *on-site residential* uses are not mentioned therein.

[28] Thus, in my view, the purpose statements heading each of the designated zones in the Zoning Bylaw are intended to serve as general guides to an applicant landowner, or the City itself, in deciding whether and how to initiate a zoning designation amendment. The purpose statements set the context for each of the respective

designated zones and do not rigidly bind or limit the uses expressly permitted in those zones. Accordingly, I conclude that City Council had the discretion to approve the application by Territorial Contracting for the "IQ-Quarry" zoning for the purpose of constructing and operating a concrete plant on the land, notwithstanding that the aggregate materials to be processed would not come from on or under site.

[29] I find support for my conclusion on this point in *Glover* v. *Kee*, [1914] B.C.J. No. 109, where Macdonald J., at paras. 5 and 6, quoted from *Regina* v. *On Hing* (1884), 1 B.C.R. (Pt. 2) 148, that "the Court ought, as far as possible, to support by-laws made by local authorities unless it can be clearly seen that the by-law was made without jurisdiction and was unreasonable." And later, at para. 8, Macdonald J. quoted from *Dillion on Municipal Corporations*, 5th Ed., Vol. 1:

> "Thus, where the law….confers upon the city council…power to determine upon the expediency or necessity of measures relating to the local government, their judgments upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the Courts. In such a case, ***the decision of the proper corporate body [i.e. the municipality] is, in the absence of fraud, final and conclusive, unless they transcend their powers***." (my emphasis)

[30] Ian Rogers, Q.C., cited above, referred to *Glover* and stated at p. 4-21 of his text:

> "***In the matter of delineating zones***, councils are left with a free hand. In the creation of a restricted area, the question of the expediency and the necessity is one for the council and not for the court. So, where there is nothing in the statute to indicate how limited or how extensive the area may be, ***the decision rests entirely within the council's discretion***." (my emphasis)

[31] Finally, as O'Brien J. commented in *Dominion Paving Ltd.* v. *Vaughan (Town)*, [1987] O.J. No. 47, at p. 9 (Q.L.), in considering the interpretation of a statute or bylaw, it

is clear that regard may be had to the conduct of those responsible for the statute or bylaw, i.e. City Council, to appreciate "their understanding of its meaning."

2. Did Council violate its "good government" obligations by enacting Bylaw 2007-39?

[32] The submission of the Residents' Assn. here is that, based on various provisions in the *Municipal Act*, 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 [that] government's mandate to reflect those concerns in its decisions". The provisions in the *Act* which the petitioner relies upon are as follows:

> "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;
>
> …"
>
> …
>
> 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;
>
> …
>
> 3. The purposes of a local government include
>
> (a) Providing within its jurisdiction good government for its community; and
>
> …
>
> 177. A council is responsible for…
>
> (b) ensuring that the powers, duties, and functions of the municipality are appropriately carried out; and
>
> (c) carrying out the powers, duties, and functions expressly given to the council under this or any other Act.
>
> …
>
> 277. The purposes of this Part and the bylaws under this Part are to provide a means whereby official community plans and related matters may be prepared and adopted to
>
> (a) achieve the safe, healthy, and orderly development and use of land and patterns of human activities in municipalities;
>
> (b) maintain and improve the quality, compatibility, and use of the physical and natural environment in which the patterns of human activities are situated in municipalities; and
>
> (c) consider the use and development of land and other resources in adjacent areas
>
> without infringing on the rights of individuals, except to the extent that is necessary for the overall greater public interest."

[33] In addition, the Residents' Assn. relies upon the provisions in the *Act* which provide for the public hearing process and notice to the public of zoning bylaw amendments.

[34] In his affidavit, Mr. Miller-Wright appended as exhibits the speaking notes he used for his appearances before Council on October 22 and November 13, 2007. In both of those presentations he warned Council against ignoring the interests of "hundreds" of City residents opposing the proposed bylaw amendment. In particular, at the October 22nd Council meeting, he stated that Council was ignoring "the explicit views of over 240 City residents that paid for a full page newspaper notice"; as well as "the 150 people that signed cards indicating their views"; and also "the 72 presentations, including over two dozens letters, people made to Council."

[35] However, the opponents referred to by Mr. Miller-Wright were apparently all in relation to the previous zoning application. The newspaper ad appeared in the *Whitehorse Star* on February 9, 2007 and begins "Dear Whitehorse Mayor and Council, we, the people, do not want a quarry and batch plant near MacLean Lake" and indicates the names of over 200 people as "Friends of McLean Lake". The ad pre-dated the final enactment of Zoning Bylaw 2006-36, which was on February 12, 2007, and refers to both the quarry and concrete plant. It was that Bylaw which was subsequently declared invalid by Mr. Justice Veale. Further, Mr. Miller-Wright conceded at the hearing of the current petition that the 150 people who signed cards addressed to the Mayor and Council, as well as the 72 presentations referred to, were also all in relation to the previous application by Territorial Contracting for both a concrete plant *and* a quarry on the subject lands.

[36] The only evidence of the extent of opposition to the subsequent application by Territorial Contracting regarding Bylaw 2007-39, apart from the submissions of Mr. Miller-Wright himself, is in the administrative report to the Planning Committee dated November

5, 2007 and the Planning Committee's minutes of its meeting held on the same date. Those documents state that, despite the fact that there were two notices of the bylaw application published in local newspapers on September 28 and October 5, 2007 and 18 letters sent to property owners within one kilometre of the subject area, there were only three written submissions received by Council, two of which were against the proposal. Besides that, only three people appeared before Council to speak against the amendment at its meeting on October 22, 2007, one of whom was Mr. Miller-Wright.

[37] Mr. Miller-Wright provided no evidence on this petition that, in his opposition to Bylaw 2007-39 before City Council, he was speaking on behalf of the identified individuals who opposed the previous application by Territorial Contracting. Indeed, at para. 4 of his affidavit, Mr. Miller-Wright simply suggests that he is acting on behalf of the Residents' Assn. on the current petition because it is a "directly related proceeding" to the matter before Justice Veale in *MacLean Lake Residents' Assoc.* v. *Whitehorse (City)*, cited above. He did not expressly state in that affidavit that he obtained authorization from the Association's Board of Directors to proceed with this petition. However, Counsel for the City of Whitehorse raised no objections to the petitioner's standing or Mr. Miller-Wright's authority to act in that regard.

[38] I have grave concerns about the representations Mr. Miller-Wright repeatedly made to this Court about the extent of the opposition to Bylaw 2007-39. Indeed, it is central to his argument on this point that City Council failed to heed and reflect the concerns of a "significant" number of City's constituents in that regard. However, objectively, it appears that there were no more than five submissions opposing the

application, which would seem to be a relatively modest number, given the City's rather extensive efforts at providing notice to the area's residents.

[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. *City of Whitehorse*, 2005 YKSC 37, 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, at p. 100 (see *Glover*, cited above, at para. 7):

> "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.***" (my emphasis)

[42] Ian Rogers, Q.C., in his text, cited above, 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 (1895)* 4 B.C.R. 63, 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***." (my emphasis).

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.

[44] While Mr. Miller-Wright also submitted that Council exceeded its jurisdiction, he seemed to have confined his remarks in that regard as being within the context of his "good government" argument. In other words, I understand his point here is that Council

exceeded its jurisdiction by failing to reflect the concerns of the opponents to Bylaw 2007-39. Having decided against the Residents' Assn. in that regard, there is no further need to address the issue of jurisdiction.

[45] Nor is it sufficient for Mr. Miller-Wright to simply say, as he repeatedly did, that Council's decision in this case was not the most "appropriate" one. Indeed, he went to so far as to say that "appropriate" in this context is synonymous with "legal". That is tantamount to an attack on the bylaw on the ground that it is "unreasonable" and such a ground of attack is expressly prohibited under s. 351(4) of the *Municipal Act.*

[46] Finally, as I previously indicated, the Residents' Assn. has provided no evidence of any bad faith on the part of Council.

[47] In conclusion, the passage of Bylaw 2007-39 did not violate City Council's "good government" obligations under the *Municipal Act.*

3. *Does s. 351(3) apply?*

[48] Finally, in the event that I am in error on either of the main issues raised by the Residents' Assn., to the extent that those issues involved arguments that Council failed to comply with a requirement of the *Municipal Act*, I am not satisfied that any possible failure by Council in that regard, in enacting Bylaw 2007-39, would likely have affected the outcome of the vote on the bylaw.

[49] Section 351(3) states:

> "(3) On hearing an application under subsection (1) [quoted above], 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***." (my emphasis)

[50] Here, I agree with counsel for the City that the record reflects a long history of support by Council for utilizing the subject lands as a natural resource and for quarry-related purposes. Under the previous City Council, a lengthy consultation and drafting process was undertaken in the preparation of the *OCP*. As stated in the *OCP*, numerous public open houses were held, as well as visioning workshops, information distribution and meetings with several neighbourhood organizations. In addition to the *OCP* process, the zoning of the subject land has been extensively considered by Council since 2006. As part of the previous rezoning application by Territorial Contracting, public hearings were held and Council heard from those in favour and those opposed to the rezoning. At both the previous application and the current one, Council was provided with administrative reports which detailed the support and opposition to the rezoning and also provided rationale in response to the concerns raised by opponents. The reports suggested options to Council on the course of action to be taken by it, which included the option of denying the zoning amendment. Finally, as Veale, J. observed in *MacLean Lake Residents' Assoc.* v. *Whitehorse (City)*, at para. 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." (my emphasis)

[51] For the foregoing reasons, I conclude that, even if City Council contravened the *Municipal Act*, either by designating subject lands as IQ-Quarries or by failing to meet its

“good government” obligations, this would not have likely affected the outcome of the vote on the bylaw. Accordingly, there is no basis for declaring Bylaw 2007-39 invalid under para. 351(1)(d) of the *Act*.

CONCLUSION

[52] Neither of the Residents’ Assn’s. grounds for challenging Bylaw 2007-39 can succeed. Further, even if City Council did act contrary to or at variance with Zoning Bylaw 2006-01, this would not have likely affected the outcome of the vote on the bylaw. Therefore, the petition is dismissed. Costs may be spoken to if necessary.

Gower J.