

NOTICE OF DECISION

DL 027/18

File No. 17/IMD-003

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CITATION: *City of Calgary v Rocky View County (Re: Rocky View County Bylaw C-7700-2017)* 2018 ABMGB 27

**Re: Intermunicipal Dispute under Section 690 of the *Municipal Government Act* (Act)
Appealed by: City of Calgary
Bylaw under Appeal: Rocky View County Bylaw C-7700-2017, OMNI Area Structure
Plan**

This letter is the decision of the Municipal Government Board (MGB) from a preliminary hearing held in the City of Calgary on Wednesday, April 11, 2018.

Before: H. Kim, Presiding Officer
D. Petriuk, Member
E. Williams, Member

C. Miller Reade, Case Manager
A Drost, Board Officer

Background

[1] As described in DL 009-18, the City of Calgary (Calgary) filed a notice of appeal under section 690 of the *Act* stating that Rocky View County's (Rocky View) Bylaw C-7700-2017, the

OMNI Area Structure Plan (OMNI ASP) has or may have a detrimental effect upon it. The OMNI ASP proposes destination retail and highway business development, and Calgary objected to its impact on the transportation network, stormwater management, and emergency services.

[2] After the December 6, 2017 hearing, Calgary and Rocky View planned to enter into mediation in February 2018, and if mediation was unsuccessful, proposed a merit hearing to start on June 18, 2018. While that hearing date was set aside for the Glenbow Ranch Area Structure Plan appeal, the parties were about to enter into mediation for that dispute and were confident that an agreement would be reached.

[3] A major landowner and the proponent for the OMNI ASP, Genesis Land Development Corporation (Genesis) applied for affected person status in order to participate in the mediation. The MGB granted Genesis affected person status, but did not order their inclusion in the mediation. The MGB accepted the proposal offered by Rocky View and Calgary to hold a meeting with Genesis once a tentative mediation agreement was reached. By providing Genesis details about the tentative agreement, Genesis had additional time to determine the implication of the agreement on the OMNI ASP.

Failure of the Mediation and Request for a Merit Hearing Date

[4] Calgary and Rocky View entered into mediation in February. On March 12, 2018, Calgary reported that it had withdrawn from mediation, requesting evidence exchange and merit hearing dates. Calgary and Rocky View both agreed that a merit hearing would be required but could not agree on suitable dates. Accordingly the MGB scheduled another hearing to determine appropriate dates.

Preliminary Matter: Calgary's Request for a Merit Hearing Date

[5] Calgary requested that the merit hearing start on October 1, 2018, instead of June 18, 2018 which was the date suggested at the initial hearing in December. Calgary requires additional time to prepare the reports and studies required to prove detriment by the OMNI ASP. Due to the resignation of the senior engineer leading the review of OMNI's transportation studies, additional time is needed for the review and preparation of these studies by either another Calgary engineer or by a consultant.

[6] To prepare submissions for a June 18, 2018 hearing, Calgary would need to complete its reports by May 4, 2018, three weeks from the date of this hearing. Calgary cannot prepare this material in time. Instead, an October merit hearing would allow adequate time for Calgary's staff to complete its material and for all parties to review without affecting other plans. Calgary added that staff availability for both municipalities is limited in July, August and September. October was the best option for all.

[7] In response to a question, Calgary explained that, although formal mediation has ceased, discussions with Rocky View continue. Calgary is hopeful that an agreement can be reached and presented to each council, resolving this dispute without the requirement for a merit hearing.

[8] Calgary's written submission also noted that with the changes to the *Act*, there is now a growth management board – the Calgary Metropolitan Growth Management Board – charged with the development of a growth management plan, which will be approved by the Minister. Any MGB decision must comply with the growth management plan.

[9] Calgary argued that the MGB's decision on the OMNI ASP should be delayed until the growth management plan is prepared, since the ASP or any amendments might be inconsistent with the growth management plan. Since the ASP is under appeal, it is of no effect under section 690(4) until the MGB makes a decision. While Genesis and Rocky View argued that the MGB's decision should not be delayed until the growth management plan is approved by the Minister, this ASP was not in effect on January 1, 2018 and the MGB should delay its decision until after the Growth Management Plan is in place.

Merit Hearing Date: Rocky View's Response

[10] Rocky View argued that an October hearing date was too late and creates unreasonable delay. Everyone agreed to the June 18 hearing date and Rocky View preferred to go to hearing then. Rocky View asserted that, after filing this appeal, Calgary ought to have been preparing its technical analysis and other documents to counter the completed studies and reports to assist in mediation discussions. The resignation of the lead engineer should not be a factor in the delay of the hearing, since other resources – engineering staff or a consulting engineer – should have been shifted to this appeal. After mediation failed in February, Calgary should have shifted its resources to prepare its detriment argument for a June merit hearing. Since Rocky View is uncertain what argument Calgary would provide to support its claim for detriment, it requires six weeks to review the submissions on this matter.

[11] The review of materials would involve Rocky View administration and engineers from Watt Consulting Group. Watt Consulting Group's lead consulting engineer is required as Watt conducted much of the engineering work for OMNI ASP and the 84 Street Study. An October hearing would not be acceptable to Rocky View as key engineering staff are unavailable in September. Rocky View proposes a merit hearing starting on July 23, 2018, which is an ambitious but workable appeal date given the work that still needs to be done. Rocky View can also accommodate Genesis's proposed July 30, 2018 hearing date.

[12] Although formal mediation was not successful, Rocky View has continued to discuss this dispute with Calgary. Recent discussions have tried to understand Calgary's particular concerns about transportation, intensity of development and how to proceed with the dispute after mediation ceased. These discussions have focused concerns but have not yet generated an agreement.

[13] Finally, this hearing should not be delayed until after the Growth Management Plan is prepared by the Calgary Metropolitan Region Growth Management Board. Part 17 of the *Act* and Section 690 are drafted to ensure that decision on planning and development matters are made in a timely manner. The Growth Management Plan still must be prepared and accepted by the Minister, and that process may take several years.

Merit Hearing Date: Genesis Land Development Corporation's Response

[14] Calgary's proposal for an October merit hearing is unacceptable, since it appears that Calgary filed their dispute without first proceeding with mediation in accordance with section 690 and without having the appeal staffed, or funded, or having full direction from Council.

[15] Citing section 690(1)(c), Genesis argued that if Calgary believed the OMNI ASP detrimental, and intended to file an appeal, Calgary was required to do two things at second reading of Bylaw C-7700-2017. Firstly, Calgary needed to provide written notice of its concerns to Rocky View. Calgary did provide written notice. Second, as soon as was practicable after second reading, Calgary was required to attempt mediation. Calgary did not do this. Both statutory declarations noted that mediation had not been attempted when Calgary filed its appeal.

[16] While there have been several intermunicipal disputes which have not had an attempt at mediation prior to hearing, in this case, there was not even an offer for mediation in this dispute. Calgary's offer to mediate only occurred prior to the preliminary hearing in December. There was adequate time prior to mediation to undertake technical analysis and prepare expert reports, which Calgary appears not to have done.

[17] When mediation failed in February, Calgary should have started its analysis and produced its studies and reports in preparation for a merit hearing. Calgary chose not to, and as a result, is not ready for the June 18, 2018 hearing date. A delay until October 2018 is inexcusable. A decision on proceeding with the appeal appears to be scheduled for consideration by Calgary Council on May 28, 2018. Calgary should not have filed the appeal in October 2017, if it was not intending to fund and staff the appeal.

[18] If it requires additional consulting expertise, Calgary can hire a consultant to examine the existing studies and prepare the reports to prove detriment. Calgary's procurement policies allow it to retain a consultant without going to tender, up to a maximum limit of \$75,000. Various trade agreements (AIT and NWPTA) do not apply when the consulting services are subject to solicitor and client privilege.

[19] Calgary had also chosen its October hearing date because several members of the team were unavailable in July and August. Citing *Royal Oak College v Burnaby (District) 1993 CANLII 860*, Genesis noted that if a member of Calgary's team or one of its consultants were required for the analysis and preparation or reports, or the hearing, vacations could be rescheduled, or other people could be assigned to the appeal.

[20] In summary, an October hearing date is unacceptable to Genesis. Genesis has been working on this project for 5 years, investing over a million dollars in studies and the area structure plan. Any delay has a greater impact on Genesis and other landowners than it does on municipalities. Genesis proposed two options for hearing dates, the first being July 23, 2018 which was Rocky View’s schedule, and a second date of July 30, 2018 allowing an additional week for all parties.

[21] The Calgary Growth Management Plan is irrelevant to this appeal, as this plan was adopted prior to January 1, 2018. At law, the OMNI ASP is exempt from the Growth Management Plan. This appeal should proceed as soon as possible.

ISSUE:

Should a merit hearing date be set for October, or an earlier date?

DECISION:

[22] Upon reviewing the submissions and considering the arguments put forward at the hearing, the MGB announced its decision orally at the April 11, 2018 hearing so the parties could plan accordingly. That decision is now confirmed in writing as follows:

The merit hearing for this matter will begin the week of July 30, 2018. These dates are peremptory.

<i>Action</i>	<i><u>Date</u></i> <i>(all submissions due at 12:00 noon)</i>
City of Calgary Submissions (with Will-Say Statements)	Friday May 25, 2018
Rocky View Response (with Will-Say Statements)	Friday July 6, 2018
Genesis and Landowner Submissions (with Will-Say Statements)	Thursday July 12, 2018
City of Calgary Rebuttal	Wednesday July 18, 2018
Rocky View Sur-rebuttal	Tuesday July 24, 2018
Merit Hearing	week of July 30, 2018

The precise location, date and time of the hearing will be set by the MGB and communicated in writing.

[23] Submissions may be made electronically to all parties, but hard copies are also required. The MGB’s submissions are to be emailed to mgbmail@gov.ab.ca. Eight hard copies (including one unbound) are to be delivered to the Municipal Government Board’s Edmonton office within

three (3) business days following the due date noted above. One hard copy is to be delivered to other parties within three (3) business days.

REASONS:

[24] The MGB finds that the October merit hearing date proposed by Calgary would result in unreasonable delay prejudicial for both Rocky View and Genesis. A hearing at the end of July will give an appropriate opportunity for parties to prepare.

Parties expected a June hearing

[25] As noted in each of the hearing submissions, the initial hearing in December set mediation dates in February. Both municipalities anticipated that the June 18, 2018 date set for the Glenbow Ranch ASP merit hearing would be reserved for the OMNI ASP if the Glenbow Ranch matter was resolved through mediation and the OMNI matter was not. As events unfolded, the Glenbow mediation was successful and Calgary terminated the OMNI mediation. At that point, both municipalities would have known to begin preparing for the OMNI hearing, which they had agreed could take place in June.

Delay prejudices Rocky View and Genesis

[26] Genesis, the landowner, is the most affected by this dispute. If delays continue, Genesis will lose more than a construction season. Genesis has agreements with anchor tenants that could be jeopardized, and may face complications with respect to contracts for site preparation and utility servicing. Rocky View also has an interest in timely planning and delay may have an adverse impact on other planning initiatives and related discussions.

A July hearing will provide a reasonable opportunity for all parties to prepare without causing additional delay

[27] The MGB understands that Calgary's lead engineer on the OMNI ASP has resigned; however, it is not persuaded that it is necessary to wait until October to overcome this occurrence. For example, Calgary may choose to hire a consultant, or assign other staff to review those studies and analysis that have already been prepared for the OMNI ASP.

[28] It has been clear since February that this work would be necessary, and Rocky View and Genesis can expect Calgary to plan for a hearing within a reasonable time. While a July hearing may cause some inconvenience to staff, the MGB is satisfied that a hearing in July will give all parties including Calgary sufficient time to make arrangements to proceed with the dispute.

The impact of the *Calgary Metropolitan Region Board Regulation AR 190/2017* on this dispute.

[29] After the proclamation of the Regulation, Calgary urged the MGB to delay this hearing until the Growth Management Plan was complete. The MGB finds little merit in this request. While

the Regulation has been adopted, the Board has met only once. A Growth Management Plan must still be prepared and must then be accepted by the Minister; this process may take several years. The situation is similar to that considered by the MGB in *City of Edmonton v Strathcona County re: Strathcona County Municipal Development Plan Bylaw 1-2007* (MGB 098/08), which occurred after the *Capital Region Board Regulation, AR 49/2008* was proclaimed and before the adoption of the Capital Region Growth Plan. In that case, the MGB determined to proceed with the dispute then before it, and this panel sees no reason to take a different course in this case. Accordingly, this dispute will proceed in July.

[30] The panel is not seized with this matter.

Dated at the City of Edmonton, in the Province of Alberta, this 15th day of May, 2018

MUNICIPAL GOVERNMENT BOARD

(SGD) H. Kim, Presiding Officer

cc: K. Cote, City of Calgary
S. Baers, Rocky View County
A. Zaluski, Rocky View County
P. Ngo, Alberta Transportation
T. Richelhof, Alberta Transportation
M. Scheidl, Alberta Municipal Affairs
A. Stefaniuk, Genesis Land Development Corporation

List of Exhibits

- 1A Appeal Submission, City of Calgary
- 2R Rocky View County Statutory Declaration
- 3AP Correspondence from Genesis Land Development Corporation requesting Affected Person Status
- 4AP Submission for Affected Person Status from Genesis Land Development Corporation
- 5 Suggested Schedule for Mediation

Exhibits for this Preliminary Hearing

- 6A Email from City of Calgary proposing Evidence Exchange and Merit Hearing dates
- 7R Email from Rocky View County regarding Evidence Exchange and Merit Hearing dates
- 8A City of Calgary submission for April 11, 2018 hearing to set Merit Hearing dates
- 9R Rocky View County submission for April 11, 2018 hearing to set Merit Hearing dates
- 10L Genesis Land Development Corporation submission for merit hearing dates. 2018 hearing
- 11A City of Calgary rebuttal to Rocky View County and Genesis Land Development Corporation submissions.