

**IN THE MATTER OF AN APPEAL TO THE MUNICIPAL GOVERNMENT BOARD
PURSUANT TO SECTION 690 OF THE MUNICIPAL GOVERNMENT ACT, R.S.A. 2000
CHAPTER M-26, as amended, REGARDING KNEEHILL COUNTY BYLAW 1657**

BETWEEN:

WHEATLAND COUNTY

Appellant

- and -

KNEEHILL COUNTY

Respondent

SUBMISSION BY AFFECTED LAND OWNERS
(listed on the following page)

MERIT HEARING
(NOV, 18 & 19, 2014)

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The submission focuses on the South Saskatchewan Regional Plan in response to the Board's request for submissions on the impact, if any, of that regional plan.

OVERVIEW

Badlands Recreational Development Corporation ("Badlands") proposes to develop a motorsports resort within the riparian environment of the Rosebud River Valley (**TAB 1**). Included in the development are numerous uses, some of which are described in the Badlands Area Structure Plan and some of which are described in the related direct control land use bylaw (Kneehill Bylaw 1657). The uses include racetracks (enlarged carriageways) on both the escarpments above the valley and river and within the valley adjacent to portions of the river (**TAB 1**).

Initially, for the purpose of full disclosure, the position of the adjacent and surrounding land owners is that they are unalterably opposed to the proposed development for two fundamental reasons:

1. The adverse impact on the Rosebud River itself, as well as the wetlands and riparian areas within the valley.
2. The adverse impact on adjacent and nearby farmland on which they live and work.

It is also their position that 4 of the 7 members of the municipal council of Kneehill, as well as the County's staff (which lacks a formally trained planner experienced with urban intensity development), completely and unequivocally abandoned any consideration of planning and environmental principles in their review and adoption of the relevant area structure plan and land use bylaw as confirmed by **TAB 2**, a Biodiversity Report by Cliff Wallis, Professional Biologist).

In my 37 years of studying, participation in drafting, presenting and arguing statutory plans and bylaws before the Municipal Government Board, I have never seen two more poorly drafted examples of an area structure plan and DC Bylaw. The area structure plan is a statutory plan in name only and the associated DC Bylaw is, in effect, a blank check for development.

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Section 690 of the Municipal Government Act, 2000 R.S.A. c. M-26, as amended

Having apprised the Municipal Government Board (the "Board") of the fundamental position of the adjacent land owners, this submission recognizes that the issue before the Board on any Section 690 Complaint is whether the plan or bylaw causes a "detriment" to the complaining municipality. Numerous decisions of the Board have defined and determined the parameters of "detriment".¹ In the context of the Agreed Statement of Facts between the Complainant, Wheatland County, and the Respondent, Kneehill County, there is no purpose to reviewing the numerous historical decisions relative to the transportation issue (access routes to the proposed development).

Transportation (road access) Issue

Our present understanding of the transportation issue, which is the original subject of the Section 690 Complaint made by Wheatland County, is that the transportation impact assessment submitted by the developer, Badlands Resort Development Corporation, to Kneehill County in support of the area structure plan and related DC Bylaw, indicates that: provided a route commencing at Highway 9 and moving south to the development area is paved, then the majority of the traffic heading to or from the site will use that route. Consequently then, there will be relatively little additional traffic heading to or from the proposed development via roads in Wheatland County so that upgrades and additional maintenance of Wheatland's roads will not be necessary.

It is also our understanding that Wheatland County accepts that proposition (our clients are more sceptical of that proposition) and has requested that Kneehill amended Kneehill Bylaw 1657 to make paving the Highway 9 route south to the

¹ Eg. *Sunbreaker Cove v. Lacombe County*, MGB 007/11; *Sturgeon County v. Edmonton, St. Albert and Morinville*, MGB Order 77/98;

development a condition of any development approval. The lack of any standards for development, including roadway access, is one of the many defects of Bylaw 1657 (the "DC Bylaw"). In any event, Kneehill apparently refuses to make that amendment.

It is our submission on behalf of adjacent and nearby land owners² that Wheatland's request is entirely reasonable. It will not, in our view, remedy the many defects in the approved land use bylaw but it is one of the needed improvements to the DC Bylaw.

The Effect of the South Saskatchewan Regional Plan

But, it is submitted that the recent approval by the Minister of Municipal Affairs of the *South Saskatchewan Regional Plan* ("SSRP") has expanded the definition of "detriment" to include, as a minimum, a significant restriction on the ability of the complaining municipality to meet its obligations pursuant to the SSRP. If the Board concludes that any statutory plan or land use bylaw conflicts with the SSRP, then it must require that such plan or bylaw be amended to remove the non-conformity or be rescinded:³

- (5) *If the Municipal Government Board receives a notice of appeal and statutory declaration under subsection (1)(a), it must, subject to any applicable ALSA regional plan, decide whether the provision of the statutory plan or amendment or land use bylaw or amendment is detrimental to the municipality that made the appeal and may*
 - (a) *dismiss the appeal if it decides that the provision is not*

² Including Richard and Wendy Clark and Rick and Linda Skibsted, whose lands abut the DC Bylaw boundaries. (TAB 3)

³ Section 690(5) Municipal Government Act 2000 R.S.A. c. M-26, as amended

- detrimental, or*
- (b) *order the adjacent municipality to amend or repeal the provision if it is of the opinion that the provision is detrimental.*

The SSRP is Not Binding (except for the "Regulatory Details")

An analysis of whether the SSRP is binding commences with section 15 of the *Land Stewardship Act*:

Binding nature of regional plans

- 15 (1) *Except to the extent that a regional plan provides otherwise, a regional plan binds*
- (a) the Crown*
 - (b) local government bodies,*
 - © decision-makers, and*
 - (d) subject to section 15.1, all other persons.*
- (2) *Subsection (1) is given effect, if at all, only*
- (a) by the provisions of the regional plan itself,*
 - (b) in accordance with another enactment, or*
 - (c) as a result of an order of the Court of Queen's Bench under section18 and the corresponding provisions in the Municipal Government Act:*

Similar provisions are found in the Municipal Government Act:

ALSA regional plans

488.01 *In carrying out its functions and in exercising its jurisdiction under this Act and other enactments, the Board must act in accordance with any applicable ALSA regional plan.*

Compliance with ALSA regional plans

630.2 *A subdivision authority, a development authority, an entity to which authority is delegated under section 625, a municipal planning commission and a subdivision and development appeal board must each carry out its functions and exercise its jurisdiction in accordance with any applicable ALSA regional plan.*

The potentially binding nature of the SSRP being noted, the provisions of the SSRP itself make it clear (page 8) that the Introduction, Implementation Plan and Strategic Plan are not binding. Only the regulatory details are binding.

Interpretation of the SSRP by the Board

How is the Board to interpret the SSRP? Initially, the SSRP is a regulation pursuant to section 13 of the *Land Stewardship Act* and consequently it is to be interpreted as a legislative instrument:

Legal nature of regional plans

13 (1) *A regional plan is an expression of the public policy of the Government and therefore the Lieutenant Governor in Council has exclusive and final jurisdiction over its contents.*

- (2) Regional plans are legislative instruments and, for the purposes of any other enactment, are considered to be regulations. (emphasis added)
- (2.1) Notwithstanding subsection (2), a regional plan may provide rules of application and interpretation, including specifying which parts of the regional plan are enforceable as law and which parts of the regional plan are statements of public policy or a direction of the Government that is not intended to have binding legal effect.
- (3) The meaning of a regional plan is to be ascertained from its text, in light of the objectives of the regional plan, and in the context in which the provision to be interpreted or applied appears.
- (4) A regional plan and every amendment to a regional plan must
- (a) be published in Part I of The Alberta Gazette, and
 - (b) be made publicly available by the secretariat in accordance with section 59(c) .
- (5) A regional plan and every amendment to a regional plan comes into effect when it is published in Part I of The Alberta Gazette or on any later date specified in the regional plan or amendment.

2009 cA-26.8 s13;2011 c9 s10

Broad and Purposive Interpretation

Members of this Board will be aware of the Supreme Court of Canada decision in *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)* 2004 SCC 19⁴ which stands for the proposition that the *Municipal Government Act* and most other

⁴ TAB 4

legislative instruments, are to be given a "broad and purposive" interpretation. That standard then applies to regulations pursuant to the SSRP (and most other regulations) and, presumably, the statutory plans and land use bylaws created pursuant to the *Municipal Government Act* and regional plans pursuant to the *Land Stewardship Act*.

The Precautionary Principle

Environmental legislation is to be interpreted with an additional twist, largely because of the environmental treaties to which Canada is a participant. Environmental legislation must be interpreted in accordance with the "precautionary principle," which is a treaty created standard and which is also part of Canadian law pursuant to the Supreme Court of Canada's decision in *114957 Canada Ltee. (Spraytech Society d'arrosage and Service de espaces vert Ltee. Chemilaw v. Town of Hudson at. al. 2001 SCC 40.*⁵ At paragraph 31 of the decision the Court applied the precautionary principle to the interpretation of a municipal bylaw restricting the use of pesticides and referred to the *Bergen Ministerial Declaration of Sustainable Development (1990)* as the source of the principle::

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent, and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

As a result of the Supreme Court's decision, the precautionary principle is not only

⁵ TAB 5

a statement of policy, it is also a standard of interpretation for environmental legislative instruments. The SSRP is clearly in large part an environmentally driven legislative instrument. Accordingly, the precautionary principle, which is sometimes stated as 'better safe than sorry,' should be applied by the Board in interpreting whether the DC bylaw complies with environmental provisions of the SSRP. Clearly, the Board is not bound by the SSRP but that does not mean that it can or should ignore it; rather the Board "must act in accordance"⁶ with the SSRP.

Hence, the Board's decisions must be in accordance with the SSRP in order to achieve the purpose of the SSRP. As well, the Board's decision must accord with the *Municipal Government Act* as that is the enabling legislation for the Board as well as providing the jurisdiction for a Section 690 hearing..

The purpose of the *Land Stewardship Act* is:

- 1(2) *The purposes of this Act are*
- (a) *to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;*
 - (b) *to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;*
 - (c) *to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;*
 - (d) *to create legislation and policy that enable sustainable*

⁶ Section 488.01 of the *Land Stewardship Act*.

development by taking account of and responding to the cumulative effect of human endeavour and other events.

The numerous purposes of the SSRP are listed at pages 1 and 2 of the document and include:

- *Uses a cumulative effects management approach to balance economic development opportunities and social and environmental considerations;*
- *Sets desired economic, environmental and social outcomes and objectives for the region.*

The purpose of Part 17 of the *Municipal Government Act* is to:

Purpose of this Part

617 *The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted*

- (a) *to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and*
- (b) *to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta, (emphasis added)*

without infringing on the rights of individuals⁷ for any public interest except to the extent that is necessary for the overall greater public interest.

⁷ The balance between public and private rights was analysed by the Court of Appeal in *Churgin v. Penzer* 1988 ABCA 283 (CanLII), 90 AR 378; 53 DLR (4th) 452; [1989] 1 WWR 82; 62 Alta LR (2d) 97
TAB 6.

Consequently, in interpreting the SSRP, it is to be interpreted broadly so as to achieve its purposes and in respect of environmental issues the precautionary principle is also to be used in determining the environmental consequences of the DC Bylaw. It is also important to note that the purposes of the SSRP and the *Municipal Government Act* are complimentary so there is no inconsistency in apply both criterion..The Board must also balance private ownership rights and public interest in respect of whether a use of private land has sufficient adverse impacts on the environment to require its regulation or even prohibition of such a use.

Does the SSRP apply to the DC Bylaw?

At first glance, the SSRP does not appear to apply to Kneehill County; only Wheatland County. Further, the whole of the proposed development is in Kneehill County - but on the boundary and that boundary lies within the Rosebud River Valley. The boundary between Kneehill County and Wheatland County is, in the relevant location, the railway track (plan) which lies at the bottom of the Rosebud River valley and the Rosebud River meanders back and forth under a series of train trestles which carry the track. Consequently, the Rosebud River lies, in significant part, in Wheatland County and, also, within the SSRP.

The significance of the location of the boundary is that the river valley contains the river as well as associated wetlands and riparian areas. It is an ecological system the whole of which is affected by any activities within the boundaries of that system or nearby land uses which adversely impact the ecological system. You cannot pollute ½ of a river or ½ of an ecosystem. Nor are environmental impacts contained within jurisdictional boundaries (which is one of the reasons for section 690 of the *Municipal Government Act*).

Environmental impacts affect, at the very least, the whole of any ecological system and, thereby, the whole of the Province of Alberta and, consequently, the whole of the world. But, the SSRP is specifically concerned with environmental impacts within its boundaries

so that it is only if the DC Bylaw adversely impacts the Rosebud River, the wetlands and riparian areas within the SSRP that they become “detriments” to Wheatland’s abilities to meet its obligations pursuant to the SSRP.

The very nature of a Section 690 complaint is that activities in one jurisdiction ‘escape’ or ‘spill-over’ into an adjacent municipality and create a detriment in the complaining municipality. It is an inter-jurisdictional complaint about inter-jurisdictional consequences. Hence, notwithstanding that the DC Bylaw allows uses wholly within Kneehill, the test for the Board in this case is whether the uses provided for in the DC Bylaw will create a detriment in Wheatland, and consequently within the SSRP.

It is submitted that in order to give a purposeful interpretation of the SSRP, as well as to be consistent with the purposes of Part 17 of the *Municipal Government Act*, the Board must conclude that the direct consequences of the DC Bylaw affect portions of the Rosebud River as well as the associated wetlands and riparian areas within the SSRP. If those impacts create a detriment, then the Board’s jurisdiction pursuant to section 690(5) requires that the Board direct the DC Bylaw to be amended or repealed. Given that an automotive racetrack in a small river valley is an inherently incompatible use,⁸ it is urged that the Board direct that the DC Bylaw be repealed.

It is important to note that the DC Bylaw, as well as the associated ASP, were passed without the requirement of an environmental impact assessment notwithstanding that the Rosebud River Valley was identified by Kneehill County, pursuant to the *Land Use Policies*, as an “environmentally significant area.”

⁸ See the attached Biodiversity Report of Cliff Wallis, **TAB 2.**

Relevant Provisions of the SSRP

Page	Policy	Statement
23	Landscapes and Biodiversity	"All ecosystem services contribute to sustaining a healthy and prosperous way of life for all Albertans."
25-28	Water and Watersheds	"The South Saskatchewan River Basin consists of four sub-basins including the Bow, Oldman, South Saskatchewan and Red Deer; along with their tributaries . . ." ⁹
25		"Water quality is influenced in each basin and sub-basin by the unique features and land and water uses."
27		"Degradation of riparian lands and loss of wetlands across the prairies have been widespread, contributing to altered flow regimes and degraded water quality."
39	Outcomes and Strategic Directions for the South Saskatchewan Region	
40		"Biodiversity and ecosystem functions are sustained through shared stewardship - The benefits received from biodiversity and healthy functioning ecosystems are critical to the ongoing prosperity of all Albertans. The impacts of multiple land use demands and pressure must be managed through an integrated approach."
40		"Watersheds are managed to support healthy ecosystems and human needs through shared stewardship - Water plays an essential role across the region and with increasing pressures and demands placed on this resource, it is essential that an integrated view across water supply, water quality and aquatic ecosystems be advanced."

⁹ The Rosebud River is a tributary of the Red Deer River which is located, in part, in the SSRP..

57	"Industrial development, recreation and other uses also increase the risk of invasive species."
76	"It is important to use collaborative approaches and to maintain and build partnerships in the region. Shared stewardship is essential>")
79	"Riparian lands are important as they are highly productive, rich and resilient parts of the landscape."
84	Encourage municipalities to use <u>Stepping Back from the Water</u> when establishing appropriate setbacks from water bodies to maintain water quality, flood water conveyance and storage, bank stability and habitat."

It is to be noted that the DC Bylaw and the associated area structure plan have not been the subjects of an environmental impact assessment and that Kneehill County specifically refused to participate in an intermunicipal plan.

It is submitted that Kneehill County acted upon poor advice from unqualified staff who indicated that any environmental issues could be dealt with at the development permit stage and therefore neither the area structure plan nor the resulting direct control land use district required environmental evaluation. Such advice makes area structure plans and land use bylaws documents without real purpose or relevant content - as can be confirmed by reading either or both of the DC Bylaw and the area structure plan.

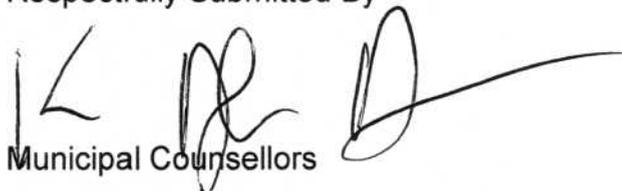
Finally, the Biodiversity Report of Cliff Wallis, Professional Biologist, is attached to this submission which confirms that the environmental consequences of the DC Bylaw will be nothing short of disastrous to the Rosebud River Valley. Those consequences are clearly the antithesis of the SSRP, as well as good planning principles.

Conclusion

One of the primary goals of the SSRP is to protect the environment within its boundaries and particularly watersheds (section 4 of the Implementation Plan). Placing a large development of any kind within an essentially undeveloped riparian environment without, as a bare minimum, any investigation of the environmental consequences is clearly contrary to the SSRP, Part 17 of the Municipal Government Act and any relevant good planning principles. But, in particular, the DC Bylaw (and, for that matter, the associated area structure plan) are clearly contrary to the SSRP's provisions protecting the Rosebud River as well as its wetlands and riparian environment.

When the DC Bylaw is considered in light of the precautionary principle, it is submitted that the Board is obligated to require the repeal of that bylaw. Due to the SSRP, the Board's role now includes ensuring that decisions are in accordance with the SSRP and safeguarding adjacent municipalities from SSRP "detriments"

Respectfully Submitted By



Municipal Counsellors

K Hugh Ham, Barrister and Solicitor

on behalf of the land owners and ratepayers

listed on page 2 of this submission