9.2 Parks & Utility (PU) District

9.2.1 Purpose

This **district** provides opportunities for active and passive recreational **uses** indoors or outdoors.

9.2.2 Permitted & Discretionary Uses

Permitted	Discretionary
Accessory Building or Structure	Cemetery
Accessory Use	Communication Facility
Campground	Community Support Centre, Warming Shelter
Community Garden	Office
Public Library or Cultural Exhibit	Parking Lot or Structure
Recreation Services	Solar Collector (Freestanding)
Public Park	Utility Services, Major
Utility Services, Minor	Wind Energy System

9.2.3 Development Regulations

In addition to the provisions contained in this Bylaw, the following regulations shall apply in this **district**:

a. **building** design shall be required according to the provisions in *Subsection 13.9* of this Bylaw,

b. **landscaping** shall be provided according to the provisions of *Part 5* of this Bylaw,

c. in accordance with *Subsection 2.10* of this Bylaw, where any property falls within the area of a Land Use Overlay described in *Section 11* of this Bylaw, the provisions or allowed **uses** of the applicable Overlay shall take precedence over the provisions of this **district** should there be any discrepancies,

d. parking shall be provided according to the provisions of *Part 6* of this Bylaw,

e. **signs** shall be provided according to the provisions of *Part 7* of this Bylaw,

f. **accessory buildings or structures** shall be developed according to the provisions of *Subsection 13.1* of this Bylaw,

g. minimum **setbacks**, maximum **height** and **lot coverage** shall be as follows:

Use	Front Setback (m)	Side Setback (m)	Rear Setback (m)	Lot Coverage (%)	Height (m)
All principal uses	7.6	3.0	7.6	60	16.0

9.3 Transitional (T) District

9.3.1 Purpose

This **district** provides a limited range of agricultural and rural land **use** activities in a relatively undeveloped state to facilitate the orderly, efficient, and logical extension of urban servicing and **development** in the future.

9.3.2 Permitted & Discretionary Uses

Permitted	Discretionary
Accessory Building or Structure	Agricultural Support Services
Accessory Use	Auctioneering Establishment
Automotive and Equipment Repair Shops	Campground
Dwelling, Additional Unit	Communication Facility
Dwelling, Secondary Suite	Community Support Centre, Warming Shelter
Dwelling, Single-detached	Home Based Business, Major
Farming	Outdoor Storage
Fleet Services	Recreation Services
Greenhouse and Plant Nurseries	Resource Extraction
Home Based Business, Minor	Solar Collector (Freestanding)
Kennel	Utility Services, Major
Public Park	Wind Energy System
Utility Services, Minor	

9.3.3 Development Regulations

In addition to the provisions contained in this Bylaw, the following regulations shall apply in this **district**:

a. **building** design shall be required according to the provisions in *Subsection 13.9* of this Bylaw,

b. in accordance with *Subsection 2.10* of this Bylaw, where any property falls within the area of a Land Use Overlay described in *Section 11* of this Bylaw, the provisions or allowed **uses** of the applicable Overlay shall take precedence over the provisions of this **district** should there be any discrepancies,

c. parking shall be provided according to the provisions of *Part 6* of this Bylaw,

d. **signs** shall be provided according to the provisions of *Part 7* of this Bylaw,

e. the minimum **site** area and **yards** shall be provided in consideration of the **abutting development** and **district** regulations, to the satisfaction of the **Development Authority**,

f. the maximum **height** shall be 12.0 m, (39.0 ft),

g. the following criteria shall be considered when evaluating **development** applications for new **single-detached, additional unit**, and **secondary suite dwellings**:

i. the **use** is supported by the **City's** individual or joint Statutory Plans,

ii. the application is intended to replace a demolished **single-detached dwelling** that was previously legally approved,

iii. the location is within a predominately agricultural or rural area,

iv. the location is adjacent to compatible **uses**, and

v. the potential for land **use** conflict is low.

h. **landscaping** requirements for **development** shall be at the discretion of the **Development Authority**, but shall consider the provisions included in *Part 5* of this Bylaw,

i. **development** of the **site** shall accommodate planned utility corridors, oil and gas pipelines, stormwater management facilities, and **roads**,

j. **warming shelters** shall comply with all appropriate provisions included in *Subsection 13.16* and shall only be considered:

i. during the months of November, December, January, February and March, and

ii. where the **development** is **temporary** and the **applicant** has obtained landowner authorization in accordance with *Subsection 13.34*.

k. the **Development Authority** shall not approve any **use** that would be prejudicial to the future economical servicing and **development** of such lands for future urban **use** on a planned basis.

9.3.4 Subdivision Regulations

a. A single parcel subdivision may be allowed when subdivided from a parent parcel with an area of 64.7 hectares more or less.

b. A single parcel subdivision shall have a maximum area of two (2) ha.

c. A multi-**lot** residential subdivision (greater than one **lot**) shall be prohibited unless otherwise indicated within an Area Structure Plan (ASP). If subdivision is accommodated by an ASP, a quarter section of 64.7 ha in the Transitional (T) **District** shall contain a maximum parcel **density** of four (4), comprising:

i. two (2) parcels of 32.4 ha or alternative areas necessary due to land fragmentation, and,

ii. two (2) parcels for residential **uses**, one (1) from each of the two (2) 32.4 ha parcels, to a maximum area of two (2) ha each.

9.4 Municipal Airport (MA) District

9.4.1 Purpose

This **district** accommodates the physical infrastructure used in support of aircraft operations. The primary intent is to accommodate for **development** that is deemed to be compatible with the existing **airport** and associated activities.

9.4.2 Permitted & Discretionary Uses

Permitted	Discretionary
Accessory Building or Structure	Accessory Use
Aircraft Sales, Rentals and Storage	Automotive Service Station
Airport	Bulk Fuel Storage and Distribution
Airport Facilities	Distribution Centre
Commercial School	Office
Protective and Emergency Services	Parking Structure or Lot
	Solar Collector (Freestanding)
	Utility Services, Minor

9.4.3 Development Regulations

In addition to the provisions contained in this Bylaw and the Airport Protection Overlay, the following regulations shall apply in this **district**:

a. minimum **site** area and **yard setbacks** are at the discretion of the **Development Authority**,

b. in accordance with *Subsection 2.10* of this Bylaw, where any property falls within the area of a Land Use Overlay described in *Section 11* of this Bylaw, the provisions or allowed **uses** of the applicable Overlay shall take precedence over the provisions of this **district** should there be any discrepancies,

c. parking shall be provided according to the provisions of *Part 6* of this Bylaw,

d. **signs** shall be provided according to the provisions of *Part 7* of this Bylaw,

e. **uses** and **developments** on **airport** property must comply with the *Lloydminster Airport Master Plan*, as amended, and the requirements of all other authorities, either Federal or Provincial, having jurisdiction,

f. all **yards abutting** 72 Street shall be landscaped and maintained to the satisfaction of the **Development Authority** in consultation with the Airport Manager. **Landscaping** is to provide a high quality, visual appearance and enhance the aesthetics of the **airport**. Fruit bearing trees shall be prohibited. **Sight triangles** shall not be compromised. The provision of parking, loading, storage, or trash collection is not permissible within the 2.0 m (6.5 ft) **yard abutting** 72 Street. The provisions regarding **landscaping** in *Part 5* of this Bylaw shall be considered,

g. the maximum **height** shall be in accordance with the **Height Limitation Contour Map** (**Figure 1, Map 1**),

h. **development** shall comply with all applicable Federal and Provincial legislation and regulations, including Transport Canada and NAV CANADA regulations and requirements,

i. except for the parking of an aircraft or any **outdoor storage** related to the operation of the municipal **airport** (including both accessory items and equipment related to aviation), **outdoor storage** of goods, materials, or equipment is not **permitted** within the Municipal Airport (MA) **District**,

j. the design, character, and appearance of **buildings** shall be to the satisfaction of the **Development Authority** and shall be encouraged to present an attractive and high-quality design, which creates visual interest when viewed from the entrance of the **airport** lands, or the **airport** terminal. The provisions regarding **building** design and character in *Subsection 13.9* of this Bylaw shall be considered,

k. no **developments** shall conflict with the safe operations of the **airport** at the discretion of the **Development Authority**,

l. any **development**, which would cause excessive or unsafe discharge of toxic or noxious particulate matter into the atmosphere, radiation or interference by the use of electric or electronic equipment, fire or explosive hazards, excessively bright or unsafe lighting or use of electronic display surfaces and accumulation of any material or waste edible by, or attractive to birds and other wildlife, shall not be approved

m. the **Development Authority** will not accept or process any **Development Permit** application occurring within this **district** unless the application is authorized by the **Airport** Manager or their designate,

n. a minimum of 50% of the **gross floor area** of a hangar facility shall be dedicated to aviation related uses,

o. **commercial schools** shall only be considered where the education material is, in the opinion of the **Development Authority**, related to aviation. This may include flight schools, aviation mechanical schools and other relevant topics.

10. Direct Control Districts

Purpose:

For the purpose of this Bylaw the following Section details the **districts** designated as Direct Control. **Development** within these **districts** have varying purposes, but due to their specific needs or impact, all **development** decisions except decisions regarding **signs** and **landscaping** (such decisions may be approved by the **Development Authority**) are made publicly through meetings of **City Council**. More information regarding the creation, application, and implementation of Direct Control **Districts** is located in *Subsection 2.11* of this Bylaw.

Section Contents:

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10.2	Direct Control Couplet (DC2) District	74

10.1 Direct Control Casino (DC1) District

10.1.1 Purpose

The purpose of this **district** accommodates the **development** of a regional destination and mixed **use site** that will consist of an **entertainment centre, casino, hotel,** and **retail development**. This **site** will be characterized by its urban design, **landscaping** features, and its pedestrian-friendly circulation within the **site**.

10.1.2 Permitted Uses

Permitted	Discretionary
Accessory Building or Structure	Casino
Accessory Use	Entertainment Centre
Automotive Service Station	Solar Collector (Freestanding)
Drinking or Eating Establishment	Wind Energy System
Drive Through Services	
Fitness Studio	
Health Services	
Hotel	
Office	
Personal Service Shop	
Public Library or Cultural Exhibit	
Recreation Services	
Retail Store	

10.1.3 Development Regulations

All **development** shall conform to the following regulations:

a. all **development** decisions, except those regarding **signs** and **landscaping**, shall be approved by **Council** in accordance with *Subsection 2.11* of this Bylaw.

   i. **development** decisions regarding **signs** and **landscaping** may be approved by the **Development Authority**.

b. in accordance with *Subsection 2.10* of this Bylaw, where any property falls within the area of a Land Use Overlay described in *Section 11* of this Bylaw, the provisions or allowed **uses** of the applicable Overlay shall take precedence over the provisions of this **district** should there be any discrepancies,

c. **building** design shall be required according to the provisions in *Subsection 13.9* of this Bylaw and shall:

   i. be constructed using similar architectural themes,

   ii. include design elements that create a pedestrian oriented built form, such as but not limited to window openings/alignment, multiple entrances, arcades, columns, quality materials, double **height** entrances, plazas, color and other architectural features, **setbacks** and **stepbacks** in the **building** mass, **building** articulation and the architectural treatment of the façades,

iii. be oriented to face the **road** with entrances that are clearly visible,

d. **landscaping** shall be provided according to the provisions of *Part 5* of this Bylaw,

e. **signs** shall be provided according to the provisions of *Part 7* of this Bylaw.

f. **accessory buildings or structures** shall be developed according to the provisions of *Subsection 13.1* of this Bylaw,

g. minimum **setbacks**, maximum **height** and **lot coverage** shall be as follows:

Use	Front Setback (m)	Side Setback (m)	Rear Setback (m)	Lot Coverage (%)	Height (m)
All principal uses	9.1	7.6	7.6	50	20.0

10.1.4 **Parking Provisions**

a. Parking space and **loading** area dimensions and locations shall be provided according to the provisions in *Part 6* of this bylaw.

b. Notwithstanding any other requirement of this Bylaw, the minimum parking requirements are as follows:

Use	Parking Requirement
Casino	1 space per 2.4 m^2 (8.0 ft^2) of public casino area
Entertainment Centre	Greater of: 1 space per 6.25 m^2 (20.5 ft^2) or 1 space per 5 seats
Hotel	1 stall per guest room
Drinking or Eating Establishment	Greater of: 1 spaces per 5.0 m^2 (16.4 ft^2) of seating area or 1 stall per 4 seats
All other Commercial Uses	3.4 spaces per 100 m^2 of gross floor area plus one space per gas pump
Additional Requirements	
Hotel, Entertainment Centre and Casino	1 spaces per 3 employees
Bus Parking	5 spaces
Barrier Free Parking	3 parking spaces plus 1 additional space for every additional increment of 100 or part thereof over first 100 stalls

10.2 Direct Control Couplet (DC2) District

10.2.1 Purpose

This **district** allows for the redevelopment of a **site** for multi-purpose commercial **uses**.

10.2.2 Permitted Uses

Permitted	Discretionary
Accessory Building or Structure	Solar Collector (Freestanding)
Accessory Use	Wind Energy System
Child Care Facility	
Drinking or Eating Establishment	
Drive Through Services	
Fitness Studio	
Health Services	
Office	
Personal Service Shop	
Recreation Services	
Retail Store	

10.2.3 Development Regulations

All **development** shall conform to the following regulations:

a. all **development** decisions, except those regarding **signs** and **landscaping**, shall be approved by **Council** in accordance with *Subsection 2.11* of this Bylaw.

   i. **development** decisions regarding **signs** and **landscaping** may be approved by the **Development Authority**.

b. in accordance with *Subsection 2.10* of this Bylaw, where any property falls within the area of a Land Use Overlay described in *Section 11* of this Bylaw, the provisions or allowed **uses** of the applicable Overlay shall take precedence over the provisions of this **district** should there be any discrepancies,

c. **building** design shall be required according to the provisions in *Subsection 13.9* of this Bylaw.

d. **development** in this **district** shall be evaluated with respect to compliance with the Corridor Commercial (CC) **District** and all provisions of this Bylaw where not specially overridden by this **district** with the exception of the following:

   i. **height** limitations, **setback** requirements, **landscaping** requirements, parking & **loading space** provisions, **sign** provisions, **lot coverage**, and, minimum **lot size**,

   ii. **sign** applications shall be submitted in accordance with *Part 7* of this Bylaw and provided to the satisfaction of the **Development Authority.**

11. Overlays

Purpose:

For the purposes of this Bylaw the following Section details the specific provisions provided by the **City's** Overlays. Overlays are intended to provide special provisions on specific areas within the **City** that require additional attention in **development**. Provisions included in this Section are in addition to and, in the case of any discrepancy, take precedence over, the provisions and regulations of the underlying Land **Use District**. Information regarding the creation and enactment of Overlays can be found in *Subsection 2.10* of this Bylaw.

Section Contents:

11.1 Airport Protection Overlay 76

11.2 Downtown Area Redevelopment Plan (DARP) Overlay 78

11.1 Airport Protection Overlay

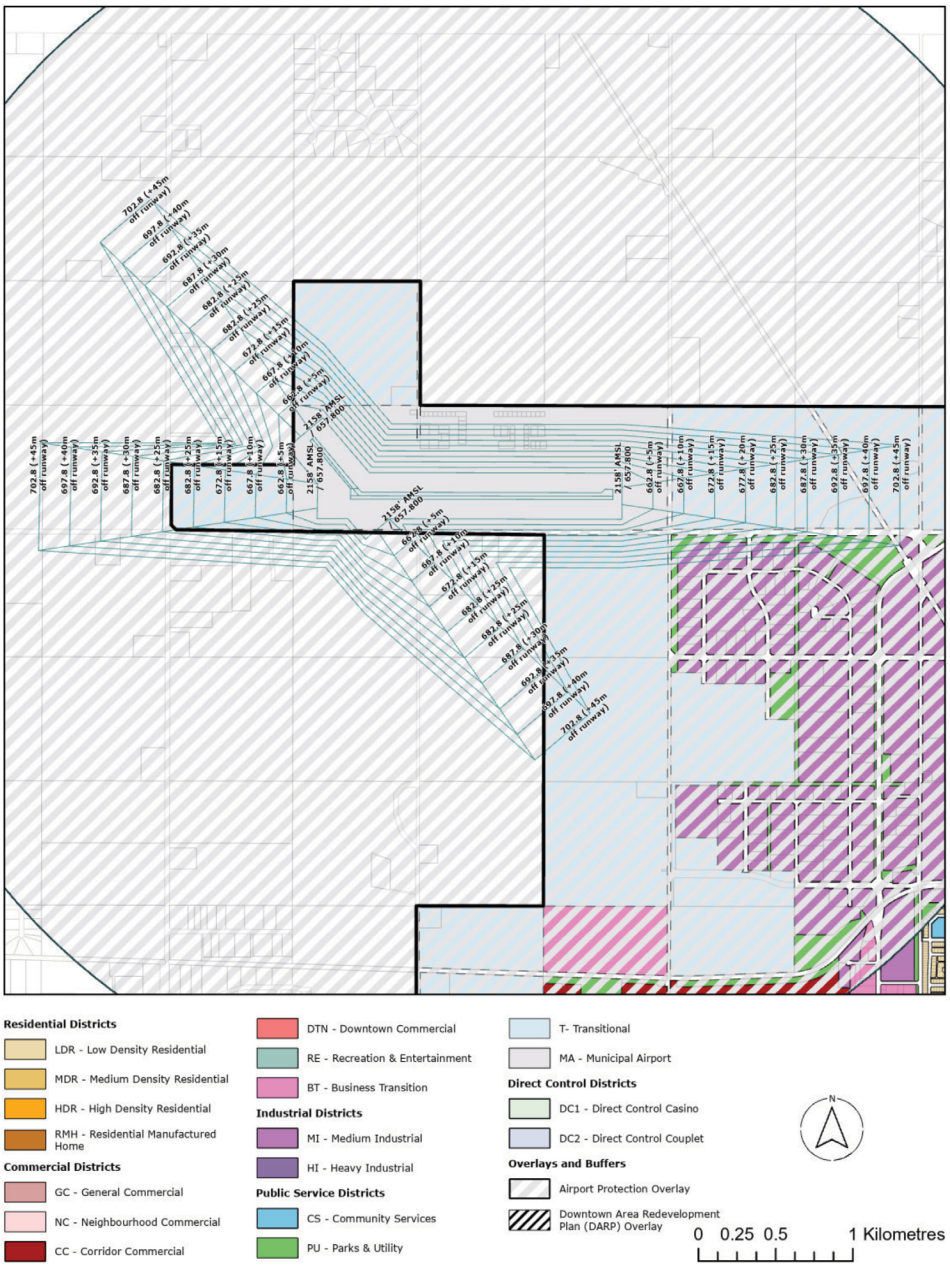
11.1.1 **Purpose**

This Overlay provides for the safe and efficient operation of the Lloydminster Municipal **Airport** through the regulation of **uses** and **building heights** in addition to the requirements of the underlying **districts** in the vicinity.

11.1.2 **Application**

This Overlay applies to all lands included in the Airport Protection Overlay area as shown on the **Land Use District and Overlay Map** (**Figure 3, Map 3**) and detailed in the **Airport Height Limitation Contour Map** (**Figure 1, Map 1**).

Figure 1: Airport Height Limitation Contour Map



11.1.3 **Development Regulations**

a. The maximum **height** of a **development** situated within an Airport Protection Overlay area, including all appurtenances and **temporary** construction equipment, shall not penetrate the surfaces identified in the **Height Limitation Contour Map** (**Figure 1, Map 1**) unless authorized and approved by the **Airport** Manager or delegate or federal or provincial agencies, which may include Transport Canada or NAV CANADA.

   i. Where the baseline measurement of the protection surfaces and the elevation of the final **grade** of a proposed **development site** differ, the maximum **height** allowable shall be the distance from the elevation of the final **grade** of the **site** to the elevation of the **Height Limitation Contour Map** (**Figure 1, Map 1**).

b. All applications made within the Airport Protection Overlay will be referred to the **Airport** Manager or designate, who may refer said application to additional federal or provincial agencies, this may include Transport Canada or NAV CANADA.

c. Applications to develop any **building**, **sign**, overhead line, mast, tower, or similar **development** will be analyzed on an individual basis and may be refused, notwithstanding that a **use** is listed as **permitted**, if it is deemed that such **use** will interfere with the operation of electronic equipment or the flight path.

d. Applications which include vehicular parking facilities, heavy electrical equipment, electric welding, or high-tension power lines will be reviewed on an individual basis and may be refused, notwithstanding that a **use** is listed as **permitted**, if it is deemed that such **use** will result in electronic interference.

11.1.4 **Submission Requirements**

a. In addition to the general submission requirements of this Bylaw, where required by the **Development Authority**, an application for a **Development Permit** for new construction in the Airport Protection Overlay must provide the following information:

   i. the **grade** elevation of the highest point of the proposed **building site**, to be referenced to geodetic elevations. Geodetic elevation is the elevation of a point and its vertical distance, determined by employing the principles of geodesy above or below an assumed level surface or datum,

   ii. the proposed **building height**, in metric measurement, including clearance lights, mechanical penthouses, antennas, **building** cranes during construction, receiving or transmitting **structures**, masts, flagpoles, clearance markers or any other erection beyond the **height** of the **principal building**, and

   iii. a narrative explaining any effects that the proposed **development** may have on the matters described in *11.1.3 (c-d)*.

11.2 Downtown Area Redevelopment Plan (DARP) Overlay

11.2.1 Purpose

This Overlay identifies the areas addressed within the **Downtown Area Redevelopment Plan (DARP) Overlay Map** (**Figure 2, Map 2**) and implement the DARP's policies to encourage revitalization alongside economic and residential growth.

11.2.2 Application

This Overlay applies to all lands included in the DARP Overlay area as shown in the **Land Use District and Overlay Map** (**Figure 3, Map 3**) and detailed in the **DARP Overlay Map** (**Figure 2, Map 2**).

Figure 2: Downtown Area Redevelopment Plan (DARP) Overlay Map

11.2.3 General DARP Overlay Development Regulations

a. The DARP Overlay regulations shall be applied as a condition of a **Development Permit**.

b. The **Development Authority** shall act as the approving authority in accordance with the **Land Use Bylaw**. Where standards or other requirements listed as part of this overlay may conflict with the underlying **district**, the Overlay regulations shall apply.

c. The provisions of the Overlay shall take effect upon all new **development** or re-**development** within the DARP Overlay area.

d. All applications received will be considered in accordance with the DARP and the amendments thereof.

e. Applications received for parcels within the DARP Overlay may be subject to the referral process identified in *Subsection 3.8*.

f. Parking and Loading requirements for all areas within this Overlay are subject to *Part 6* of this Bylaw unless otherwise indicated.

g. **Landscaping** requirements for all areas within this Overlay are subject to *Part 5* of this Bylaw unless otherwise indicated.

h. Fencing and **screening** requirements for all areas within this Overlay are subject to *Subsection 13.24* of this Bylaw unless otherwise indicated.

i. **Sign** requirements for all areas within this Overlay are subject to *Part 7* of this Bylaw unless otherwise indicated.

j. **Building** design requirements for all areas within this Overlay are subject to *Subsection 13.9* of this Bylaw unless otherwise indicated.

11.2.4 Core Mixed Use Area

a. **Permitted** and **discretionary uses**, and **Development** Regulations within this area of the DARP Overlay shall be in accordance with the Downtown Commercial (DTN) **District** *(Subsection 7.4)* and in accordance with the regulations contained in Subsection 4.3.1 of the DARP.

11.2.5 Mixed Use Transition

a. The following shall apply to all areas within the Mixed Use Transition area as detailed in the **DARP Overlay Map** (**Figure 2, Map 2**).

i. Permitted, Discretionary, and Prohibited Uses:

1. In addition the provisions of a **site's district** designation regarding **permitted** and **discretionary uses**, the following **uses** shall be considered as either **permitted**, **discretionary**, or prohibited within the Mixed Use Transition Area as identified in the **DARP Overlay Map** (**Figure 2, Map 2**).

Permitted	Discretionary	Prohibited
As per the underlying district	Child Care Facility	Automotive Service Station
	Drive Through Services	
	Dwelling, Single-detached	
	Dwelling, Two-unit	

ii. Development Regulations:

1. Regulations for **development** within this area of the DARP Overlay shall be in accordance with those of a **site's** underlying **district** unless otherwise indicated here. Regulations contained in Section 4.3.2 of the DARP shall be considered in areas where the regulations of the DARP differ from that of the applicable **district**.
2. **Single-detached** and **two-unit dwellings** shall be developed in accordance with the regulations of LDR **District** (*Subsection 6.1.3*) and shall only be considered when replacing an existing legally **permitted development** destroyed through fire, flood, or other act of nature. Such replacements shall be developed in accordance with *Subsections 1.9.18* and *1.9.19*.
3. **Districts** designated as HDR within this area of the DARP Overlay shall have a maximum **density** of two-hundred (200) **dwelling units**/hectare. All other **districts** within this area of the DARP Overlay shall have a maximum **density** of one-hundred (100) **dwelling units**/hectare.

11.2.6 Neighbourhood Residential

a. The following shall apply to all areas within the Neighbourhood Residential area as detailed in the **DARP Overlay Map** (**Figure 2, Map 2**).

i. Permitted, Discretionary, and Prohibited Uses:

1. In addition the provisions of a **site's district** designation regarding **permitted** and **discretionary uses**, the following uses shall be considered as either **permitted**, **discretionary**, or prohibited within the Neighbourhood Residential Area as identified in the **DARP Overlay Map** (**Figure 2, Map 2**).

Permitted	Discretionary	Prohibited
Dwelling, Apartment, up to four (4) units	Dwelling Apartment, more than four (4) units	
Dwelling, Mult-unit, up to four (4) units	Dwelling, Multi-unit, more than four (4) units	
Mixed Use Building, up to four (4) units	Mixed Use Building, more than four (4) units	

ii. Development Regulations:

1. Regulations for **development** within this area of the DARP Overlay shall be in accordance with those of a **site's** underlying **district** unless otherwise indicated here. Regulations contained in Section 4.3.5 of the DARP shall be considered in areas where the regulations of the DARP differ from that of the applicable district.
2. The maximum **density** for **lots** within this area of the DARP Overlay shall be sixty (60) **dwelling units**/hectare.
3. **Single-detached**, **two-unit**, and **multi-unit dwellings** shall be developed in accordance with the regulations of the LDR **District** (*Subsection 6.1.3*).

4. **Apartment dwellings** and **mixed use buildings** shall be developed in accordance with the regulations of the MDR **District** (*Subsection 6.2.3*).

5. In LDR **Districts** located within this area of the DARP Overlay, commercial **uses** shall only be considered where they are located within a **mixed use building**, or are a **home based business**.

11.2.7 **Creative Industrial:**

a. The following apply to all areas within the Creative Industrial area as detailed in the **DARP Overlay Map** (**Figure 2, Map 2**).

i. Permitted, Discretionary, and Prohibited Uses:

1. In addition the provisions of a **site's district** designation regarding **permitted** and **discretionary uses**, the following **uses** shall be considered as either **permitted**, **discretionary**, or prohibited within the Creative Industrial Area as identified in the **DARP Overlay Map** (**Figure 2, Map 2**).

Permitted	Discretionary	Prohibited
Drinking or Eating Establishment	Automotive and Equipment Repair Shop	Adult Services
Entertainment Centre	Contractor Services, without Outdoor Storage	Agricultural Oriented Sales and Services
Health Services	Community Support Centre, Major	Auctioneering Establishment
Live/Work Unit	Distribution Centre	Automotive Service Station
Pet Care Facility	Education Services	Bulk Fuel Storage and Distribution
Personal Service Shop		Cannabis Production and Distribution Facility
		Campground
		Contractor Services, with Outdoor Storage component
		Commercial School
		Fleet Services
		Industrial Uses, General
		Recycling Depot, Major or Minor
		Utility Services, Minor
		Veterinary Services, Major

ii. Development Regulations:

1. Regulations for **development** within this area of the DARP Overlay shall be in accordance with those of a **site's** underlying **district** unless otherwise indicated here. Regulations contained in Section

4.3.4 of the DARP shall be considered in areas where the regulations of the DARP differ from that of the applicable **district**.

11.2.8 Highway Commercial

a. Regulations for **development** within this area of the DARP Overlay shall be in accordance with those of a **site's** underlying **district** unless otherwise indicated here. Regulations contained in Section 4.3.4 of the DARP shall be considered in areas where the regulations of the DARP differ from that of the applicable **district**.

i. Permitted, Discretionary, and Prohibited Uses:

1. In addition the provisions of a **site's district** designation regarding **permitted** and **discretionary uses**, the following uses shall be considered as either **permitted**, **discretionary**, or prohibited within the Highway Commercial Area as identified in the **DARP Overlay Map** (**Figure 2, Map 2**).

Permitted	Discretionary	Prohibited
As per the underlying district	As per the underlying district	Automotive and Equipment Sales or Rentals
		Agricultural Oriented Sales
		Commercial School
		Distribution Centre
		Outdoor Storage
		Utility Services, Minor

ii. Development Regulations:

1. Regulations for **development** within this area of the DARP Overlay shall be in accordance with those of a **site's** underlying **district** unless otherwise indicated here. Regulations contained in Section 4.3.6 of the DARP shall be considered in areas where the regulations of the DARP differ from that of the applicable **district**.

11.2.9 Civic

a. The following apply to all areas within the Civic area as detailed in the **DARP Overlay Map** (**Figure 2, Map 2**).

i. Permitted, Discretionary, and Prohibited Uses:

1. In addition the provisions of a **site's district** designation regarding **permitted** and **discretionary uses**, the following **uses** shall be considered as either **permitted**, **discretionary**, or prohibited within the Civic Area as identified in the **DARP Overlay Map** (**Figure 2, Map 2**).

Permitted	Discretionary	Prohibited
As per the underlying district	As per the underlying district	Cemetery
		Communication Facility
		Crematorium
		Dwelling, Supportive Housing
		Exhibition and Convention Facilities
		Utility Services, Major
		Utility Services, Minor

ii. Development Regulations:

1. Regulations for **development** within this area of the DARP Overlay shall be in accordance with those of a **site's** underlying **district** unless otherwise indicated here. Regulations contained in Section 4.3.3 of the DARP shall be considered in areas where the regulations of the DARP differ from that of the applicable **district**.

12. Land Use District and Overlay Map

Purpose

The **Land Use District and Overlay Map** (**Figure 3, Map 3**) allocates **districts** to all land within the **City** and specifies the **district** or Overlay provisions applying to particular lands.

12.1 Application

12.1.1 Where a **district** boundary is shown on **Figure 3** and **Map 3**: **Land Use District and Overlay Map, districts** are approximately following:

a. a **road**, **lane**, railway, pipeline, power line, utility right-of-way, or easement at the centre line, unless otherwise clearly indicated on the **Land Use District and Overlay Map** (**Figure 3, Map 3**);

b. the **City** boundary;

c. a property line, if applicable.

12.1.2 A **district** boundary should generally follow the features listed above.

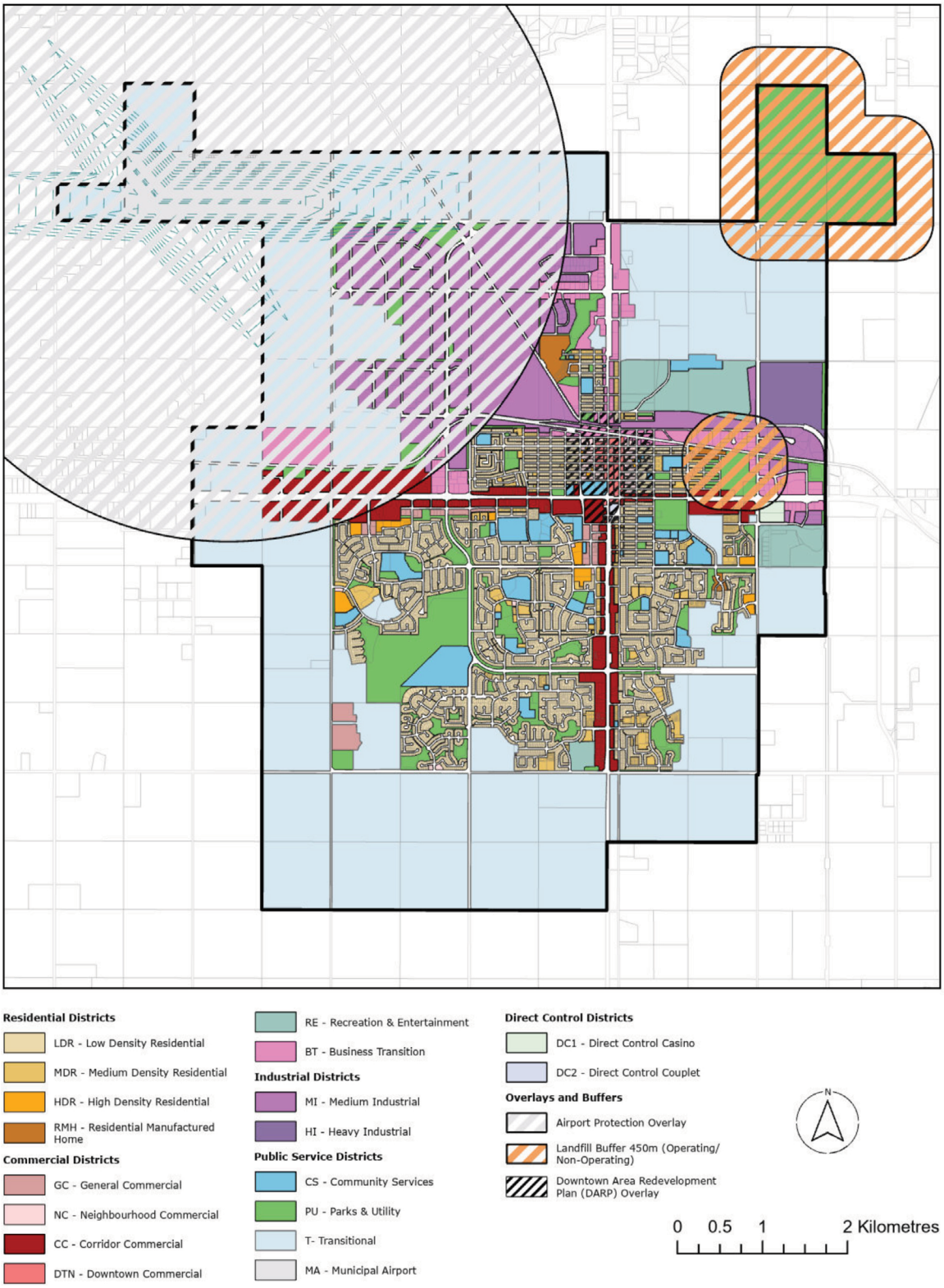
12.1.3 In circumstances not covered above, the **district** boundary shall be determined by the **Development Authority**.

12.1.4 When any **road** or **lane** is closed, it has the same **districting** as the **abutting** land.

12.1.5 When different **districts** govern **abutting** lands, the centre of the **road** or **lane** is the **district** boundary unless the **district** boundary is shown clearly following the edge of the **road** or **lane.** If the **road** or **lane** is consolidated with an adjoining parcel, that parcel's **district** designation applies to affected portions of the closed **road** or **lane**.

12.1.6 Where the application of the above rules does not determine the exact location of the boundary of a **district**, **Council**, either on its own motion or upon written application being made to it by any person requesting the determination of the exact location of the boundary, shall fix the portion of the **district** boundary in doubt or in dispute in a manner consistent with the provisions of this Bylaw and with the degree of detail as to measurements and directions as the circumstances may require.

Figure 3: Land Use District and Overlay Map



An enlarged version of this map, as well as a detailed look at each area of the **City**, is included in *Part 9* of this Bylaw as **Map 3**.

Part 4: General Land Use Provisions

Purpose:

For the purpose of this Bylaw the following Section provides **use** specific provisions to facilitate the safe, orderly, and vibrant **development** within the **City**.

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13. General Land Use Provisions

The **General Land Use Provisions** shall apply to all **developments** on all **sites**, and shall take precedence, except where the provisions of a **district** or Overlay specifically exclude or modify these provisions with respect to any **use**.

13.1 Accessory Buildings or Structures

13.1.1 All **accessory buildings or structures** shall:

a. be constructed with similar exterior finish materials that complement those of the **principal building**,

b. have a minimum **rear** and **side yard setback** of 0.9 m (3.0 ft) provided that overhanging eaves are at least 0.6 m (2.0 ft) from any **lot line**,

c. be located in a **site's rear** or **side yard**, except where the **site** does not contain a **principal building**,

d. not be attached to the **site's principal building** by a roof, or other means as determined by the **Development Authority**,

e. not be located on an easement or utility right-of-way in accordance with **Figure 4**,

f. not be used as a **dwelling**, or

g. not exceed the **height** of the **principal building**, or 12.0 m (39.0 ft), whichever is lower.

13.1.2 **Sites** that do not contain **principal buildings**, such as **sites** containing **community gardens** or **private outdoor skating rinks**, may develop an **accessory building or structure** in the **front yard** of the **site** provided it meets the minimum front **setback** requirement of the underlying **district** and is in direct correlation to the **use** of the **site**.

13.1.3 While **accessory buildings or structures** developed in accordance with the provisions included in **Table 1** (**Development Not Requiring a Development Permit**) are not required to obtain a **Development Permit**, there shall be a maximum allowance of two (2) **Development Permit** exempt **accessory buildings or structures** on a single **site**. Each additional **accessory building or structure** beyond the two (2) building maximum shall be required to obtain a **Development Permit** regardless of the size of the **development**.

13.1.4 **Shipping containers/sea cans** are only **permitted** to be stacked in Industrial **Districts** and no more than three (3) containers high.

13.1.5 **Shipping containers/sea cans** in all Commercial **Districts** shall be limited to maximum of three (3) per **site** and be located in the **rear** or **side yard** and be **screened** from view to the satisfaction of the **Development Authority**.

13.1.6 **Shipping containers/sea cans** on **sites abutting** a Residential **District** shall be finished in materials that are characteristic of the **principal building on-site**.

13.1.7 A **shipping container/sea can** may be **permitted** in a Residential **District** provided that it:

a. is finished in materials that are characteristic of a Residential **District** and complement the **principal building**,

b. is not more than 6.0 m (20.0 ft) in length.

13.1.8 A **shipping container/sea can** that is not finished with materials that are characteristic of a Residential **District**, may be considered provided that:

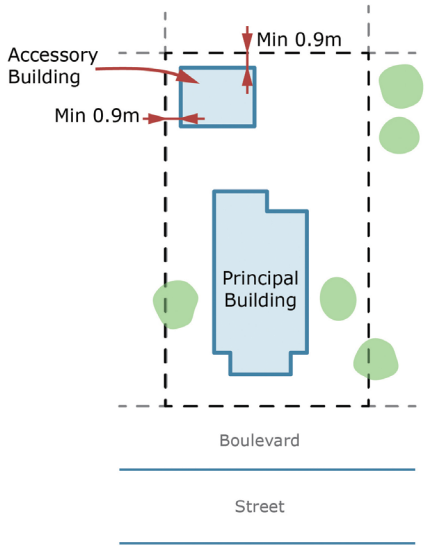
a. the **shipping container/sea can** shall be removed from the **site** within ninety (90) days,

b. the intention of the **shipping container/sea can** is for **temporary** storage of household items from moving, a construction project or other purpose accepted by the **Development Authority**, and

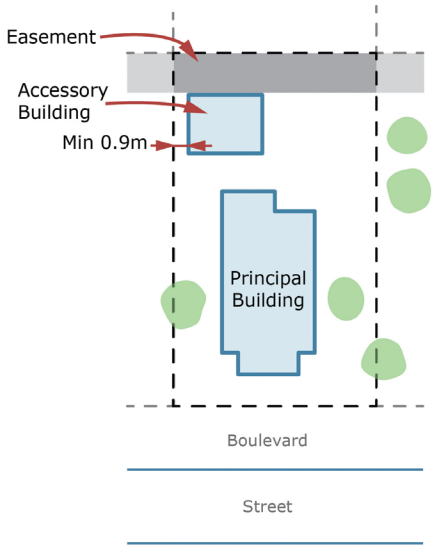
c. the **shipping container/sea can** is located wholly on private land in the **rear yard** or within a driveway, provided it is not taking up required parking spaces, does not interfere with the **sight triangle** on a **site**, or encroach onto public sidewalks or landscaped areas.

Figure 4: Accessory Buildings

Accessory Building, No Easement



Accessory Building with Easement



13.2 Accessory Uses

13.2.1 Any **use** listed in this Bylaw, other than **adult services** involving erotic massage may be allowed as an **accessory use** under the following conditions:

a. All **accessory use** applications shall be considered **discretionary** except where the **use** is already **permitted** as a **principal use** in the same **district** for which the application has been submitted. In such cases the **accessory use** application shall be processed as a **permitted use**.

b. All **accessory uses** must meet the provisions associated with said **use**, as well as any additional provisions described in this Subsection.

c. All **accessory uses** shall be complementary to the **principal use** of a **site**.

d. For **accessory uses** located within Residential **Districts**, only **uses** listed as either **permitted** or **discretionary** within the underlying **District** shall be considered.

e. **Signs** shall not be considered as an **accessory use**. **Signs** may only be approved as a **use** if they are listed as a **sign** considered in a **district** as detailed in **Table 15** (**Signs Allowed by District**).

f. Notwithstanding *13.2.1,* industrial related **accessory uses** shall only be considered within Industrial or Business Transition (BT) **Districts**.

g. Notwithstanding *13.2.1,* **adult services** may be considered as an **accessory use** only where it is **temporary** and meets the requirements of *Subsection 13.4*.

h. Notwithstanding *13.2.1,* a **cannabis establishment** may be considered as an **accessory use** only where it is in conjunction with a **drinking or eating establishment** and meets the requirements of *Subsection 13.11*.

i. Notwithstanding *13.2.1,* a **community support centre, major** may be considered as an **accessory use** only in **districts** where it is already listed as either a **permitted** or **discretionary use**.

13.3 Additional Dwelling Units (ADU)

13.3.1 An **ADU** shall only be developed where the **principal building** on the **site** is a **single-detached dwelling**.

13.3.2 **Sites** containing a **single-detached dwelling** shall be limited to one (1) **ADU**.

13.3.3 A **home based business, major** shall not be considered or developed within an **ADU**.

13.3.4 An **ADU** shall be a minimum of 4.0 m (13.0 ft) from the **principal dwelling** on the **site**.

13.3.5 An **ADU** shall have a minimum **rear yard setback** of 3.0 m (10.0 ft) if located on a **site** with rear **lane access**. All other **ADUs** shall meet the **setback** requirements for **accessory buildings or structures** detailed in *Subsection 13.1*.

13.3.6 An **ADU** shall not be of a **height** greater than that of the **principal dwelling** on the **site** and shall be a maximum **height** of 6.0 m (20.0 ft).

13.3.7 An **ADU** shall not be assigned a separate municipal address or be eligible for separate municipal servicing including, but not limited to, a separate water meter or separate garbage collection.

13.4 Adult Services

13.4.1 Where **adult services** is the **principal use** on a **site** it shall only be considered on **sites** where there is minimum **radial separation distance** of 300 m from all property line of **sites** containing the following **uses**:

a. **child care facilities** and **day homes** operating under an active and valid business license,

b. **education services** where the primary attendees are under eighteen (18) years of age, and

c. **public parks**, not including public trails, pathways, or retention ponds.

13.4.2 Where **adult services** in the form of erotic dancing is proposed as an **accessory use** to an approved business activity, it shall be considered only:

a. for **developments** such as a **drinking establishment**, **nightclub** where minors are prohibited at all hours, and

b. as a **temporary development** limited to one (1) night only with a minimum ninety (90) days in between events.

13.4.3 **Adult services** involving the massaging of the body with a sexual intent shall only be considered as the **principal use** of a **site**.

13.5 Alcohol Sales

13.5.1 Where a **retail store's** primary intention is the sale of alcohol, the **development** shall only be considered on **sites** where there is a minimum **radial separation distance** of 100 m from all property lines of **sites** containing the following **uses**:

a. **child care facilities** and **day homes** operating under an active and valid business licenses,

b. **education services** where the primary attendees are under eighteen (18) years of age, and

c. **public parks**, not including public trails, pathways, or retention ponds.

13.6 Alternative Energy

13.6.1 **Solar Collector (Attached)**

a. **Solar collectors (attached)** may be located on the roof or wall of a **building** and shall not require a **Development Permit**, as per *Subsection 3.2*, provided they:

i. meet the **setback** and **height** regulations of the underlying **district**, and

ii. do not extend beyond the outermost edge of the roof or wall.

13.6.2 **Solar Collector (Freestanding)**

a. **Solar collectors (freestanding)** shall be considered a **discretionary use** in all **districts** provided they:

i. are located in the **rear yard**,

ii. meet the **setback** and **height** requirements of the underlying **district**, and

iii. are **screened** from view in Residential **Districts** to the satisfaction of the **Development Authority**.

13.6.3 **Wind Energy Systems**

a. **Wind energy systems** shall be considered a **discretionary use** in all **districts** provided they:

i. are located in the **rear yard** or on a roof,

ii. meet the **setback** and **height** requirements of the **district**, and

iii. do not create noise uncharacteristic to that of the surrounding area.

13.7 Amenity Areas

13.7.1 **Amenity areas** may be located in any **yard,** and shall be required for the **developments** indicated in **Table 3** (**Amenity Area Requirements**).

Table 3: Amenity Area Requirements

Development Type	Minimum Required Amenity Area
Dwelling, Apartment, Dwelling, Multi-unit, Mixed Use Building	7.5 m^2 (24.5 ft^2) per dwelling unit

13.8 Bare Land Condominiums

13.8.1 Except for common property lines on attached units, no **building** on a **bare land condominium** unit may encroach on any property line, easement or right-of-way.

13.8.2 A **bare land condominium** plan shall be treated in all respects as though it were a plan of subdivision and shall comply with all requirements for a subdivision and all applicable regulations of its underlying **district** including, but not limited to:

a. adequate pedestrian and vehicle **access**,

b. provision of supply of water, electrical power, gas and sanitary sewer and storm drainage, and

c. sequencing and timing of construction of all **buildings** and servicing.

13.8.3 A **bare land condominium** shall be considered a **discretionary use** in any **district** which allows residential **uses** provided that:

a. the dwelling types proposed for the **bare land condominium** are listed as either **permitted** or **discretionary** in the underlying **district**, and

b. the number of proposed **dwelling units** does not exceed the maximum **density** of the underlying **district**.

13.9 Building Design & Character

13.9.1 Compliance with any neighbourhood specific architectural controls or other design provisions provided by a developer, home owner's association, condo

board or otherwise not listed within this Bylaw are not the responsibility of the **Development Authority** to be informed of or advised upon.

13.9.2 All **development**:

a. shall, in the opinion of the **Development Authority**, be consistent with the relevant **district** and compatible with nearby **buildings**,

b. unless otherwise stipulated or extended by the **Development Authority**, the exterior finish of **buildings** shall be completed within two (2) years of the issuance of a permit,

   i. failure to complete the **development** within this time frame may be subject to review under *Subsection 3.9 – Validity of Development Permits*,

c. shall avoid or mitigate adverse impacts on **development** located on **abutting sites**,

d. shall use high-quality materials such as brick, brick veneer, natural stone, cementitious boards or panels, glass, metal accents, or other high-quality, durable finish acceptable to the **Development Authority** on **building** exteriors,

e. shall incorporate architectural features, such as distinct roof forms, variation in **building** material or colour or the articulation of the **façade**, intended to minimize the perception of the **building's** massing on any **building** with a **façade** 30.0 m (98.4 ft) or longer,

f. stormwater management facilities shall be incorporated into the design of open spaces, **buildings**, and paved areas, and shall be reviewed on case-by-case basis,

g. other than in Transitional (T) **Districts**, all mechanical equipment, including roof mechanical units shall be incorporated into the **building** or **screened** according to *Subsection 13.24*,

h. other than in Residential **Districts, buildings** shall be generally located close to the **road** to enhance public realm while still meeting required **setbacks**,

i. any **building** on a **corner** or double fronting **lot** shall wrap **façade** treatments around the **building** to provide a consistent design facing both **roads**,

j. required **front yard setbacks** in established Residential **Districts** may be reduced provided the proposed **setback** is complementary to that of surrounding **developments**,

k. where any **site** contains more than one (1) **principal building**, there shall be a minimum **separation distance** between each **principal building** equal to double the required **side yard setback** of the underlying **district** (required **side yard setback** x two (2) = **building separation distance**), and

l. shall incorporate home numbers and address plates in a visible location on the front side of the **development**.

13.9.3 All **apartment**, **multi-unit dwellings**, and **mixed use buildings** shall:

a. have minimum ground-floor **height** of 4.0 m (13 ft) where commercial **uses** are provided,

b. integrate **balconies** into the overall design of the **building façade**,

c. screen ground-floor private **amenity areas** according to *Subsection 13.24*.

13.9.4 **Multi-unit dwellings** in the form of row housing shall:

a. have a minimum three (3) attached **dwelling units** and no more than six (6) attached **dwelling** units in a **building**, unless the units are stacked or oriented back-to-back, in which case the maximum shall be twelve (12).

13.9.5 All **development** exceeding four (4) **storeys** in **height** and **abutting** a **single-detached** or **two-unit dwelling** shall:

a. provide a minimum **stepback** of 2.0 m (6.5 ft) per **storey** for each **storey** above the fourth (4th) **storey** to a maximum of 4.0 m (13.0 ft) along the **abutting** property line,

b. not locate outdoor parking, garbage collection, common **amenity areas**, or **outdoor storage** within 3.0 m (10.0 ft) of the **abutting** property line,

c. ensure windows or **amenity areas** are placed in locations minimizing overlook into the **abutting** properties.

13.9.6 All industrial **development** shall:

a. be designed to increase compatibility with adjacent land **uses** through **building** siting, **landscaping**, fencing, **screening**, and **site access** locations. At minimum, **development** shall mitigate noise, dust, sound, and smell impacts when adjacent to residential and commercial **development** by considering prevailing winds and providing mitigation to the satisfaction of the **Development Authority**.

13.9.7 **Lots** containing **two-unit** or **multi-unit dwellings** that share a **party wall** may have their required **side yard setback** reduced to zero (0) metres. In such cases only the setback on which a **party wall** is located may be reduced.

13.10 Campgrounds

13.10.1 All **campgrounds** shall:

a. not include year-round recreational vehicle storage,

b. not include **mobile manufactured home dwellings**,

c. be connected to municipal servicing,

d. locate all utility and telecommunication services below ground,

e. provide a minimum 10% of the **site** as common outdoor **amenity areas**,

f. provide reasonable and adequate internal pedestrian connectivity to the satisfaction of the **Development Authority**.

13.10.2 All camping **sites** shall:

a. be a minimum of 15.0 m (49.2 ft) from all **lot lines**, and

b. provide buffer/**screening** around the perimeter of the **site** to the satisfaction of the **Development Authority**.

13.10.3 Internal **roads** must comply with the standards identified in the **City's *Municipal Development Standards (MDS)*** as amended.

13.10.4 Onsite garbage receptacles shall be provided and **screened** from the street.

13.10.5 The **Development Authority** encourages the utilization of existing natural features including but not limited to berms, trees, etc. to minimize the impacts on adjacent residential areas.

13.11 Cannabis Establishments

13.11.1 All **cannabis** related **uses** shall only be considered on **sites** where there is a minimum **radial separation distance** of 100 metres from the property line of **sites** containing the following **uses**:

a. **child care facilities** and **day homes** operating under an active and valid business license,

b. **education services** where the primary occupants are under eighteen (18) years of age, and

c. **public parks**, not including public trails, pathways, or retention ponds.

13.12 Cannabis Production & Distribution Facilities

13.12.1 This **use** shall only be considered as a **principal use**, not as an **accessory use**.

13.12.2 An application for a **cannabis production and distribution facility** shall include a **copy** of the current license for the facility as issued by Health Canada.

13.12.3 An application for a **cannabis production and distribution facility** may require the submission of a waste management plan (including the incineration of waste products), a water/wastewater (including the quantity and characteristics of discharge material) and stormwater management plan, and a ventilation plan prepared by a qualified professional.

13.12.4 All **cannabis production and distribution facilities** shall:

a. not occur in a **building** containing a **dwelling**,

b. only be considered on **sites** where there is a minimum **radial separation distance** of 400 m from all property lines of **sites** containing the following **uses**:

   i. any residential **development**,

   ii. **child care facilities** and **day homes** operating under an active and valid business license,

   iii. **education services** where the primary attendees are under eighteen (18) years of age, and

   iv. **public parks**, not including public trails, pathways or retention ponds.

c. be fully enclosed within the **building**,

d. not cause, create or emit any emission or condition that may be

objectionable, dangerous or a **nuisance** beyond the **building** that contains it, including but not limited to the following:

i. noise,

ii. odor, or

iii. light sources.

13.13 Child Care Facilities

13.13.1 All **child care facilities** shall:

a. be licensed under the applicable Provincial Legislation (see provisions for **day homes** for unlicensed facilities),

b. be consistent with the character, scale and form of the **district** in which it is located,

c. provide a fenced outdoor play space to the satisfaction of the Provincial Governing Body and the **Development Authority**, and

d. provide **on-site** drop off area suitable to accommodate traffic associated with the **use** and to limit any impacts on the surrounding neighborhood to the satisfaction of the **Development Authority**.

13.14 Communication Facilities

13.14.1 The Federal Government is responsible for regulating **communication facilities** in Canada and authorizing the location of such facilities.

13.14.2 The location, review and approval of **communication facilities** will be completed in accordance with all applicable legislation, regulations and Bylaws associated to their approval.

13.14.3 **Communication facilities** are not **permitted** in Residential **Districts**.

13.15 Community Gardens

13.15.1 **Community gardens** developed in accordance with the provisions included in **Table 1** (**Development Not Requiring a Development Permit**) shall not require a **Development Permit**.

13.15.2 Produce grown within **community gardens** shall not be commercially sold or distributed.

13.15.3 **Buildings** developed on **sites** containing a **community garden** shall not require a **Development Permit** provided the **development**:

a. is under 10.0 m^2 (108 ft^2),

b. has a maximum wall height of 2.5 m (8.0 ft),

c. is developed in accordance with *Subsection 13.1*, and

d. a **Site** Plan and **building** design are submitted and approved by the **Development Authority**.

13.15.4 **Buildings** developed on **sites** containing a **community garden** that do not conform to the provisions listed in *13.15.3* shall:

a. be considered a **discretionary use** in all **districts** and shall be considered on a case-by-case basis,

b. require a **Development Permit**, and

c. shall meet all **setback** requirements of the underlying **district**.

13.15.5 All **buildings** developed on **sites** containing a **community garden** shall:

a. only be considered where the **development** serves the **site's community garden** in the form of tool storage, additional plant growth, or other purpose directly correlated to the operation of the **community garden**, and

b. require a **Site** Plan and **building** design to be submitted to the **Development Authority** for approval.

13.15.6 Residential **lots** containing **community gardens** may be required to be returned to the previous state should the **community garden** be deemed as no longer serving the needs or the intention of the neighbourhood.

13.15.7 **Community gardens** located on **City** owned **lots** shall:

a. require a **Development Permit**,

b. be considered a permitted **use** in all **districts**, and

c. require **landowner authorization** in accordance with *Subsection 13.34*.

13.16 Community Support Centres

13.16.1 All **community support centres**:

a. may be required to provide the **Development Authority**, as part of the **Development Permit** Application, with a Safe Environment Assessment prepared in accordance with *Subsection 13.40.3* of this Bylaw including at least the following:

i. provision of clear sightlines between public and private spaces, and

ii. provision of security lighting in strategic locations.

b. may be required to provide the **Development Authority**, as part of the **Development Permit** Application, details regarding the **development** including but not limited to the following:

i. service standards including sanitation and hygiene practices,

ii. how the **applicant** will mitigate negative impact on surrounding **developments** including but not limited to:

1. property maintenance including garbage collection,

2. hazardous waste management,

3. noise and activity management,

4. security measures regarding client and public safety, and
5. any other item as deemed necessary by the **Development Authority** based on the nature of the **development**,

iii. summary of services provided,

iv. overall occupancy capacity,

v. number of beds,

vi. proposed hours of operation, and

vii. a twenty-four-seven (24/7) **on-site** contact.

13.16.2 When required by the **Development Authority**, the information described in *13.16.1(b)* shall be disclosed publicly by the **applicant** and shall be provided to the **City** for information purposes only. Notwithstanding the foregoing, the **Development Authority** may, at its discretion, impose conditions of approval requiring the **development** to operate in accordance with some or all of the information described in *13.16.1(b)*.

13.16.3 **Sites** containing a **community support centre, major** or a **warming shelter** that requires a **Development Permit** shall only be considered on **sites** where the following minimum **radial separation distances** are met:

a. 200 m from:

i. **child care facilities** and **day homes** operating under an active and valid business license,

ii. **education services** where the primary attendees are under eighteen (18) years of age, and

iii. **public parks** not including public trails, pathways or retention ponds.

b. 50 m from:

i. **religious assemblies**,

ii. any Residential **District,** and

iii. any Neighbourhood Commercial (NC) **District**.

13.16.4 All **warming shelters** shall:

a. only be considered during the months of November, December, January, February and March,

b. notwithstanding *Subsection 5.2.2*, require a new **Development Permit** each year regardless of the length of time operation is discontinued,

c. provide in person supervision during all hours the **shelter** is open, and

d. provide, to the satisfaction of the **Development Authority**, details regarding the **development** including but not limited to the following:

i. the **shelter's** hours of operation,

ii. the extreme weather conditions under which the **shelter** will operate,

iii. the maximum number of patrons the **shelter** will serve at a single time,

iv. how long the **shelter** will operate for, and

v. any other information that may required by the **Development Authority**.

13.16.5 The **Development Authority** may allow for a **warming shelter** to be in place beyond the months detailed in *13.16.4* in extreme circumstances such as extended winter weather or extreme heat in the summer months. In such cases the **applicant** shall provide the **Development Authority** with reasons necessitating the extension. All extensions shall be reviewed on a case-by-case basis by the **Development Authority**.

13.16.6 **Warming shelters** developed as an **accessory use** located within an already existing **building** shall not require a **Development Permit**, and shall not be required to provide any additional parking, provided they are developed in accordance with the provisions of Table 1 (**Development Not Requiring a Development Permit**).

13.17 Corner & Double Fronting Sites

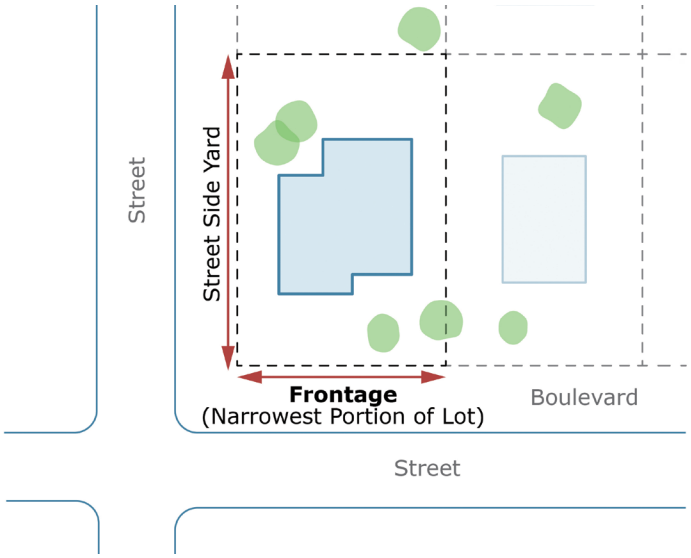
13.17.1 Any **development** on a **site abutting** more than one (1) **road**, such as a **corner** or double fronting **site**, shall only have one (1) **frontage** determined as the narrowest portion of the **lot**.

13.17.2 Not withstanding *13.17.1*, on **corner** or double fronting **sites** the **Development Authority** may determine a **yard** other than the narrowest portion of the **lot** to be determined as the **front yard**. Such determinations shall be made on a case-by-case basis.

13.17.3 Any **development** on a **corner** or double fronting **site** may include a driveway in the **side yard** provided it is a minimum length of 5.5 m (18.0 ft).

13.17.4 **Corner** or double fronting **sites** with a **corner cut lot line** shall be required to maintain a minimum **setback** of 4.0 m (13.0 ft) from the **corner cut lot line**. Such **setbacks** shall be measured perpendicularly from the **corner cut lot line** to the portion of the **building** or **structure** nearest to the **corner cut lot line** in accordance with Figure 44 (**Setbacks**).

Figure 5: Corner & Double Fronting Sites



13.18 Day Homes

13.18.1 In addition to these provisions, a **day home** shall be considered a **home based business**, **major** and reviewed based on *Subsection 13.26*.

13.18.2 **Day home** are limited to one (1) per **dwelling unit**.

13.18.3 **Dwelling units** containing a **day home** shall not have any other **home based business, major** operating or considered.

13.18.4 The **day home** and all **signs** shall be consistent with the character, scale and form of the **district** in which it is located.

13.18.5 **Day homes** shall not be considered within an **apartment dwelling**.

13.19 Decks

13.19.1 All **decks**, **covered** or otherwise:

a. may be attached to the **principal building**,

b. shall meet the **front, side, rear yard** and projection **setback** requirements in accordance with its appropriate **district** and *Subsection 13.35*,

c. shall not interfere with a **site's sight triangle**.

13.20 Drive Through Services

13.20.1 **Drive through services** shall:

a. where it is an **accessory use,** be complementary in nature to the **principal use** of the **site** and shall be integrated into the overall **site** design in a manner that does not create a conflict between the movements of pedestrians and vehicles, or conflict with adjacent land **uses**,

b. be designed to not obstruct designated fire lanes or any required parking space,

c. be **hard surfaced** in all areas which vehicles have **access** to,

d. take appropriate steps to ensure that vehicles enter and leave the **site** only at the entrances and exits provided for such purpose,

e. ensure that outdoor speakers are a minimum of 2.0 m (6.6 ft) from the property line of any Residential **District**, and,

f. ensure that drive aisles are designed so they are not within a required **setback** area.

13.20.2 The **landowner**, tenant, operator, or person in charge of a **drive through service** shall maintain the **site**, **buildings**, **structures**, and improvements thereon in a clean, neat, tidy, and attractive condition, free from all rubbish and debris.

13.20.3 The **Development Authority** may require a Traffic Impact Analysis for any **drive through service**.

13.20.4 The **Development Authority** may require a Noise Impact Assessment for any **drive through service**.

13.20.5 All queuing spaces shall:

a. be a minimum of 6.1 m (20.0 ft) long and 2.75 m (9.0 ft) wide,

b. be provided solely within the **site** of the **development**, and

c. be provided in accordance with **Table 4** (**Minimum Number of Queuing Spaces for Drive Through Services**).

13.20.6 Where a **drive through service** has multiple **service windows** sharing a single queuing lane, for example a window for collecting payment and a window for providing a customer with goods or services, queuing shall be calculated as if there were only one (1) **service window**.

Table 4: Minimum Number of Queuing Space for Drive Through Services

	Use Type	In-bound	Out-bound
1	Automotive and Equipment Repair Shop	Two (2) per service bay	One (1) per exit from drive-though
2	Automotive Service Station	Two (2) per fueling position	One (1) per exit from drive-though
3	Car Wash	Three (3) per wash bay (manual or automatic)	One (1) per exit from drive-though
4	Drinking or Eating Establishment	Six (6) per service window (pertaining to vehicles approaching the first service window only)	One (1) per exit from drive-though
5	Other Commercial Uses providing Drive Through Service	Three (3) per service window	One (1) per exit from drive-though

13.21 Easements and Rights-of-Way

13.21.1 No **development**, including **temporary development** such as **portable signs** or **sheds**, shall be allowed on or over any **easement** or right-of-way without **landowner authorization** in accordance with *Subsection 13.34*.

13.21.2 Notwithstanding *13.21.1*, **portable signs** may be placed on or over an **easement** or right-of-way registered in the name of the **City** provided they conform with all applicable provisions included in *Subsection 16.5.4*, including provisions regarding r**oad** rights-of-way where applicable and obtain a **Development Permit**.

13.21.3 The owner of any **development**, including **temporary development** such as **portable signs** or **sheds** placed on or over an **easement** with or without a **Development Permit**, shall be responsible for:

a. any damage done to the underlying infrastructure beneath or upon an **easement** or right-of-way, and

b. any damage done to the **development**, lands, adjacent **buildings**, or otherwise should the **easement** or right-of-way need to be accessed and damages occur.

13.22 Education Services

13.22.1 **Education services** where the primary attendees are under eighteen (18) years of age shall only be considered on **sites** where the following minimum **radial separation distances** are met:

a. 300 m from all property lines of an **adult services site**,

b. 100 m from all property lines of a **cannabis establishment site**, a **retail store site** where the **principal** intention is the sale of alcohol,

c. 200 m from all property lines of a **community support centre**, **major site**, or a **community support centre**, **warming shelter** that requires a **Development Permit site**, and

d. 400 m from all property lines of a **cannabis production and distributions facility site**.

13.23 Excavation, Stripping, Drainage, Grading, & Retaining Walls

13.23.1 All excavation, stripping, grading, and drainage shall be provided in accordance with the **City's *Municipal Development Standards (MDS)***, *Community Standards Bylaw and Lot Grading and Drainage Bylaw*, as amended.

13.23.2 In all **districts**, unless required for the preparation of a **site** for which a **Development Permit** has been issued or a **Development Agreement** is in place, excavation, stripping, and grading activities shall require a **Development Permit**.

13.23.3 **Site** grading shall be completed in accordance with an approved grading plan.

13.23.4 Where a **site** will feature fill greater than 1.0 m (3.0 ft) above stripped ground, the **Development Authority** may require an engineered plan prepared by a Professional Engineer licensed to practice in the province of the **site**.

13.23.5 Following construction completion **applicants** or **landowners** may be required to submit a **Grading Certificate** in accordance with the **City's** *Lot Grading and Drainage Bylaw*, as amended.

13.23.6 **Site grades** shall be established and maintained to prevent drainage from one (1) **site** to another except where drainage conforms to an approved local or subdivision drainage plan.

13.23.7 The **landowner** of a **site** shall ensure that grading is maintained to provide effective drainage including drainage swales established within an easement or right-of-way.

13.23.8 Retaining walls shall not disrupt existing drainage patterns.

13.23.9 Retaining walls greater than 1.0 m (3.0 ft) in **height** shall only be considered provided the **applicant** submits a design certified by a Professional Engineer.

13.23.10 For any excavation, stripping, or grading activity, as a condition of a **Development Permit**, the **Development Authority** may require security in accordance with *Subsection 1.7* up to the estimated value of the proposed work.

13.24 Fencing & Screening

13.24.1 Fencing and **screening** shall complement the character and quality of the **principal building** and:

a. shall be constructed of wood, masonry, berms, metal screens, plant material or other architectural features, and

b. shall not contain barbed wire, electric, or razor wire, except where it is used for security purposes only and is placed atop a 3.0 m (10.0 ft) high fence in an Industrial **District**.

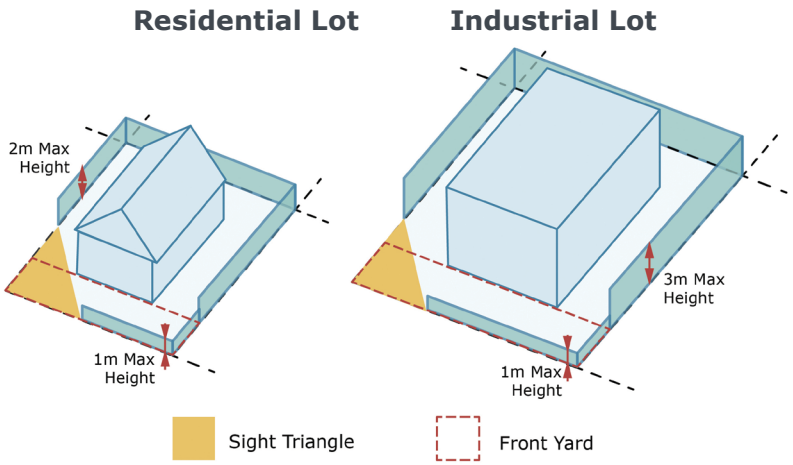
13.24.2 A fence, wall, gate, or other form of **screening** on a **site** shall not interfere with the **sight triangle** depicted in **Figure 6** (**Sight Triangle & Fence Heights**) and shall be a maximum **height** of:

a. 3.0 m (10.0 ft) in any Industrial **District**,

b. 2.0 m (6.5 ft) in any Residential, Commercial or Public Service **District**,

c. 1.0 m (3.0 ft) for portions located in the **front yard** of any **district**.

Figure 6: Sight Triangle & Fence Heights



13.24.3 **Screening** shall:

a. complement the architectural style of the **development** and be a **height**, width, and length sufficient, in the opinion of the **Development Authority**, to screen the **use** from view,

b. be required along the **lot lines** of all commercial and industrial **sites** where such lines **abut** a residential **lot line** or a **lane abutting** a residential **site**. Such **screening** shall not exceed 2.0 m (6.5 ft) in **height**,

c. be required for bulk **outdoor storage**, and

d. be provided according to **Table 5** (**Screening Requirements**).

Table 5: Screening Requirements			
	Development Type	**Minimum Height**	**Minimum Length and Width**
1	Any trash collection area, open storage or service area visible from an adjoining site in a Residential District	2.0 m (6.5 ft)	Sufficient to block the view
2	Any parking lot or structure visible from a Residential District	1.2 m (4.0 ft)	Sufficient to screen the length of all parking spaces from view of the Residential District
3	Along the lot lines of all commercial and industrial lots where such lines abut a residential lot line or a lane abutting a residential lot	2.0 m (6.5 ft)	Provided to the satisfaction of the Development Authority
4	Commercial, industrial, multi-unit residential, and public service garbage facilities	Same as height of container or a maximum of the maximum fence heights of the underlying district	Sufficient to screen the view of all containers
5	Bulk outdoor storage, including but not limited to auto wrecking, lumber yards, pipe storage or similar use	Provided to the satisfaction of the Development Authority	
6	Mechanical equipment, in all districts except the Transitional (T)	Provided to the satisfaction of the Development Authority	

13.24.4 A blank banner constructed of canvas or similar material secured to a fence for the purpose of security features may be considered **screening** and not require a **Development Permit**. The banner shall be properly secured and maintained in good condition at all times to provide adequate **screening** and shall be replaced accordingly.

13.24.5 **Screening** in the form of plant material may be used as an alternative to other forms of **screening** where deemed appropriate by the **Development Authority**. Plant material **screening** shall:

a. be sufficient to provide at least a 2.0 m (6.5 ft) high screen at the time of plant maturity, and at least 1.2 m (4.0 ft) at the time of planting,

b. be spaced adequately to ensure plant health and growth,

c. be maintained and replaced as needed to provide adequate **screening**,

d. not impact sightlines and vehicle or pedestrian safety, and shall

e. not contribute toward a **site's** planting requirements.

13.25 Garbage Enclosures

13.25.1 All commercial, industrial, **multi-unit** residential, including **apartments**, and public service **developments** shall provide a garbage facility containing

weatherproof receptacles, except where:

a. receptacles are located in the **rear yard** of an industrial **site** that is **screened** or if, in the opinion of the **Development Authority**, **site** conditions do not warrant the need for an enclosure, or

b. **multi-unit residential developments** waste collection is serviced by the **City**.

13.25.2 Garbage, recycling, and other waste containers and areas shall:

a. be located within the **principal building** or at the rear of the **principal building**, or in other locations deemed suitable by the **Development Authority**,

b. be **landscaped** and **screened** according to the provisions of this Bylaw, and

c. shall not be permitted in a **front yard** of any **development**, if the containers are permanent.

13.26 Home Based Businesses

13.26.1 A **home based business** questionnaire as prepared by the **Development Authority** must be completed and submitted in conjunction with the **Development Permit** application to be considered for review.

13.26.2 **Home based businesses** shall:

a. be incidental and subordinate to the **principal dwelling**,

b. be deemed compatible with the character, scale, and form of the **district** in which it is located, and

c. comply with the provisions in **Table 6** (**Home Based Business Provisions**).

13.26.3 **Development Permits** pertaining to **home based businesses**, **major** shall be processed in accordance with *Subsection 4.3* and *Subsection 4.4* and shall be circulated according to *Subsection 3.8*.

13.26.4 Any change of **use**, intensity or location of any existing **home based business** shall require a new **Development Permit** application to be submitted.

13.26.5 A maximum of two (2) **home based businesses, major or minor** may be **permitted** within one (1) **site** containing a **single-detached**, **two-unit**, or **multi-unit** (up to four (4) units) **dwelling** provided that both obtain an approved **Development Permit** and the provisions for both businesses within this Bylaw are met.

13.26.6 A **home based business, major** shall not be **permitted**:

a. in an **apartment dwelling** or,

b. within a **principal dwelling**, **secondary suite**, or **ADU** where a combination of two (2) or more of these **uses** are located on the same **site**.

13.26.7 **Uses** that are prohibited to operate as a **home based business** include:

a. **adult services**,

b. dating and escort services,

c. **fleet services**, where commercial vehicles are stored at or frequent the **dwelling**,

d. automotive, industrial, or recreational vehicle sales, modification, restoration, repair, servicing, painting, storage or similar services and activities,

e. industrial **uses**, including but not limited to, salvaging, recycling, warehousing,

f. businesses that use or store **hazardous**, explosive, or flammable materials in quantities exceeding those found in a normal household,

g. overnight **kenneling**,

h. **cannabis** related **uses**, and

i. any other **use** that would, in the opinion of the **Development Authority**, be considered incompatible in a **district** which allows residential **uses** or will materially interfere with or affect the use, enjoyment or value of neighbouring properties.

Table 6: Home Based Business Provisions

	Standard	Home Based Business, Limited	Home Based Business, Minor	Home Based Business, Major
1	Maximum Area	15% of total floor area of the dwelling, including the basement and garage	25% of total floor area of the dwelling, including the basement and garage and accessory buildings	35% of total floor area of the dwelling, including the basement and garage and accessory buildings
2	Impact	No negative impacts or nuisance to the neighbours or neighbourhood, including but not limited to: noise, dust, odour, smoke, or anything of an offensive or objectional nature		
3	Exterior Business Activity	All business activity related to the home business shall be contained fully within the primary dwelling		All business activity related to the home business shall be contained fully within the primary dwelling and accessory buildings on site Exterior business activity may be permitted provided that it does not impact the neighbours or neighbourhood and is screened from view in a form and manner deemed acceptable by the Development Authority

Table 6: Home Based Business Provisions				
	Standard	**Home Based Business, Limited**	**Home Based Business, Minor**	**Home Based Business, Major**
4	Business Storage	All storage related to the home based business shall be contained fully within the primary dwelling, which could include an attached garage The usage of an attached garage shall not interfere with or take away required parking for the principal dwelling as identified within this Bylaw		All storage related to the home business shall be contained fully within the primary dwelling and accessory buildings on site Exterior business activity may be permitted provided that it does not impact the neighbours or neighbourhood and is screened from view in a form and manner deemed acceptable by the Development Authority The usage of a garage on site for storage shall not interfere with or take away required parking for the principal dwelling as identified within this Bylaw or parking requirements below
5	Traffic Generation	No traffic impacts		The development shall not generate vehicular or pedestrian traffic or increase parking, to the dwelling in excess of that which is characteristic of the neighbourhood within which it is located
6	Parking	No additional parking required	One (1) off-street parking space in addition to the required parking for the dwelling, or at the discretion of the Development Authority	Two (2) or more off-street parking spaces, in addition to the required parking for the dwelling
7	Employees	Residents of the dwelling		One (1) non-resident employee or volunteer, in addition to residents of the dwelling
8	Client Visits (businesses other than a day home)	Client visits at the residence are prohibited	One (1)/day	Two to five (2-5)/day and not more than twenty-five (25) in a seven (7) day period

Table 6: Home Based Business Provisions				
	Standard	**Home Based Business, Limited**	**Home Based Business, Minor**	**Home Based Business, Major**
9	Client Visits (Day Home)	Client visits at the residence are prohibited	Client visits at the residence are prohibited	six (6) or less for day homes not licensed by the applicable provincial agency Licensed day home visits are allowed in accordance with the provincial standard for the number of children permitted
10	Delivery Vehicles	Should not have an unreasonable negative impact on the neighbours and should not generate traffic uncharacteristic of the neighbourhood		
11	Business-Related Vehicles	Personal vehicles only		One (1) single rear axle, commercially licensed vehicle parked and maintained on-site Any trailer associated with the home based business shall be parked off-street and in a location on the lot where the visual impact to the street is minimized
12	Hours of Operation	Not Applicable		At the Discretion of the Development Authority
13	Sign and Visibility	No aspect of the home based business may be visible from outside the dwelling or building. Signs are not permitted		One (1) non-illuminated fascia sign, no larger than 0.2 m^2 (2.15 ft^2) attached to the dwelling or display window
14	Exterior/ Interior Structural Alterations	Structural alterations additions, or renovations relating to home based business may be allowed, provided that the proposed work remains consistent with the residential character of the building and property and they obtain required permits that comply with the City's Bylaws and the *National Building Codes*		
15	Equipment	There shall be no mechanical or electrical equipment used which creates noise beyond the site, interferes with wireless signal, or visible or audible interference in radio or television representation		
16	Business Announcement	Not Required	A permit approval card must be placed in a window visible from the street	A permit approval card must be placed in a window visible from the street
17	Development Permit	Not Required	Required	Required

13.27 Landfill Buffer Area

13.27.1 In areas falling within 457 m of a **site** containing a current or former landfill as identified in the **Land Use District and Overlay Map** (**Figure 3, Map 3**) the following **uses** shall be considered **discretionary** and reviewed in accordance with the *Saskatchewan Municipal Refuse Management Regulations*:

a. any residential **development**,

b. **drinking or eating establishment**,

c. **drinking establishment, nightclub**,

d. **hall**, or

e. **hotel**.

13.28 Lighting

13.28.1 In all **districts**, generated outdoor lighting shall:

a. be designed and installed to be **dark sky compliant**, unless otherwise approved by the **Development Authority**,

b. project downwards,

c. not project directly into adjacent parcels, and,

d. shall not adversely affect adjacent parcels or traffic safety through unnecessary brightness, spillage, harsh colours, flashing or other factors.

13.29 Live/Work Units

13.29.1 All **live/work units** shall have internal access between the **dwelling** and the work components of the **live/work unit**.

13.29.2 The **dwelling** and work components of the **live/work unit** shall not be legally separated through a subdivision or condominium conversion.

13.29.3 If located within the Downtown Commercial (DTN) **District**, the business shall be located on the ground floor.

13.29.4 Parking shall be provided in accordance with *Part 6* of this Bylaw.

13.29.5 **Uses** Prohibited as part of a **live/work units** include:

a. **home based business, major or minor**,

b. **adult services**,

c. dating and escort services,

d. **fleet services**, where commercial vehicles are stored at or frequent the **dwelling**,

e. automotive, industrial, or recreational vehicle sales, modification, restoration, repair, servicing, painting, storage or similar services and activities,

f. industrial **uses**, including but not limited to, salvaging, recycling, warehousing,

g. businesses that use or store **hazardous**, explosive, or flammable materials in quantities exceeding those found in a normal household,

h. animal breeding or overnight **kenneling**,

i. **cannabis** related **uses**, and

j. any other **use** that would, in the opinion of the **Development Authority**, be considered incompatible in a **district** which allows residential **uses** or will materially interfere with or affect the use, enjoyment or value of neighbouring properties.

13.29.6 Goods, materials, or business-related items shall be stored within the **live/work unit** or within an **accessory building** on **site**.

13.29.7 **Outdoor storage** is not allowed unless **screened** from view in a form and manner acceptable to the **Development Authority**.

13.29.8 Business activity shall not occupy more than 60% of the **gross floor area (GFA)** of the **dwelling unit**.

13.30 Mixed Use Buildings

13.30.1 Commercial **uses** located within the ground floor of a **mixed use building** shall require a **Development Permit** and shall be considered as either **permitted** or **discretionary** based on the provisions of their underlying **district**.

13.30.2 Commercial and residential **uses** in **mixed use buildings** shall not be located on the same **storey**.

13.30.3 In **mixed use buildings** located within Residential **Districts**, only the following **uses** shall be considered:

a. **child care facility**,

b. **drinking or eating establishment**,

c. **fitness studio**,

d. **office**,

e. **pet care facility**,

f. **recreation services**, and

g. **retail store**.

13.31 Objects Prohibited in Yards

13.31.1 No person shall be allowed to keep or maintain in any Residential **District**:

a. any vehicle, other than a recreational vehicle, weighing over 4,500 kg,

b. any unlicensed, derelict, or dismantled vehicle located in the **front yard**,

c. any vehicle not located on a driveway or within a **garage**, or

d. any object that, in the opinion of the **Development Authority**, is deemed to be unsightly or have an adverse impact on the surrounding area.

13.31.2 Recreational vehicles may be stored on a residential **lot** provided they:

a. are located entirely on a driveway,

b. do not interfere with the **sight triangle** on a **site** or public **walkways**,

c. do not occupy or block **access** to required parking spaces, and

d. are not used as a **dwelling unit**.

13.32 Outdoor Display Areas

13.32.1 All outdoor display areas shall not:

a. obstruct any pedestrian **walkway**, drive aisle, or required parking space, or

b. be placed over any landscaped area.

13.33 Outdoor Storage

13.33.1 All **outdoor storage** shall:

a. be located in a **rear** or **side yard**,

b. be **screened** according to *Subsection 13.24* and

c. shall meet the **setback** and **yard** requirements of the underlying **district**.

13.33.2 **Outdoor storage** shall only be considered as an **accessory use** in all **districts** other than the MI, HI, and T **Districts** where it may be considered as a **principal use**.

13.34 Owner Authorization

13.34.1 Authorization from the **landowner** shall be:

a. required for all applications, including for **temporary development**, where the **applicant** is not the **landowner**, and

b. provided through a completed application form for **landowner** authorization as established by the **City** that:

i. bears the signature of the **landowner** or their authorized representative, and

ii. is dated within thirty (30) days of the date of application.

13.35 Projections into Required Setbacks

13.35.1 Other than the items indicated as allowed projections in **Table 7** (**Allowed Projections into Required Setbacks**) and **Figure 7**: **Allowed Projections**, and the items listed in *Subsection 13.35.3*, no portion of a **principal building**, or any portion of **structure** attached to a **principal building**, shall be allowed within any required **setback**.

13.35.2 Projections shall not interfere with:

a. any required parking or **loading space** or drive aisle, or

b. a **site's sight triangle**.

13.35.3 The following are not considered as projections:

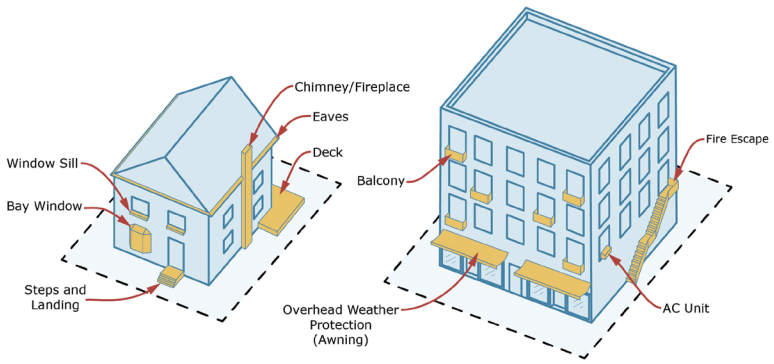
a. construction located wholly below **grade**,

b. **decks**, concrete pads, sidewalks, steps, or other similar **development** that do not rise more 0.6 m (2.0 ft) above **grade**.

Table 7: Allowed Projections into Required Setbacks

	Development Type	Maximum Projection into Front Yard (m)	Maximum Projection into Side Yard (m)	Maximum Projection into Rear Yard (m)
1	Bay windows, boxed windows, chimneys, fireplaces, eaves, fire escapes, gutters, sills	0.6	0.6	0.0
2	Balconies, decks, landings, overhead weather projections, steps	2.0	0.6	0.0
3	Mechanical equipment including air conditioning units	0.0	0.6	0.0

Figure 7: Allowed Projections



13.36 Public Parks

13.36.1 **Public parks**, not including public trails, pathways or retention ponds, shall only be considered on **sites** where the following minimum **radial separation distances** are met:

a. 300 m from all property lines of an **adult services site**,

b. 200 m from all property lines of a **community support centre**, **major site**, or a **community support centre**, **warming shelter** that requires a **Development Permit site**, and

c. 400 m from all property lines of a **cannabis production and distributions facility site**.

13.37 Railways

13.37.1 Applications for **development** located within 1 km of a railway operation:

a. may be referred to the appropriate rail operator for review,

b. may be required to comply with the *Guidelines for New Development in Proximity to Railway Operations*,

c. may be required to provide a noise or vibration study prepared by an appropriate professional,

d. may be required to take necessary steps to mitigate adverse impacts based on the rail operator's review or provided study such as:

   i. fencing or **screening**,

   ii. berms and increased **setbacks** in accordance with restrictive covenants registered on title, or

   iii. any other item deemed appropriate by the **Development Authority**.

13.38 Recreation Services

13.38.1 **Recreation services** involving **livestock** shall only be considered where the **livestock** involved are horses, ponies, or other equines. All such **developments** shall:

a. provide adequate loading and parking areas for the trailering, loading and offloading of animals. Such loading and parking shall be required in addition to the parking required in accordance with **Part 6** of this Bylaw,

b. not include the overnight accommodation of any animals,

c. not have any outdoor component including but not limited to, the riding of animals outside (beyond what is necessary to transfer the animals from trailer to facility), feeding or watering animals outdoors, **outdoor storage**, or the outdoor stabling or penning of animals,

d. be limited to no more than nine (9) animals **on-site** at a single time, and

e. not involve any **livestock** other than horses, ponies, or other equines, for riding, roping, or other similar activity. **Developments** utilizing **livestock** other than the prior mentioned for recreation purposes, including for rodeos or other similar **developments**, shall be considered as **exhibition and convention facilities**.

13.39 Relocation & Demolition

13.39.1 The relocation or demolition of any **building** or **structure** greater than 10.0 m^2 (108 ft^2) shall require a **Development Permit**.

13.39.2 Relocated **buildings** or **structures** shall comply with all of the appropriate regulations of their **district** and this Bylaw.

13.39.3 The **Development Authority**, as a condition of a permit for demolition or relocation may require:

a. all utilities to be disconnected before demolition starts,

b. adequate **screening** to the satisfaction of the **Development Authority**,

c. provision of pedestrian and traffic safety measures,

d. provisions for dust control, noise, or other negative impact mitigation,

e. provision for debris removal and grading of **site** following completion, or

f. a deposit in the form of either a certified cheque or an irrevocable letter of credit equal to 60% of the costs of a proposed demolition to maintain or repair any public property damaged by a demolition or relocation.

13.39.4 All demolitions shall first ensure that any asbestos-containing materials with the potential to release fibres have been dealt with per the Alberta or Saskatchewan *Occupational Health and Safety Regulations* depending on the location of the **site**.

13.39.5 **Buildings** with existing services may be required, as a condition of a **Development Permit**, to replace the existing water, sanitary sewer, or other services in accordance with the **City's *Municipal Development Standards (MDS)*** as amended.

a. Where services are required to be replaced, the **applicant** shall notify the **Development Authority** upon completion.

b. If services are required to be replaced, the **Development Authority** may, as a condition of a **Development Permit**, require the **applicant** to register a caveat on title stating that the services shall be replaced.

c. If, in the opinion of the **Development Authority**, services are not replaced, or there is no intention of replacement within twelve (12) months of the application, the **City** may employ the caveat described in *13.38.5(b)* and replace.

d. Notwithstanding *13.38.5*, existing services may be reused at the discretion of the **Development Authority**, provided the **applicant** demonstrates the services are in accordance with the **City's *Municipal Development Standards (MDS)*** as amended.

13.40 Safe Environments

13.40.1 All **developments** other than **single-detached** and **two-unit dwellings** shall incorporate elements to promote public safety through the creation of safe environments. These elements may include, but are not limited to:

a. provision of clear sightlines between public and private spaces,

b. provision of security lighting in strategic locations, and

c. utilization of **walkways**, **signs**, and **landscaping** to clearly identify public and private spaces.

13.40.2 The **Development Authority** may require a Safe Environment Assessment as part of a **Development Permit** application for any **development** including **adult services**, **education services**, **community support centres** or **public park** as either a **principal** or **accessory use**.

13.40.3 A Safe Environment Assessment shall be prepared by a qualified professional such as a landscape architect or urban designer, and shall include at least the following:

a. **site** overview including **building access** points, parking areas, pedestrian circulation and **landscaping**,

b. **site** security details, including lighting, sightlines, potential entrapment areas, and

c. any design recommendations to mitigate concerns.

13.40.4 The **Development Authority** may apply conditions to a **Development Permit** based on the recommendations of Safe Environment Assessment.

13.41 Secondary Suites

13.41.1 All **dwelling**, **secondary suites** shall not be assigned a separate municipal address or be eligible for separate municipal servicing including, but not limited to, a separate water meter or separate garbage collection.

13.41.2 A **development** may be designated as a **dwelling**, **secondary suite** regardless of:

a. remuneration being collected from the occupant of the **secondary suite**,

b. the relationship between the primary residents of the **dwelling** and the occupants of the **secondary suite**, or

c. the duration of time the **secondary suite** is being used as a separate **dwelling** from the primary residence.

13.41.3 The inclusion of multiple kitchens within a **dwelling** shall be reviewed on a case-by-case basis by the **Development Authority** and may result in the **development** being designated as a **dwelling**, **secondary suite** if it is determined that the additional kitchen's primary use will be by anyone other than the residents of the primary **dwelling**.

13.42 Shopping Centres

13.42.1 Each commercial unit within a **shopping centre** shall be required to obtain a **Development Permit**.

13.42.2 Only **uses** listed as either **permitted** or **discretionary** within the underlying **district** shall be considered within the individual commercial units of a **shopping centre**.

13.43 Short Term Rentals

13.43.1 A **dwelling** or portion thereof may be used as a **short term rental** provided that:

a. adequate parking is provided in accordance with *Part 6* of this Bylaw,

b. the **dwelling** is allowed within the appropriate **district**, and

c. the **short term rental** is operating under an active and valid business license.

13.43.2 Where the owner of a short term rental is residing at the **dwelling**, the **short term rental** shall be considered a **home based business, major** and shall be required to provide one (1) parking space per guest room in addition to the parking required depending on the **dwelling** type.

13.43.3 Where the owner of **short term rental** is not residing at the **dwelling**, the **short term rental** shall not be considered a **home based business**, and shall not be required to provide any additional parking beyond what is required of the **dwelling**.

13.43.4 All **short term rentals** shall, as a condition of a Notice of Decision made by the **Development Authority**, include their valid and active business license number as part of their rental posting.

13.44 Show Homes

13.44.1 A **dwelling** may be used as a **show home** provided that all municipal infrastructure required for servicing the **development** is complete and a **Development Permit** has been issued for the **dwelling**. A **dwelling**, **show home** shall not be used for any residential purpose prior to the issuance of an Occupancy Permit.

13.45 Surveillance Suites

13.45.1 A **surveillance suite** shall only be allowed as an **accessory use** to a **principal use** or **buildings**.

13.45.2 Only one (1) **surveillance suite** shall be allowed per titled parcel.

13.45.3 A recreational vehicle shall not be used as a **surveillance suite**.

13.45.4 **Surveillance suites** shall not be used as a **principal dwelling**.

13.45.5 Where a **surveillance suite** is not part of the **principal building**, it shall adhere with the following:

a. **setbacks** shall conform to the **district** in which the **surveillance suite** is located,

b. shall be located a minimum of 2.0 m (6.5 ft) from any **buildings**, and

c. shall not be placed on, under or over a utility easement or right-of way.

13.45.6 A **surveillance suite** is no longer **permitted** when the **principal use** ceases to operate on the subject **site**.

13.46 Temporary Commercial Services

13.46.1 A **temporary commercial service**, while exempt from requiring a permit, shall:

a. be designed to be complementary in nature to the other **uses** on a **site** and must be integrated into the overall **site** design in a manner that does not create a conflict between the movements of pedestrians and motor vehicles, or conflict with adjacent land **uses**,

b. operate no more than one-hundred-eighty (180) days per calendar year, this may be calculated as consecutive days or spread over a twelve (12) month period,

c. be limited to two (2) **temporary commercial services** at one time per **site**, and

d. not be located within a residential **district**, unless on a **site** containing a **mixed use building**.

13.46.2 A seasonal **development** classified as a **temporary commercial service** may include the placement of a **temporary building** on a **site** provided that:

a. the **building** does not exceed 20.0 m^2 (215 ft^2) in area, and

b. the **building** is removed from the **site** in its entirety when service is closed for the season.

13.47 Temporary Development

13.47.1 Any **use** other than **adult services**, **community support centres**, and **cannabis** related **uses** listed in this Bylaw may be allowed as a **temporary development** in any **district** under the following conditions:

a. all **temporary development** shall meet the provisions associated with the proposed **use**, as well as any additional provisions described in this Subsection,

b. all **temporary development** shall complement the surrounding area,

c. notwithstanding *13.47.1*, **adult services** not involving erotic massage, may be considered as a **temporary accessory use** where it meets the requirements of *Subsection 13.4.2.*

13.47.2 All applications for **temporary development** shall be considered **discretionary** and shall be reviewed on a case-by-case basis in accordance with *Subsections 4.3* and *4.4*, and shall not be considered in accordance with any previously made decisions.

a. In addition to the provisions of *Subsection 4.3* and *4.4* applications for **temporary development** shall:

i. provide adequate justification for why the **use** should be considered, and

ii. specify the time period for which the **temporary development** shall be in place.

13.47.3 **Temporary development** shall not be approved for a time period exceeding one-hundred-eighty (180) consecutive days from the date of permit validity.

13.47.4 Notwithstanding *13.47.3*, an **applicant** may reapply a maximum of one (1) time for an additional one-hundred-eighty (180) day period provided the **applicant** provides justification for the extension to the satisfaction of the **Development Authority**.

13.47.5 Following the completion of either a one-hundred-eighty (180), or three-hundred-sixty (360) day period, a **site** containing a previously approved **temporary development** shall not be considered for another **temporary development**, of the same **use** or otherwise, on the same **site** for a period of ninety (90) days.

13.48 Underground Tanks

13.48.1 The installation, replacement, or removal of any underground tank shall:

a. require a **Development Permit**,

b. be referred to the **City's** Fire Services Department,

c. be registered with the Petroleum Tank Management Association of Alberta or Saskatchewan Environment and comply with the requirements of the appropriate Provincial and Federal legislation if the installation or removal includes a petroleum tank, and

d. require a reclaiming of the **site** in accordance with the Alberta *Environmental Protection and Enhancement Act* or the Saskatchewan *Environmental Management & Protection Act* and lands restored to the satisfaction of the **Development Authority** when tanks are removed.

Part 5: Landscaping Provisions

Purpose:

For the purpose of this Bylaw the following Section provides specific provisions for all **landscaping** within the **City**. It includes the provisions for all **development** types and is intended to promote the beautification of Lloydminster through **landscaping**.

Section Contents:

14. Landscaping Provisions 122

14.1 General Landscaping Provisions 122

14.2 Landscaping Plan 123

14.3 Planting Requirements 123

14. Landscaping Provisions

The provisions of this Section shall apply to new and existing **developments** as follows:

a. all new **developments** shall provide **landscaping** in accordance with this Section,

b. where it is determined that a change to an existing **development** does not significantly increase or intensify the **use**, additional **landscaping** may not be required. Such changes shall be considered by the **Development Authority** on a case-by-case basis.

14.1 General Landscaping Provisions

14.1.1 Any portion of a **site** not occupied by **buildings** shall be landscaped as part of the **development** process.

14.1.2 **On-site** pedestrian circulation, by means of sidewalks or **walkways**, shall connect with public sidewalks and **walkways**.

14.1.3 All landscaped areas shall be designed to facilitate effective surface drainage consistent with an approved **Lot** Grading Plan.

14.1.4 All landscape designs shall ensure the safety and maintainability of the **site** and its surroundings.

14.1.5 Existing natural **landscaping** shall be preserved and protected unless removal is demonstrated to be necessary to efficiently accommodate a proposed **development** and may be considered as part of the required **landscaping** if the vegetation is deemed appropriate and is properly protected during construction.

14.1.6 All plant material should conform to the standards set forth in the current edition of the Canadian Nursery Landscape Association's "*Canadian Standards for Nursery Stock*". The plant material is recommended to be hardy to Zone 2A, and the source of the plant material should be grown in Zones 2A, 2B or 3A of the *Canadian Hardiness Map (1981-2010)*. All the trees at the time of planting shall be a minimum caliper of 50 mm (2.0 inches) and a minimum **height** of 1.8 m (6.0 ft).

14.1.7 After construction completion of the approved landscape design, **applicants** shall request an inspection by the **City**.

14.1.8 **Landscaping site** inspections shall not be conducted while there is snow on the ground. Requested inspections will be conducted in the spring or when weather conditions permit.

14.1.9 **Landscaping** shall be subject to a two (2) year maintenance period beginning at the completion of the inspection described in *14.1.7* and *14.1.8*. If plant material does not survive the maintenance period, it shall be replaced with the same or other complementary species at the same size originally provided within one (1) year of the end of the initial two (2) year period.

a. Notwithstanding *14.1.9* **landscaping** of a site is a permanent obligation of a **Development Permit** and shall be installed and maintained in accordance with the approved **Landscaping** Plan beyond the initial two (2) year maintenance period.

14.1.10 **Landscaping** securities described in *Subsection 1.7* shall not be released prior to the completion of inspection regardless of the culmination date of the two (2) year maintenance period described in *14.1.9*.

14.2 Landscaping Plan

14.2.1 **Landscaping** shall be constructed and maintained in accordance with an approved **Landscaping** Plan. Any changes to an accepted plan require approval by the **Development Authority**.

14.2.2 A **Landscaping** Plan shall be prepared and submitted for all **development** other than **single-detached**, **two-unit**, and **multi-unit dwellings** containing up to four (4) units.

14.2.3 A **Landscaping** Plan for a proposed **development** must be submitted by an appropriate professional such as a landscape design technologist, a landscape architect, or an individual who, in the opinion of the **Development Authority**, has adequate proven experience in landscape design, and submitted as part of a **Development Permit** application prepared according to *Subsection 3.3* and shall include at least the following:

a. a north arrow and legend,

b. the property lines of the **site**,

c. location of all **buildings**, parking areas and vehicular and pedestrian circulation systems on the **site**,

d. all overhead, surface and underground utilities, easements, and rights-of-way,

e. the existing vegetation that will be retained,

f. the layout of berms, retaining walls, **screening**, soft surfaced landscape areas and **hard surfaced** landscape areas,

g. the location, **height** and materials of all proposed walls, fences, and **screens**,

h. common and botanical names, sizes and quantities of all proposed plant material and the types of **landscaping**.

14.3 Planting Requirements

14.3.1 In determining the planting requirements for a commercial or public service **development** the following shall apply:

a. **hard surfaced** areas of the **development** shall be included in the

calculation of the landscaped area and do not negate the requirements for plant material, and

b. the required **landscaping** area shall be calculated by combining the area of the required **front** and **rear yards** (**front yard** + **rear yard** as identified in **Figure 47: Interior Site Yard** = total required **yard**).

   i. **Developments** located on **corner lots** may meet their required **landscaping** by providing the required plantings identified in **Table 8** (**Planting Requirements**) in the **street side yard**.

Table 8: Planting Requirements

	Residential Development	**Minimum required landscaping per lot contained within the front yard**
1	Dwelling, Mobile Manufactured Home, Dwelling, Multi-unit (4 units or less), Dwelling, Single-detached, Dwelling, Two-unit	One (1) tree and one (1) shrub, or equivalent in cost, and, sodding or seeding within two (2) years of Development Permit approval
2	Dwelling, Apartment, Dwelling, Multi-unit (more than 4 units)	One (1) tree for every 45.0 m^2 (484 ft^2) of required yard, One (1) shrub for every 25.0 m^2 (269 ft^2) of required yard, and, sodding or seeding within two (2) years of Development Permit approval
	Commercial and Public Service Development	**Minimum Required Landscaping per lot**
3	All Commercial Development All Public Service Development	One (1) tree for every 45.0 m^2 (484 ft^2) of required yard, One (1) shrub for every 25.0 m^2 (269 ft^2) of required yard, sodding or seeding within two (2) years of Development Permit approval
	Industrial Development by Lot Size	**Minimum Required Landscaping per lot**
4	Up to 1.0 acre	Seven (7) trees and ten (10) shrubs
5	1.0 acres – 2.5 acres	Ten (10) trees and fourteen (14) shrubs
6	4.0 acres – 5.0 acres	Twelve (12) trees and twenty-one (21) shrubs
7	Over 5.0 acres	Eighteen (18) trees and thirty-two (32) shrubs
	Parking Lot or Structure	**Minimum Required Landscaping per lot**
8	Landscape islands	One (1) tree and two (2) shrubs 2.0 m^2 (21.5 ft^2)of landscape island per parking space, contained by a concrete curb, provided at the beginning and end of every row of spaces, provided with no more than twenty-five (25) spaces between islands

Part 6:
Parking & Loading Provisions

Purpose:

For the purpose of this Bylaw the following Section provides details on parking for all **developments**. It provides the specific provisions regarding minimum parking requirements and parking and **loading space** dimensions to ensure that each **development** has adequate parking to meet the needs of the **City**.

Section Contents:

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	15.10	Bicycle Parking	133

15. Parking and Loading Provisions

The provisions of this Section shall apply to new and existing **developments** as follows:

a. all new **developments** shall provide parking and loading in accordance with this Section,

b. a change to an existing **development** where the **development** is increased or **use** is intensified shall provide parking and loading requirements to be met in accordance with this Bylaw.

15.1 General Parking & Loading Provisions

15.1.1 All **development** applications, excluding **single-detached**, **two-unit**, and **multi-unit dwellings** with four (4) or less **dwelling units** providing off-street vehicular parking, **garage** spaces, bicycle parking, or **loading spaces**, shall include the following as part of the **Site** Plan detailed in *Subsection 3.3*.

a. **site access**,

b. number and dimensions for all parking and **loading spaces**,

c. **on-site** circulation, and

d. any other information required by the **Development Authority**.

15.1.2 **Hard surfacing** of a **site** is a permanent obligation of a **Development Permit** and shall be installed and maintained in accordance with approved **Site** Plan or **Landscaping** Plan.

15.1.3 All parking and loading areas, including driveways for all **dwelling units**, vehicle entrances and exits, landscape islands, drop-off areas, **on-site** and **off-site** traffic and pedestrian routes, and any other form of **development** associated with vehicular traffic shall:

a. align with the **City's *Municipal Development Standards (MDS)*** where applicable,

b. be landscaped in accordance with *Part 5* of this Bylaw,

c. be **hard surfaced** except where they are accessed by a non-**hard surfaced road** or **lane**, or are located in the rear of an Industrial **District**, in which case they may be gravel,

d. be clear of any obstructions,

e. clearly delineate each parking space through painting or other means,

f. provide adequate **access** to exits from individual parking spaces,

g. not be used as driveways, except for driveways in residential **developments**,

h. provide adequate lighting, in accordance with *Subsection 13.28*, directed only upon the parking area,

i. meet the off-street parking and loading requirements as detailed in **Tables**

10 (**Off-Street Parking Requirements**) and 11 (**Off-Street Loading Requirements**),

j. meet the bicycle parking requirements as detailed in Table 13 (**Bicycle Parking Requirements**), and,

k. align with the minimum dimensions detailed in Table 9 (**Parking Space Dimensions**).

15.1.4 Where Tables 10 (**Off-Street Parking Requirements**), 11 (**Off-Street Loading Requirements**) and 13 (**Bicycle Parking Requirements**) do not clearly define regulations for a particular **development**, the **Development Authority** shall use a similar **use** to determine the vehicular parking, bicycle parking and loading requirements.

15.1.5 Where a Professional Parking Study is provided, the Study shall be completed by a professional engineer and contain at least the following:

a. the amount of parking proposed by the **development** compared to the amount required, and

b. discussion rationalizing the proposed parking supply which could include the following:

i. data supporting the proposed parking based on demand for a similar **site**,

ii. assumptions and rational for non-vehicle transportation **access** to the **site**, and

iii. rational for shared parking with other **uses** on or near the proposed **site**.

15.1.6 Vehicles shall not be parked, either permanently or temporarily, on grass in any **district** and shall only be parked in an approved parking area.

15.1.7 Tandem parking shall only be **permitted** where it is located within the driveway of a residential **development**.

15.1.8 Other than in Residential **Districts**, **developments** shall minimize driveway **access** from **roads** by sharing driveways and laneways where possible.

15.1.9 Below-**grade parking structures**:

a. shall be reviewed on a case-by-case basis,

b. may extend into a required **yard**, subject to ensuring that there are no encumbrances registered on title which would prevent or be inconsistent with such extension, and

c. shall require a detailed **Landscaping** Plan, including a cross section.

15.1.10 Landscape islands intended to visually break up, define, **screen**, and generally enhance the parking area shall be provided within at-**grade parking areas or structures** provided for commercial or **mixed use buildings** with a capacity of twenty-five (25) or more vehicles and shall be installed and maintained according to the **landscaping** provisions in *Part 5* of this Bylaw.

15.1.11 Any **parking lot or structure** visible from an adjoining Residential **District** shall

have plant material **screening** installed and maintained according to *Subsection 13.24* of this Bylaw.

15.1.12 Snow storage within any **parking lot or structure** shall not interfere with sight lines or any vehicular or pedestrian **access**.

15.1.13 Snow storage that impedes a **development's** required parking spaces may, at the discretion of the **Development Authority**, be required to be moved **off-site**.

15.2 Barrier-Free Parking

15.2.1 The requirements for barrier-free parking and loading spaces, including but not limited to the number required, design, and placement shall conform to the requirements of the *Barrier-Free Design Guidelines of the Alberta Building Code* as amended and shall be included as part of and not in addition to, the applicable minimum parking requirement.

15.2.2 Barrier-free parking spaces shall be located as close as possible to a barrier-free entrance.

15.2.3 Each barrier-free parking space shall be marked with a symbol and a **sign** consisting of:

a. the International Symbol of Access and include the message "Permit Required",

b. the symbol shall be white on a blue background and shall have a minimum dimension of 0.46 m (1.5 ft) by 0.61 m (2.0 ft), and

c. the **sign** shall be mounted at a **height** of at least 1.2 m (4.0 ft) from the pavement or sidewalk to the bottom of the **sign**.

15.3 Location of Parking Facilities

15.3.1 Required or additional parking, except in the case of residential **developments**, may be provided **off-site** provided it is not further than 120 m from the **site** via the shortest public pedestrian route measured from the nearest point of the **off-site** parking area to the nearest point of the **site**.

15.3.2 Residential **developments** shall provide the required parking spaces wholly on the same **site** as the **principal building**.

15.3.3 **Developments** providing **off-site** parking shall be considered **discretionary** and shall identify **off-site** spaces being used for that **development** or **use** using appropriate **signage** designed in accordance with *Part 7* of this Bylaw.

a. Where a **development** provides **off-site** parking, the **Development Authority** may, as a condition of a **Development Permit**, require the **applicant** to register a caveat on title stating that the **development** shall continue to provide adequate **off-site** parking.

15.3.4 All parking areas shall be wholly located within all **lot lines** of a **site**.

15.4 Parking Space & Drive Aisle Dimensions

15.4.1 Each **off-street** parking space and drive aisle shall conform to the general provisions of this Section and be built according to the dimensions provided in Table 9 (**Parking Space Dimensions**) and shown in Figure 8 (**Parking Space & Drive Aisle Dimensions**) and shall:

a. have a minimum vertical clearance of 2.0 m (6.5 ft), and

b. shall not provide any spaces shorter than 5.44 m (17.8 ft), other than the 15% described in *15.4.2* below.

15.4.2 Up to 15% of the required parking spaces, excluding parallel spaces, may be of a length shorter than that required within Table 9 (**Parking Space Dimensions**) and Figure 8 (**Parking Space & Drive Aisle Dimensions**), to a minimum of 4.6 m (15.0 ft).

15.4.3 Up to 100% of the required parking spaces may be a length shorter than that required under Table 9 **(Parking Space Dimensions**) and Figure 8 (**Parking Space & Drive Aisle Dimensions**), should the **applicant** justify the reduction, to the satisfaction of the **Development Authority**, through the completion of a Parking Study or similar document prepared by a qualified professional.

15.4.4 Where a parking space is located with **access** directly off a **lane**, the required width of the drive aisle may be reduced to match the width of the **lane** provided the parking space is wholly **on-site**.

15.4.5 Where a parking space is limited by a wall, column, fence, or other form of **screening**, the unobstructed width from face to face of the obstruction shall be:

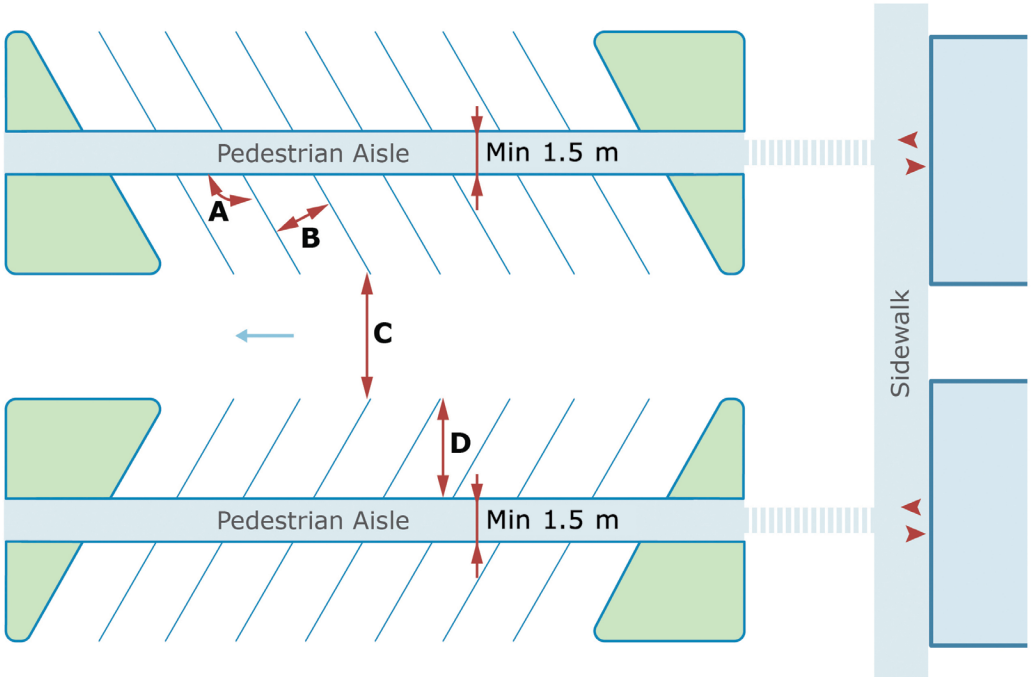
a. 2.75 m (9.0 ft) if the limitation occurs on one (1) side of the space. If, in this case, a **building** door opens into the parking space on its long side, the unobstructed width shall be 3.0 m (10.0 ft),

b. 3.0 m (10.0 ft) if the limitation occurs on both sides of the space. If, in this case, a **building** door opens into the parking space on its long side, the unobstructed width shall be 3.3 m (11.0 ft).

Table 9: Parking Space Dimensions

Parking Space Angle (degrees) 'A'	Minimum Parking Space Width 'B'	Aisle Width, Including Access Ramps (doubled for 2-way aisles) 'C'	Minimum Parking Space Depth 'D'
0° (parallel)	2.75 m (9.0 ft)	3.5 m (11.5 ft)	5.5 m (18.0 ft) for end spaces 7.0 m (23.0 ft) for inner spaces
45°	2.75 m (9.0 ft)	4.0 m (13.0 ft)	6.1 m (20.0 ft)
60°	2.75 m (9.0 ft)	5.5 m (18.0 ft)	6.4 m (21.0 ft)
90°	2.75 m (9.0 ft)	3.5 m (11.5 ft)	6.4 m (21.0 ft)

Figure 8: Parking & Drive Aisle Dimensions



15.5 Pedestrian Aisles

15.5.1 All **off-street** parking in the Business Transition (BT) and Commercial **Districts** shall provide pedestrian aisles with a minimum width of 1.5 m (5.0 ft) connecting parking areas to **abutting** sidewalks and commercial **developments**.

15.5.2 **On-site** pedestrian circulation, by means of sidewalks, **walkways**, or paths, shall connect with public sidewalks.

15.6 Parking Requirements

15.6.1 All off-street parking shall be provided in accordance with Table 10 (**Off-Street Parking Requirements**).

15.6.2 In addition to the reductions described in Table 10 (**Off-Street Parking Requirements**) parking reductions may be considered where they are justified through the completion of a Professional Parking Study prepared in accordance with *Subsection 15.1.5*.

15.6.3 For all approved reductions described in Table 10 (**Off-Street Parking Requirements**) the **Development Authority** may require a Professional Parking Study to justify the reduction.

15.6.4 Notwithstanding *15.6.1*, parking requirements may be reduced in conjunction with an approved **variance** application submitted in accordance with *Subsection 2.7*.

15.6.5 Parking spaces provided for any motor vehicle, regardless of its fuel source, shall be counted towards meeting a **development's** parking requirements.

Table 10: Off-Street Parking Requirements		
	Use of Building or Site	**Minimum Number of Parking Spaces Required** (GFA = Gross Floor Area)
Residential Uses		
1	Dwelling, Mobile Manufactured Home, Dwelling, Single-detached, Dwelling, Two-unit, Live/Work Unit	Two (2) parking spaces, including garage spaces, per dwelling unit
2	Dwelling, Multi-unit	Two (2) parking spaces, including garage spaces, per dwelling unit, plus One (1) visitor parking space per five (5) dwelling units, if less than five (5) units are provided no guest spaces shall be required
3	Dwelling, Additional Unit (ADU), Dwelling, Secondary Suite	One (1) parking space per two (2) bedrooms with a minimum of 1 space, in addition to what is required for the primary dwelling
4	Dwelling, Apartment	One (1) parking space per dwelling unit containing one (1) bedroom or less One and one half (1.5) parking spaces per dwelling unit containing two (2) bedrooms or more, plus One (1) visitor parking space per five (5) dwelling units, if less than five (5) units are provided no guest spaces shall be required
5	Dwelling, Supportive Housing	Shall meet the requirements of the residential character of the dwelling unless a Professional Parking Study is provided to indicate otherwise. For example, if supportive housing takes the form of an apartment dwelling, it shall be required to provide parking in accordance with row four (4) of this Table
6	Mixed Use Building	Residential component in accordance with apartment dwellings, plus commercial component in accordance with the appropriate use detailed in this Table
7	Short Term Rentals	One (1) parking space per guest room in addition to the requirements of the dwelling type where the owner of the short term rental resides at the dwelling Provided according to the requirements of the dwelling type where the owner of the short term rental does not reside in the dwelling

Table 10: Off-Street Parking Requirements		
	Use of Building or Site	**Minimum Number of Parking Spaces Required** (GFA = Gross Floor Area)
Commercial and Public Service Uses		
8	All commercial and public service uses unless otherwise specified in this Table	Two and one half (2.5) parking spaces per 100 m^2 of GFA where the total GFA is 2,000 m^2 or less Three and one half (3.5) parking spaces per 100 m^2 of GFA where the total GFA is between 2,000 and 9,000 m^2 Four (4.0) parking spaces per 100 m^2 of GFA where the total GFA is greater than 9,000 m^2 All developments shall provide a minimum of three (3) parking spaces regardless of GFA
9	Automotive and Equipment Repair Shop	Two (2) parking spaces per vehicle bay or one and one half (1.5) spaces per 100 m^2 of GFA if no vehicle bays are provided
10	Car Wash	One quarter (0.25) parking spaces per vehicle wash bay with a minimum of two (2) spaces
11	Drinking or Eating Establishment, Drinking Establishment, Nightclub	One (1) parking space per 12 m^2 (129 ft^2) of building GFA
12	Education Services, Elementary and Middle Schools	Three (3) parking spaces per classroom
13	Health Services	Four (4) parking spaces per 100 m^2 of building GFA
14	Hotel	One and three twentieths (1.15) parking spaces per guest room
15	Education Services, high school	Four (4) parking spaces per 100 m^2 of building GFA, including auditoriums
16	Casino, Education Services, post secondary, Entertainment Centre, Exhibition and Convention Facilities, Developments located within the Municipal Airport (MA) District	Professional Parking Study required
Industrial Uses		
17	All industrial uses unless otherwise specified in this Table	One and one half (1.5) parking spaces per 100m^2 of building GFA
18	Storage facility, indoor or outdoor	One and one half (1.5) parking spaces per 100 customer units
Allowed Parking Reductions		
19	Commercial Downtown District – excluding all residential developments	Up to 100% of the required parking based on use may be reduced
20	Developments with shared customers and similar hours utilizing shared parking spaces	Up to 10% of the required parking based on use may be reduced
21	Developments with separate hours utilizing shared parking spaces	Up to 20% of the required parking based on use may be reduced

15.7 Loading Requirements

15.7.1 Off-street **loading spaces** shall be provided in accordance with **Table 11** (**Off-Street Loading Requirements**).

Table 11: Off-Street Loading Requirements

Use of Building or Site	Minimum Number of Loading Spaces Required
All uses in Commercial and Industrial Districts	One (1) space for each loading door, with a minimum of one (1) on-site loading space provided per site
Dwelling, Apartment (twenty (20) or more units)	One (1) on-site loading space

15.8 Location of Loading Spaces

15.8.1 All **loading spaces** shall:

a. be located wholly **on-site**,

b. provide **access** such that no backing or turning movements of vehicles going to or from the **site** causes interference with traffic on the adjoining or **abutting roads**, **lanes**, sidewalks or boulevards,

c. be located at the rear or the sides of the **principal building**,

d. be **screened** from view from any **abutting sites** or **roads** in accordance with *Subsection 13.24*,

e. not impede the safe and efficient flow of traffic and pedestrian movement, and shall,

f. minimize impacts on **abutting** land **uses**.

15.9 Loading Space Dimensions

15.9.1 Each **off-street loading space** shall be built in accordance with **Table 12** (**Loading Space Dimensions**).

Table 12: Loading Space Dimensions

Minimum Area	Minimum Width	Minimum Overhead Clearance
28.0 m^2 (301.4 ft^2)	3.0 m (10.0 ft)	3.7 m (12.0 ft)

15.10 Bicycle Parking

15.10.1 All bicycle parking shall be provided in accordance with **Table 13** (**Bicycle Parking Requirements**).

15.10.2 Bicycle parking shall:

a. be separated from vehicle parking by a physical barrier or a minimum 1.52 m (5.0 ft) of open space,

b. not interfere with pedestrian accessibility (leaving a minimum of 1.8 m (6.0 ft) clear width for accessibility),

c. be anchored securely to the ground, and

d. may be allowed on public rights-of-way at the discretion of the **Development Authority** if this places bicycle parking at a more publicly observable location.

Table 13: Bicycle Parking Requirements	
Dwelling, Apartment, Dwelling, Multi-unit (over 4 units), Mixed Use Building	2% of the number of vehicle parking spaces with a minimum of 5 required
Education Services	10% of the designed student capacity

Part 7:
Sign Provisions

Purpose:

For the purpose of this Bylaw the following Section provides specific provisions for **signs** within the **City**. These include which areas of the **City** specific **signs** may be erected, size requirements and the steps for properly permitting **signs**. These provisions are intended to provide clear and simple provisions for all **sign** types within the **City** for which all **sign development** shall follow.

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16. Sign Provisions

16.1 Development Permits for Signs

16.1.1 Except as otherwise stated in this Bylaw, the enlargement, relocation, erection, construction or alteration of a **sign** requires a **Development Permit**.

16.2 Signs not Requiring a Development Permit

16.2.1 A **Development Permit** is not required for:

a. routine maintenance of **signs** including the cleaning, painting, or repair,

b. replacement of any existing approved **sign** provided it is on the same base and the **sign height** or **sign area** is not increased,

c. **signs** described in Table 14 (**Signs not Requiring a Development Permit**), provided that the **sign** complies with all applicable provisions of this Bylaw, and does not require a **variance**.

Table 14: Signs not Requiring a Development Permit

	Sign Type	Description/Provisions
1	**A-Board Signs**	One (1) sign per business per façade on a site provided that does not exceed 1.0 m² (10.7 ft²) in area per side, not erected for a period exceeding the operating hours of the business and does not impede pedestrian or vehicle circulation
2	**Awning or Canopy Signs**	A non-illuminated sign that forms part of, or is attached to an existing approved awning or canopy on a building A non-illuminated sign that forms part of, or is attached to an existing approved awning or canopy on a building Awning or canopy signs shall be wholly contained within the awning or canopy and shall not extend above or project beyond it
3	**Banner Signs**	When flush mounted to a building or fence and does not extend above the eave line on the building or fence where it is attached. If the banner sign is attached to a fence, the top edge of the sign shall coincide with or be below the top edge of the fence The banner sign shall not include digital copy/electronic messaging and the area shall not exceed 40% of the building façade or fence. Where the banner sign is attached to a building or structure, such as an archway, the sign shall have a minimum clearance of 2.44 m (8.0 ft), measured from the ground to the bottom edge of the sign Banner signs may only display third party advertising and community events on fences in parks and playing fields and are only permitted to remain onsite for a period not exceeding sixty (60) consecutive days, after which time the banner sign shall be removed and not replaced on the same site for a minimum of thirty (30) days

Table 14: Signs not Requiring a Development Permit		
	Sign Type	**Description/Provisions**
4	**Community Event Signs**	Signs on City owned property, excluding road right-of-way, when the sign copy is used to advertise community events or non-profit groups
5	**Contracting Signs**	Temporary signs of contractors relating to construction work in progress on the land on which the sign is erected, provided that the signs are wholly situated upon the site of the structure or the land use to which it refers is limited to a maximum of 1.0 m^2 (10.7 ft^2) in size; are limited to one (1) per contractor; and all signs are removed prior to occupancy of the building
6	**Development Marketing Signs**	Temporary sign located within a property, neighbourhood or industrial park being developed which does not exceed 9.25 m^2 (100 ft^2) in sign copy area with height from grade not exceeding 2.44 m (8.0 ft)
7	**Directional Signs**	Non-illuminated freestanding signs on private land that do not exceed 0.1 m^2 (1.0 ft^2) in area that are designed to direct vehicle and pedestrian movement within a site. (ex: curb side pickup, loading areas, no parking areas)
8	**Election Signs**	Election candidate sign displayed by or on behalf of a candidate participating in any Federal, Provincial or Municipal election. Such signs shall not exceed 1.5 m^2 (16.15 ft^2) in area and are only allowed to be displayed for a maximum of twenty-eight (28) days prior to an election, and must be removed within two (2) days after the election
9	**Fence Signs**	Sign flush mounted to a fence which does not extend above the fence where it is attached, provided that it does not contain digital copy/ electronic messaging, and the area of all fence signs does not exceed 40% of fence. Fence signs may display third party advertising and community events on fences in parks and playing fields
10	**Flags**	Flags or emblems that do not exceed 2.0 m^2 (21.5 ft^2) in area with a height no greater than 12.0 m (39.0 ft) or the maximum height of a principal building in that district (whichever is less)
11	**Government Signs**	A sign erected by or at the direction of the Municipal, Provincial or Federal Governments to give information to the public, regulate traffic or safety or identify public buildings
12	**Hanging Signs**	Each hanging sign, when installed vertically shall be spaced a minimum 2.0 m (6.5 ft) from any other vertically hanging sign. Hanging signs that are installed horizontally shall be spaced a minimum of 0.15 m (0.5 ft) from other horizontally installed signs All hanging signs shall have a minimum 2.44 m (8.0 ft) clearance measured from the ground to the bottom edge of the sign Maximum sign area for a hanging sign shall be 1.5 m^2 (16.15 ft^2)
13	**Identification Signs**	Sign attached to a building not exceeding 0.1 m^2 (1.0 ft^2) in area which identifies a name or address in a Residential District, or a sign attached to a building not exceeding 0.5 m^2 (5.4 ft^2) in area which identifies a name or address in a non-residential district or a multi-family development over four (4) units

Table 14: Signs not Requiring a Development Permit		
	Sign Type	**Description/Provisions**
14	**Inflatable Signs**	One (1) temporary inflatable sign per commercial or industrial site, located wholly on private land, provided that the sign is not located on the roof of a building, and it is tethered or anchored to the ground. Temporary inflatable signs are only permitted to remain onsite for a period not exceeding fourteen (14) consecutive days, after which time the inflatable sign shall be removed and not replaced on the same site for a minimum of thirty (30) days
15	**Menu Boards**	A maximum of two (2) menu boards per queuing aisle per site for drive-through services. Menu boards do not have a separation requirement and may include illumination and digital copy/electronic messaging but shall follow the regulations pertaining to such within this Bylaw
16	**Murals**	An artistic design applied to or attached to a building or a wall
17	**Neighbourhood Signs**	A neighbourhood sign only if it is described within a signed Development Agreement
18	**Real Estate Signs**	A maximum of two (2) non-illuminated real estate signs per site, which shall not exceed 0.60 m^2 (6.5 ft^2) in area in Residential Districts and 2.0 m^2 (21.5 ft^2) in area for Commercial and Industrial Districts
19	**Window Signs**	Signs located within a window intended to be viewed from outside the building, as long as they are not greater than 50% of the window in which it is placed. Window signs may be illuminated but shall not display flashing or intermittent light

16.3 Making an Application

16.3.1 **Applicants** wanting to obtain a **Development Permit** for a **sign** shall supply to the **Development Authority** the following, in addition to the requirements of *Section 3* and *Section 4* of this Bylaw:

a. a completed application form for a **sign** as established by the **City**,

b. all dimensions of the **sign structure** including the **height** and projection of the **sign** attached to the **building**,

c. details of **sign** design along with total overall area of the **sign** itself and the **sign copy area**,

d. details of **sign illumination** or digital media (if any),

e. type of construction and finishing,

f. method of supporting, attaching, or affixing the **sign**,

g. **Site** Plan showing **sign** location, distances to other **signs**, property boundaries and **buildings**, and

h. any additional information as deemed necessary by the **Development Authority** to evaluate the **Development Permit** application, including but not limited to photographs of the proposed and adjacent sites as well as conceptual rendering of the proposed sign.

16.4 General Sign Provisions

16.4.1 **Sign** type must be listed as either a **permitted** or **discretionary use** in the applicable **district** as indicated in **Table 15** (**Signs Allowed by District**) and conform to all applicable **sign** regulations in order to be considered unless listed otherwise in **Table 14** (**Signs not Requiring a Development Permit**).

16.4.2 **Signs** shall:

a. be integrated into the overall **site** design and be complementary to exterior finishes of the **principal building**,

b. be deemed compatible with the character, scale, and form of the **district** in which it is located,

c. be placed so they do not obstruct or impair vision or hinder or interfere with pedestrian or vehicular traffic or traffic devices,

d. not contain or incorporate flashing lights,

e. not reduce or obstruct parking or **loading spaces** that are required pursuant to this Bylaw, and

f. not contain advertising on or around the base of the **structure** that is visible from the street.

16.4.3 Other than **portable signs** and **election signs**, no item shall be placed on a **City** right-of-way or a public **road** in accordance with the **City's** *Community Standards Bylaw* as amended.

16.4.4 If trees, shrubbery or other **landscaping** is removed in order to place a **sign**, the removed **landscaping** shall be replaced with similar **landscaping** elsewhere on the **site** to the satisfaction of the **Development Authority**.

16.4.5 Except as provided in the **home based business**, **major** provisions (*Subsection 13.26*) the maximum number of **temporary signs** and **permanent signs** per **site**, excluding **signs** listed in *Subsection 16.2*, shall be as follows:

a. **multi-unit dwellings** (over eight (8) units): one (1) **permanent freestanding** sign per street **access**,

b. non-residential **developments**: one (1) **permanent sign** for every 30.0 m (98.0 ft) of **frontage** or fraction thereof and one (1) **portable sign** for every 50.0 m (164 ft) of **frontage** or fraction thereof. **Portable signs** on a **site** shall also be a minimum of 12.2 m (40.0 ft) from existing **freestanding signs**.

16.4.6 When determining an application for a **sign**, the **Development Authority** shall consider the following, in addition to any other relevant planning considerations:

a. the nature and design of the proposed **sign**,

b. the impacts of the proposed **sign** on adjacent and surrounding properties and the community, and

c. the number and type of existing or proposed **signs** on the **site**.

16.4.7 No **signs** shall be attached to or placed on a vehicle, trailer, or other similar implement with the intent of acting as a **portable sign** for **temporary** or permanent purposes. Vehicle wraps and decals are permitted.

16.4.8 Notwithstanding *16.4.7* **signs** may be placed on a vehicle, trailer or other similar implement for transportation purposes.

16.5 Sign Provisions by Type

Notwithstanding **signs** listed as exempt in Table 14 (**Signs Not Requiring a Development Permit**), the **Development Authority** shall review **Development Permit** application as related to **signs** in accordance with Table 15 (**Signs Allowed by District**).

Table 15: Signs Allowed by District

Sign Type	Land Use Districts														
	LDR	MDR & HDR	RMH	DTN	CC	NC	GC	RE	BT	MI	HI	CS & PU	MA	T	DC1 & DC2
Billboard	X	X	X	X	D	X	X	D	P	P	P	D	P	D	X
Fascia	X	P	P	P	P	P	P	P	P	P	P	P	P	D	P
Freestanding	P	P	P	P	P	P	P	P	P	P	P	P	P	X	P
Portable	X	D*	X	P	D	D	P	P	P	P	P	D	D	P	P
Projecting	X	X	X	P	P	P	P	P	P	P	P	P	P	X	P
Roof	X	X	X	D	D	D	D	X	D	D	D	X	X	X	X

P = Permitted D = Discretionary X = Not Allowed
* shall only be considered on sites containing a mixed use building.

16.5.1 **Billboard Signs**

a. Shall be a minimum of 150 m from any other **billboard** or **freestanding sign** facing the same oncoming traffic where there are multiple lanes of traffic traveling in a single direction.

b. Shall be a minimum 100 m from a Residential **District**.

c. Shall have a maximum **sign area** of 30.0 m^2 (98.5 ft^2) per **sign** face.

d. Shall not exceed a maximum **height** of 10.0 m (32.0 ft) from **grade** to top of **sign**.

e. Shall not exceed 10.0 m (32.0 ft) in length.

f. Shall be placed a minimum distance of 3.0 m (10.0 ft) from the property line and be placed at an angle of either 60 or 90 degrees.

g. May display **third party advertising**.

16.5.2 **Fascia Signs**

a. Shall be securely attached to a **building** or other **structure**, including a fence.

b. Shall not extend above the eave line of any **building** elevation, if the **sign** is attached to a **building**.

c. May be illuminated but shall not display flashing or intermittent light, if the **sign** is attached to the **principal building**.

d. Shall not exceed 40% of the **building façade**.

16.5.3 **Freestanding Signs**

a. Shall be at **road** or sidewalk **grade**.

b. Shall be limited to advertising businesses or **buildings** on **site**, or in the case of a **neighborhood sign**, the neighbourhood within their **site**/vicinity.

c. Shall not include **third party advertising** except where it is for non-profit agencies or community events.

d. **Height**, area, and number of **signs** shall be determined based on the **district** according to Table 16 (**Freestanding Sign Provisions**). If the **district** is not listed, **freestanding signs** are not a **permitted** or **discretionary use** in that **district**.

Table 16: Freestanding Sign Provisions

District	Maximum Height	Maximum Area	Maximum # of Freestanding Signs per Site
LDR, MDR & RMH (developments under eight (8) units)	5.0 m (16.0 ft)	10.0 m^2 (107.0 ft^2)	One (1) per road entrance to community
MDR & HDR (developments over eight (8) units)	5.0 m (16.0 ft)	6.0 m^2 (64.5 ft^2)	One (1) per site
DTN	10.0 m (32.0 ft)	10.0 m^2 (107.0 ft^2)	One (1) per site
CC **GC** **BT** **MI** **HI** **DC1** **DC2**	10.0 m (32.0 ft)	17.0 m^2 (183.0 ft^2)	One (1) per 30.0 m (98.0 ft) on same site and minimum 15.0 m (49.0 ft) from a freestanding sign on an adjacent site
NC	10.0 m (32.0 ft)	10.0 m^2 (107.0 ft^2)	One (1) per site
CS	10.0 m (32.0 ft)	6.0 m^2 (64.5 ft^2)	One (1) per site
PU	10.0 m (32.0 ft)	17.0 m^2 (183.0 ft^2)	One (1) per site
RE	10.0 m (32.0 ft)	17.0 m^2 (183.0 ft^2)	One (1) per site

Table 16: Freestanding Sign Provisions			
District	**Maximum Height**	**Maximum Area**	**Maximum # of Freestanding Signs per Site**
MA	10.0 m (32.0 ft)	17.0 m^2 (183.0 ft^2)	One (1) per site
T	5.0 m (16.0 ft)	6.0 m^2 (64.5 ft^2)	One (1) per site

16.5.4 **Portable Signs**

a. May receive a permit approved for a period not exceeding the following:
   i. thirty (30) consecutive days,
   ii. three hundred and sixty-five (365) consecutive days, or
   iii. five (5) consecutive years.

b. **Height**, **area**, and number of **signs** shall be determined based on the **district** according to Table 15 (**Signs Allowed by District**). If the **district** is not listed, **portable signs** are not allowed in that **district**.

c. Shall:
   i. be wholly located upon the **site** indicated in the approved application,
   ii. be placed directly on the ground,
   iii. not be fastened to a foundation, permanent or otherwise, other than what is necessary for safe securing of the **sign**,
   iv. contact *Utility Safety Partners* for **signs** placed on properties in Alberta, or *1st Call* for properties in Saskatchewan to locate utility and service locations prior to placing any stakes or other fastening instrument into the ground,
   v. not be placed on any privately owned **easement** or right-of-way,
   vi. be maintained in good condition, and
   vii. have the non-transferable permit approval system issued by the **Development Authority** attached in an easily visible location.

d. Approved for a period of thirty (30) days shall be considered as a **permitted use** in every **district** except where they are designated as 'Not Allowed' in Table 15 (**Signs Allowed by District**).

e. Placed on or over an **easement** or right-of-way registered in the name of the City, excluding **City road** rights-of-way, shall:
   i. be considered according to the same provisions as any other **portable sign** placed on private property,
   ii. meet all applicable requirements of this Subsection, an
   iii. be responsible for any damage resulting from the installation of the **sign** or damage that may occur through the necessary accessing of the **easement** or right-of-way in accordance with *Subsection 13.21.3*.

f. Placed on a **City** right-of-way or on **City** owned property shall obtain **landowner** authorization in accordance with *Subsection 13.34*. Such authorization shall only be granted by the City Manager or their authorized designate.

g. Placed on **City** owned property, excluding rights-of-way, shall be considered according to the same provisions as **portable signs** placed on private property, and shall meet all requirements of this Subsection.

h. Placed on **City road** rights-of-way shall:

i. only receive permits approved for a period of thirty (30) consecutive days,

ii. be removed within twenty-four (24) hours of the expiration of their approved permit,

iii. not be considered for any extension or immediate renewal prior to the **sign** being removed,

iv. be a minimum of 50.0 m (164 ft) or 200 m (656 ft) from any other **portable sign** in accordance with the **Road Right-of-Way Portable Sign Approval Map** (**Map 4**),

v. the minimum separation distances described in *iv* shall apply to **portable signs** regardless of the side of the **road** they are located on,

vi. as a condition of a **Development Permit** application, require the **applicant** to maintain the **sign** and the immediate surrounding area, including grass length, and

vii. only be placed in the areas approved in the **Road Right-of-Way Portable Sign Approval Map** (**Map 4**).

Table 17: Portable Sign Provisions

District	Maximum Height	Maximum Area	Maximum # of Portable Signs per Site - Interior Lot	Maximum # of Portable Signs per Site - Corner Lot
MDR & HDR (Only on sites containing a mixed use building) **NC** **DTN**	3.0 m (10.0 ft)	5.0 m^2 (54.0 ft^2) (per side)	One (1) portable sign per site provided it is a minimum of 12.2 m (40.0 ft) from existing freestanding signs	One (1) portable sign per site provided it is a minimum of 12.2 m (40.0 ft) from existing freestanding signs

Table 17: Portable Sign Provisions

District	Maximum Height	Maximum Area	Maximum # of Portable Signs per Site - Interior Lot	Maximum # of Portable Signs per Site - Corner Lot
CC **GC** **RE** **BT** **MI** **HI** **CS** **PU** **MA** **T** **DC1** **DC2**	3.0 m (10.0 ft)	5.0 m^2 (54.0 ft^2) (per side)	One (1) portable sign per site with a width 50.0 m (164.0 ft) or less provided that the portable sign is a minimum 6.1 m (20.0 ft) from an existing freestanding sign Two (2) portable signs per site are permitted on sites greater than 50.0 m (164.0 ft), provided that the portable signs are 30.0 m (98.0 ft) from each other and a minimum of 6.1 m (20.0 ft) from existing freestanding signs	Two (2) portable signs per site with a width of 50.0 m (164.0 ft) or less provided that there is only one (1) sign on each frontage and the portable sign is a minimum 6.1 m (20.0 ft) from existing freestanding signs Two (2) portable signs per frontage (4 total) may be permitted on sites where each frontage is greater than 50.0 m (164.0 ft), (2 on each frontage) provided that the portable signs are 30.0 m (98.0 ft) from each other and a minimum of 6.1 m (20.0 ft) from existing freestanding signs Notwithstanding the above, a total of three (3) portable signs may be permitted where one frontage of a corner lot is greater than 50.0 m (164.0 ft) and one is not, provided that the two (2) portable signs are on the frontage over 50.0 m (164.0 ft) and all signs on site are a minimum of 30.0 m (98.0 ft) from each other and 6.1 m (20.0 ft) from existing freestanding signs

16.5.5 **Projecting Signs**

a. Shall be spaced a minimum of 2.0 m (6.5 ft) from any other **projecting sign**.

b. Shall have a maximum **sign area** per side of 5.0 m^2 (54.0 ft^2)

c. Shall not project more than 1.5 m (4.9 ft) above the eave line or the roofline, measured from the top of the **sign**.

d. Shall have a minimum clearance, measured from the ground to the bottom

edge of the **projecting sign**, shall be 2.44 m (8.0 ft).

e. Shall architecturally integrate visible means of support within **building** upon which they are located to the satisfaction of the **Development Authority**.

f. Shall not project more than 2.0 m (65.0 ft) from the **building** face.

16.5.6 **Roof Signs**

a. Shall only be considered when there is no opportunity for a **freestanding** or **fascia sign** or where a **sign** would not be visible from the street.

b. Shall not contain **third party advertising**.

c. Shall not contain **digital copy** or electronic messaging.

d. Shall only provide **illumination** in accordance with *Subsection 16.7*.

e. Shall not protrude beyond the eaves or parapet of the roof of the **building** on which it is located.

f. Shall be constructed so that it appears as an architectural feature of the **building** and no supporting **structure** shall be visible unless deemed acceptable to the **Development Authority**.

g. **Height**, **area**, and number of **signs** shall be determined based on the **district** according to **Table 15** (**Signs Allowed by District**). If the **district** is not listed, **roof signs** are not a **permitted** or **discretionary use** in that **district**.

Table 18: Roof Sign Provisions

District	Sign Height	Sign Area	# of Roof Signs Per Site
DTN **CC** **NC** **GC** **BT**	3.0 m (10.0 ft) or max height in the district, whichever is lower	8.0 m^2 (86.0 ft^2)	One (1)
MI **HI**	5.0 m (16.5 ft) or max height in the district, whichever is lower	10.0 m^2 (107.6 ft^2)	One (1)

16.6 Sign Control & Maintenance

16.5.1 The owner of a **sign** shall comply with the provisions of this Bylaw and shall not deviate from the approved plan, unless such deviation is approved, in writing by the **Development Authority**.

16.6.2 The owner of a **sign** shall maintain the **sign** in a proper state of repair and shall:

a. ensure that all structural members, guy wires or other methods of support are properly attached to the **sign**, **building** or **structure**,

b. ensure that any **sign** that no longer advertises a genuine business or service

shall be removed by the **landowner** or replaced with a blank panel until such time a new **sign** or panel is required, **portable signs** shall not remain in place unless they contain advertising,

c. ensure that **signs** remain in a proper state of repair, meaning no portion of a **sign**, its supports, electrical system, anchorage, or **landscaping** around the perimeter of the **sign** becomes **unsightly**, dilapidated, or unsafe, and

d. where the **Development Authority** deems a **sign** dilapidated, unsafe, irrelevant, **unsightly**, defaced, damaged, or destroyed the **sign** owner must:

i. immediately repair the **sign** to its original condition,

ii. replace it with a new **sign** that complies with any applicable **Development Permit** or the rules of this Bylaw where a **Development Permit** is not required, or

iii. remove the **sign**.

16.6.3 Should the **sign** owner not comply with the provisions of this Section, the **Development Authority** may commence removal and Enforcement measures as per *Subsection 16.9* of this Bylaw.

16.7 Sign Illumination

16.7.1 **Illumination** of **signs** shall be considered by the **Development Authority** according to the merits of each individual application. The **Development Authority** may approve a **Development Permit** for an illuminated **sign** provided that:

a. the **sign** conforms to all other provisions of this Bylaw,

b. there is no strobe, animator, revolving beacon or flashing lights that resemble emergency vehicles,

c. there are no exposed bulbs or lamps on the exterior surface of the **sign**,

d. the source of light is directed in such a manner that it is not visible from a **road**, residential related **uses**, or Residential **Districts**, and

d. the maximum lumens produced are consistent with outdoor lighting guidelines contained in *Subsection 13.28*.

16.7.2 The **Development Authority** may require **sign** lumens be reduced should the intensity or brightness of the **sign** create a **nuisance** for occupants of surrounding **uses** and properties or be identified as a traffic hazard for motorists or pedestrians.

16.7.3 When determining an application for an illuminated **sign**, the **Development Authority** shall consider the following, in addition to any other relevant planning considerations:

a. the total amount of existing or proposed light on the property,

b. the lighting provisions detailed in *Subsection 13.28*,

c. the total number of **signs** proposed on the property,

d. the number of existing and proposed **signs** per **building**, and

e. the number of existing and proposed **signs** per **building** face.

16.8 Digital Copy/Electronic Messaging

16.8.1 Unless otherwise stated in this Bylaw, **digital copy/electronic messaging** shall only be **permitted** on **freestanding signs** and **billboard signs** which can be incorporated into any or all of the allowable **sign copy area** as prescribed by this Bylaw and shall conform to the following:

a. **copy** shall be static and remain in place for a minimum of six (6) seconds before switching to the next **copy**,

b. transitions between each **digital copy/electronic messaging** shall be instantaneous and not involve any visible effects, including but not limited to action, motion, fading in or out, dissolving, blinking, intermittent or flashing lights, or the illusion of such effects,

c. **illumination** of the **digital copy/electronic messaging** shall be reviewed against and adhere to *Subsection 16.7*,

d. the electrical power supply for **digital copy/electronic messaging** shall be provided underground, unless solar powered,

e. **digital copy/electronic messaging** on **freestanding signs** shall not contain **third party advertising** unless it is a community event or not for profit,

f. **digital copy/electronic messaging** on **billboard signs** may display **third party advertising**,

g. if any component of the **sign** fails or malfunctions in any way, the **sign** owner shall ensure that the **sign** is turned off until all components are fixed and operating as required.

16.9 Sign Enforcement

16.9.1 **General Sign Enforcement**

a. Any **sign** located on any property in the **City's** control or management without **City** approval may be removed and impounded immediately, and without notice, by the **Development Authority** at the sole expense of the **sign** owner.

b. The **Development Authority** shall immediately remove or direct the removal of any **sign**, at the sole expense of the owner which:

i. has been placed without a permit,

ii. have been placed in contravention of an approved **Development Permit**,

iii. has become **unsightly**,

iv. is deemed to be unsafe to the general public or in a state of disrepair that constitutes a hazard,

v. obstructs the views of any portion of a traffic control signal, or

vi. in the opinion of the **Development Authority** has been abandoned.

c. All associated costs for the removal and or storage of any **sign** shall be the responsibility of the **sign** owner or **landowner** of the **lot**/parcel on which the **sign** was located.

d. All **signs** require **landowner** approval and may be removed without notice if it is not obtained.

16.9.2 **Portable Sign Enforcement**

a. Enforcement of **portable signs** will be conducted in accordance with **Table 19** (**Portable Sign Enforcement**).

b. **Portable sign** offenses are calculated based on the information documented by the **Development Authority** for previous offenses of the person or entity to whom the permit was issued.

c. All associated costs for the removal and storage of any **sign** shall be the responsibility of the **sign** owner or **landowner** of the lot or parcel on which the **sign** was located.

Table 19: Portable Sign Enforcement

First offense	The Development Authority shall provide the offending sign owner and landowner Notice of the Contravention and provide three (3) days for the Contravention to be rectified If the Contravention is not rectified in the specified time frame, the Development Authority may immediately remove or direct the removal of the portable sign in contravention of this Bylaw without further notice No extensions will be provided by the Development Authority
Second offense within one (1) calendar year of the first offense	The Development Authority may immediately remove or direct the removal of the portable sign in contravention of this Bylaw without notice
Third or subsequent offense within one (1) calendar year of the first offense	The Development Authority may immediately remove or direct the removal of the portable sign in contravention of this Bylaw without notice The Development Authority will issue a fine to the applicant in accordance with the City's *Fees and Charges Bylaw* as amended

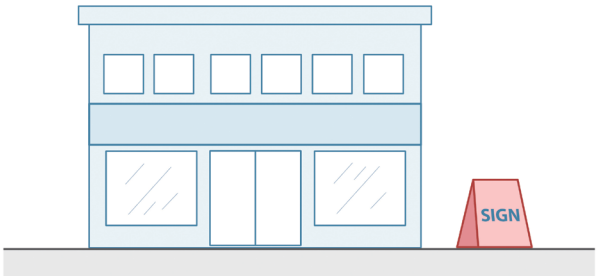
16.10 Sign Definitions

A

A-Board Sign

A-shaped **sign**, which is set upon but not attached to the ground and has no external supporting **structure**, no **illumination**, and no electronic display.

Figure 9: A-Board Signs



Awning or Canopy Sign

Permanent sign attached to or constructed in or on the face of an awning or canopy but does not include a **hanging sign**.

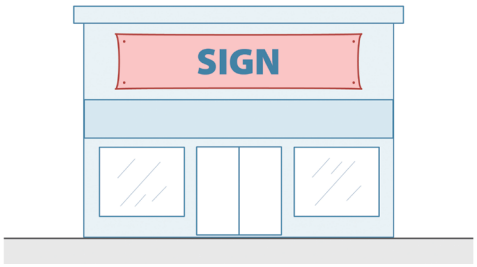
Figure 10: Awning or Canopy Signs

B

Banner Sign

Sign that is attached to a **building**, fence or other **structure** that is made from lightweight, flexible fabric material.

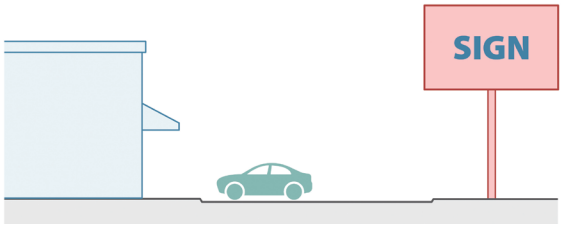
Figure 11: Banner Signs



Billboard Sign

Sign supported by one (1) or more uprights, braces, or pylons which stands independently of a **building** and contains **copy** related to a product, service, facility, or business located outside of the **site** upon which the **sign** is located.

Figure 12: Billboard Signs



C

Copy

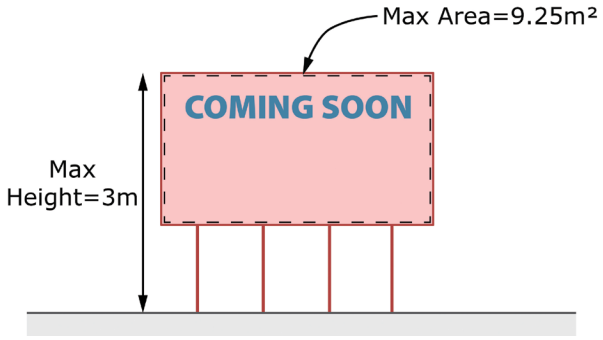
Any image, message or other representation displayed on a **sign**.

D

Development Marketing Sign

Sign for the purpose of promoting neighbourhoods, **shopping centres**, or industrial parks under **development**.

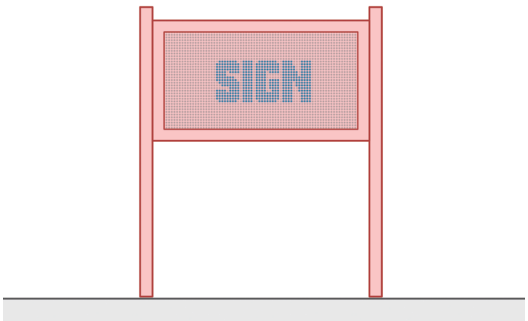
Figure 13: Development Marketing Signs



Digital Copy

Sign copy area that is changed remotely by electronic means.

Figure 14: Digital Copy



Directional Sign

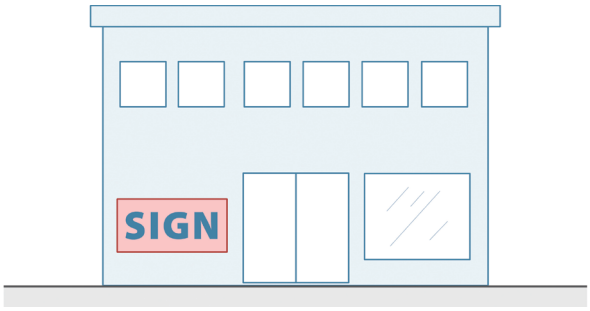
On-premise **sign** that gives direction or instruction to pedestrian, bicycle, and vehicular traffic.

F

Fascia Sign

Sign attached flush to, or marked, painted or inscribed on a vertical surface of a **building**, but does not include a **billboard sign** or a **mural**.

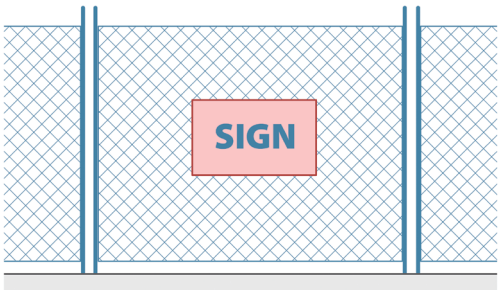
Figure 15: Fascia Signs



Fence Sign

Means a **sign** constructed of material other than a banner, that is attached to a fence and not used as **screening**.

Figure 16: Fence Signs



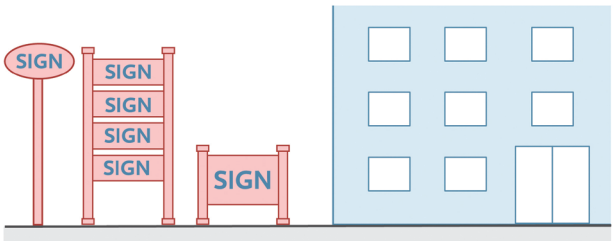
Flag

A piece of cloth or similar material attachable by one (1) edge to a pole or rope.

Freestanding Sign

On-premise **sign** that is supported independent of a **building** and may display **copy** for a single tenant or multiple tenants, and may contain a **digital copy/electronic messaging** display component.

Figure 17: Freestanding Signs



G

Government Sign

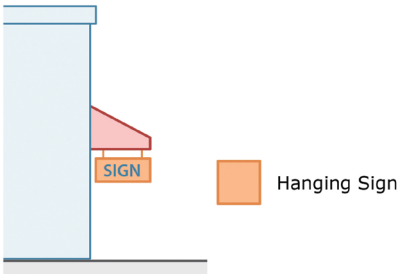
Sign erected by or at the direction of a Municipal, Provincial or Federal Government to give information to the public, regulate traffic or safety or identify public **buildings**.

H

Hanging Sign

Sign suspended from a **structure** which may include an awning or canopy.

Figure 18: Hanging Signs



I

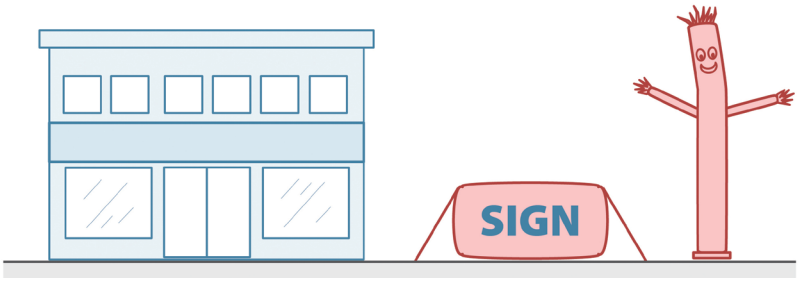
Identification Sign

Sign which contains no advertising, but is limited to the name, address and number of a **building**, institution, or the occupation of the person.

Inflatable Sign

Any inflated three (3) dimensional **sign** or advertising device supported by air or gas that is attached to the ground or any **structure**.

Figure 19: Inflatable Signs

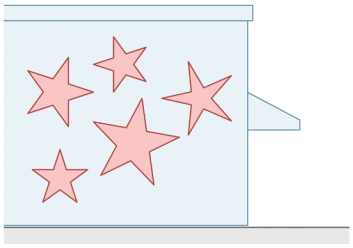


M

Mural

Sign that is painted or sculpted onto a **building** wall and considered artistic rather than advertising and does not contain any product advertising.

Figure 20: Murals



N

Neighbourhood Sign

Sign which states the name of a community area.

Figure 21: Neighbourhood Signs

P

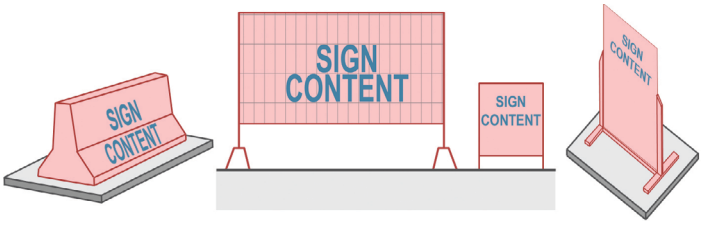
Permanent Sign

Any **sign** that is anchored to a footing extending below **grade** or affixed to, or painted on, a **building** or other **structure**.

Portable Sign

Standalone **temporary sign** mounted or painted on a frame, stand or similar **structure** that is easily transported and erected for a limited time. This **use** does not include decaled vehicles, urban furniture, recycling or rubbish containers or **A–board signs**, but does include magnet **signs**, painted concrete barriers and other similar **signs**.

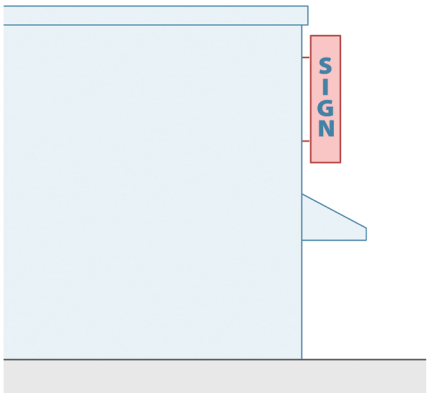
Figure 22: Portable Signs



Projecting Sign

Sign which projects from a **building** or **structure.**

Figure 23: Projecting

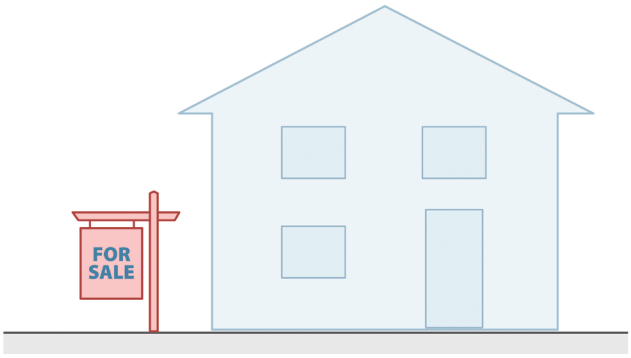


R

Real Estate Sign

Temporary sign advertising real estate that is for sale, lease, or rent.

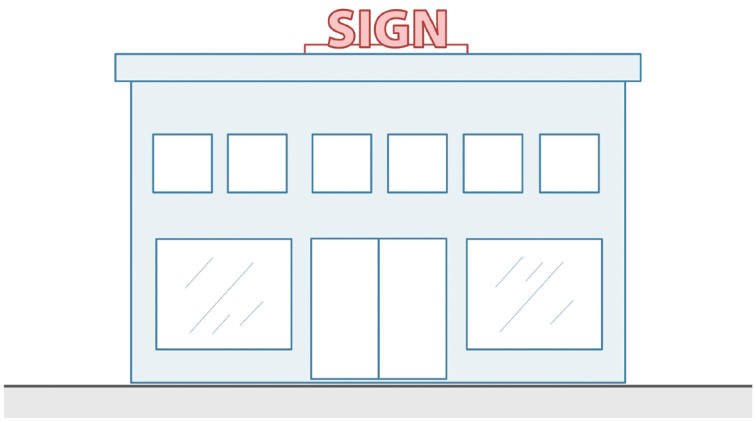
Figure 24: Real Estate Signs



Roof Sign

Sign which projects above the top eaves or is erected upon a roof of a **building** to which the **sign** is attached.

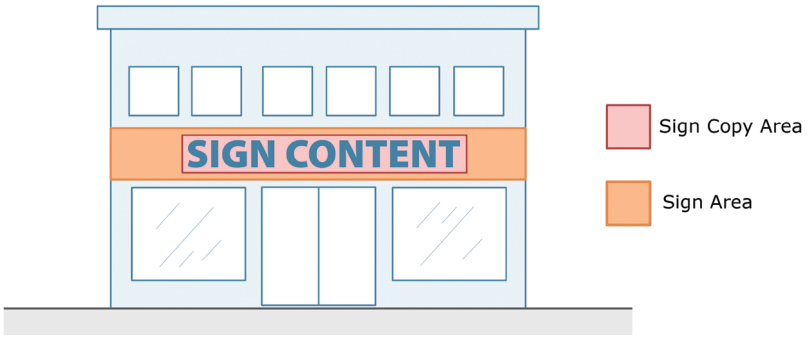
Figure 25: Roof Signs



S

Sign	A device, **structure**, or fixture intended for advertising or calling attention to any person, matter, object, business, or event or to provide direction.
Sign Area	The entire area of a **sign**, measured to the outer perimeter of the **sign**, but does not include the supports.
Sign Copy Area	Portion of a **sign** in which the advertising content is contained.

Figure 26: Sign Copy Area



Sign Height	Vertical distance measured from the finished ground surface directly under the **sign** to the highest point of the **sign**.

T

Temporary Sign	**Sign** which is not in a permanently installed or affixed position, advertising a location, product, event, or activity on a limited time basis.
Third Party Advertising	Advertising which directs attention to a business, commodity, service, or entertainment that is conducted, sold, or offered elsewhere than on the premises on which a **sign** is located. **Signs** of any type advertising community, cultural, athletic, charity, arts or similar not-for-profit groups or events are not considered **third party advertising**. **Third party advertising** is only permitted on **billboard signs**, **portable signs**, **fascia signs**, and **free standing signs** where the **free standing sign** is promoting a community event, or not for profit organization.

U

Unsightly Sign

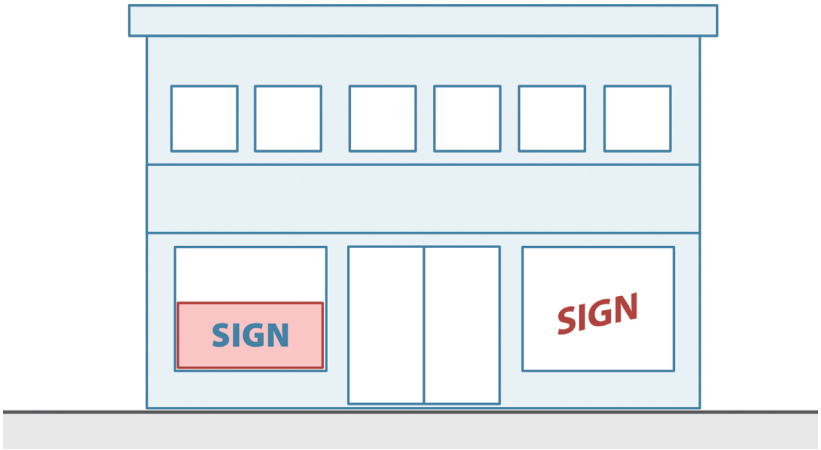
Any **sign** or part thereof, or it's location, which is determined, in the opinion of the **Developed Authority**, to be unappealing or in disrepair. Such determination may be characterized by any visual evidence of defacement, a lack of maintenance or upkeep, the accumulation of any rubbish, refuse or other debris on or around the **sign**, or by any other similar means that may cause the **sign** to become unsightly.

W

Window Sign

Sign that is painted on, attached to, or installed inside a window.

Figure 27: Window Signs



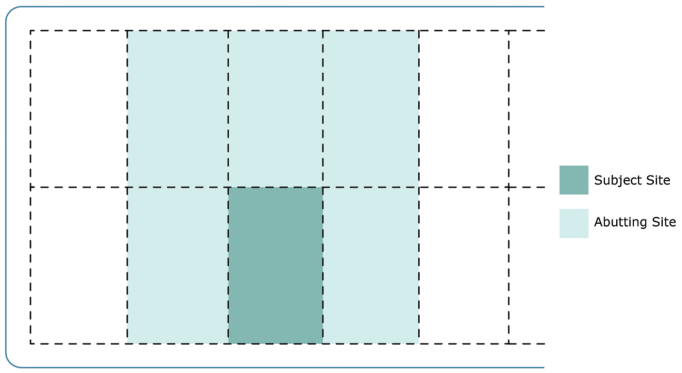
Part 8: General Definitions

Purpose:

For purpose of this Bylaw the following words, terms, and phrases, wherever they occur in this Bylaw, shall have the meaning assigned to them as noted in this Section.

Definitions

A

Abutting	Adjacent to, and when used with respect to a **lot** or **site**, means that the **lot** or **site** physically touches upon another **lot**, **site**, or parcel of land. **Figure 28: Abutting Sites** 
Access	The way of approaching or entering a parcel of land.
Accessory Building or Structure	A **structure** or detached **building**, the use of which is incidental, subordinate, or devoted and located on the same **site** as the **principal building**.
Accessory Use	A **use**, normally incidental, subordinate, or devoted to and located on the same **lot** as the **principal use**.
Act	*The Municipal Government Act, RSA 2000, c.26*, as amended.
Adult Services	**Development** or part thereof in which products or services are provided which are of an erotic or sexual intent. **Developments** may include but are not limited to erotic dancing, erotic massage, or escort or dating services. This **use** does not include **retail stores** whose primary intent is the selling of sexual or erotic materials.
Agricultural Oriented Sales and Services	**Development** used for the sale or rental of **farming** equipment together with maintenance services and the sale of parts.
Agricultural Support Services	**Development** providing products or services directly related to the agricultural industry. This **use** include such facilities as **grain elevators**, feed mills, bulk fertilizer distribution plants, bulk agricultural chemical distribution plants, bulk fuel plants, and crop spraying.
Aircraft Sales, Rentals and Storage	**Development** used for the sale, charter or rental of aircraft and storage together with incidental maintenance services, and the sale of parts and accessories.

Airport	Lloydminster **Airport** and includes any land used either in whole or in part for the arrival and departure, and servicing of aircraft, and any **building**, installation or equipment used in connection with the operation of the **airport**.
Airport Facilities	Use of land, **buildings**, or **structures** designed for the arrival and departure of aircraft, their passengers, and freight. Services provided may include but are not limited to **airport** operations and administration, food and personal services, freight and baggage handling, vehicle rental, and aircraft maintenance and repair. **Accessory uses** may include but are not limited to hangars, runways, taxiways, tie-down areas, terminals, fueling facilities.
Alternative Energy	Renewable sources of energy including the following: a. **Solar Collector (Attached)** means a non-reflective **accessory structure** attached to a **building**, used to collect sunlight and convert it into energy, b. **Solar Collector (Freestanding)** means a non-reflective **accessory structure** not attached to a **building**, used to collect sunlight and convert it into energy, c. **Wind Energy System** means an **accessory structure**, used to collect wind and convert it into energy.
Amenity Area	a. In residential **developments**, space provided for the active or passive recreation and enjoyment of the occupants of the **development**, which may be for private or communal use and owned individually or in common, subject to the provisions of this Bylaw. b. In non-residential **developments**, space provided for the active or passive recreation and enjoyment of the public, which shall be owned and maintained by the owners of the **development**, subject to the provisions of this Bylaw.
Appellant	Person who has served a Notice of Appeal to **the Board**.
Applicant	Person who has made an **application.**
Arterial Road	**Road** that carries larger volumes of traffic and typically having relatively few and controlled vehicle **access** points. These **roads** connect with **collectors** and other **arterials**, but not with local streets and do not typically allow on-street parking. Examples in Lloydminster include College Drive, and the Alberta side of 36 street.
Auctioneering Establishments	**Development** specifically intended for the auctioning of goods and equipment, including **temporary** storage of such goods and equipment.

Automotive and Equipment Repair Shops	**Development** used for the painting, servicing or mechanical repair of vehicles or the sale, installation or servicing of related accessories and parts. This **use** includes heavy duty mechanic services.
Automotive and Equipment Sales or Rentals	**Development** used for the retail sale or rental of new or used vehicles, recreational vehicles, construction or **farming** equipment and other similar vehicles, together with incidental maintenance services, sales of parts and accessories.
Automotive Service Station	**Development** used for the sale of gasoline, other petroleum products and a limited range of vehicle parts and accessories or the servicing or washing of vehicles. **Automotive service stations** may include a convenience store or restaurant.

B

Balcony	Outside projecting platform with an entrance from an upper floor of a **building** intended to be used as **amenity space**.
Bare Land Condominium	Condominium **development** where only the land is condominimized. This is created specifically through subdivision and registered as a condominium plan in accordance with the appropriate Provincial legislation governing the particular lands.
Broadcasting and Television Studio	**Development** used for the production or broadcasting of audio and visual programming.
Bulk Fuel Storage and Distribution	Facility for the storage and distribution of petroleum products and may include card lock retail sales or mobile fuel distribution.
Building	Anything constructed or placed on, in, over or under land but does not include a **highway**, **road**, or a bridge that forms part of a **highway** or **road**, as defined in the **Act**, as amended.
Bylaw Enforcement Officer	Person appointed by the **City** pursuant to The **Charter** to enforce **City** Bylaws, including a regular member of the Royal Canadian Mounted Police and, when authorized, a Community Peace Officer appointed under the *Peace Officer Act S.A/ 2006, c. P-3.5*, as amended or repealed and replaced from time to time.

C

Campground	**Development** of land which has been planned and improved for the seasonal short term use of recreational vehicles or tents and is not used for year-round storage, or accommodation for permanent residential use.

Cannabis	**Cannabis** plant, fresh **cannabis**, dried **cannabis**, **cannabis** oil and **cannabis** plant seeds and any other substance defined as **cannabis** in the *Cannabis Act (Canada)* and its regulations, as amended from time to time and includes edible products that contain **cannabis**.
Cannabis Establishment	**Development** used for the retail sales of **cannabis** that is licensed by Provincial or Federal legislation. This **use** does not include **cannabis production and distribution facility**, but may include retail sales of related products.
Cannabis Production and Distribution Facility	**Development** where **cannabis** is cultivated, processed, packaged, tested, destroyed, stored, or loaded for shipping; where a license for all activities associated with a **cannabis** production is issued by Health Canada.
Carnival	**Temporary** entertainment activity providing a variety of shows, games and amusement rides in which the patrons participate.
Casino	Facility that is licensed by required agencies in the applicable Province for patrons to participate in gaming opportunities as the **principal use**. The **casino** may include an **accessory use** such as a **drinking or eating establishment**.
Cemetery	**Development** primarily used as landscaped open space for the entombment of the deceased, and may include, but is not limited to, the following **accessory uses**: **crematorium**, cinerarium, columbarium, and mausoleums.
Charter	*The Lloydminster Charter*
Child Care Facility	**Development** intended to provide care, educational activities and supervision for groups of seven (7) or more children as licensed and identified under provincial legislation during the day or evening, but does not include overnight accommodation. Shall include daycare centres, out-of-school care centres, drop-in centres and nursery schools. These **developments** shall be approved by the applicable Province and are not allowed as a **home based business**.
City	The City of Lloydminster and the area contained within the corporate boundaries of the City.
Client	Customer; a person or organization that engages the services of a person or company.
Collector Road	As defined by the **City's** *Street Numbering Bylaw*, as amended.
Commercial School	**Development** used for training and instruction in the operation of heavy equipment or machinery for the financial gain of the individual or company owning the school.

Communication Facility	Industry Canada regulated **communication facility**, including, but not limited to, radio, television, cellular telephone and other applicable transmission towers, and **accessory structures**.
Community Garden	Area where flowers, vegetables or fruit are cultivated for consumption and not for distribution or sale.
Community Support Centre, Major	**Development** that provides support and assistance for that whose mental and physical well-being are at risk. This **use** shall be sponsored or supervised by a public authority or non-profit agency and may include accommodation for anyone requiring immediate shelter. This **use** may also include the provision of food services, counselling, group meetings, or day or night shelter for the short term as determined by the sponsoring agency or authority. This **use** does not include permanent residency, long term stays, **supportive**, transitional or affordable **housing**, health care facilities, residential treatment facilities, or safe consumption space.
Community Support Centre, Minor	**Development** where the **principal use** is to provide social services aimed at addressing the needs of people whose well-being may be at risk, on an outpatient basis only. Overnight accommodation is not permitted at any time. This **use** is generally sponsored or supervised by a public authority or non-profit agency and may include the provision for food services, counselling, group meetings, or day shelter for the short term. This **use** does not include short term or permanent residency, health care facilities or safe consumption space.
Community Support Centre, Warming Shelter	**Temporary development** that provides support and assistance for those whose physical well-being is at risk by extreme inclement weather such as heavy snowfall, extreme cold, or extreme heat waves. This **use** may be open for up to twenty-four (24) hours in a day and may include the provision of food services or bathrooms, but does not include permanent residency, health care facilities, sleeping facilities including temporary cots, showering facilities or safe consumption space.
Contractor Services	**Development** used for the provision of services of a construction nature which require **on-site** storage space for materials, construction equipment or vehicles normally associated with the **contractor service** may be included.
Council	The Municipal Council of the **City** of Lloydminster.

Crematorium	Facility used for the purification and reduction of the deceased body by heat and the keeping of deceased bodies, other than in **cemeteries**. This **use** does not include **funeral services** and shall include equipment designed to control odor and emissions prior to discharge from the **building**, thereby limiting any adverse effects on adjacent parcels.

D

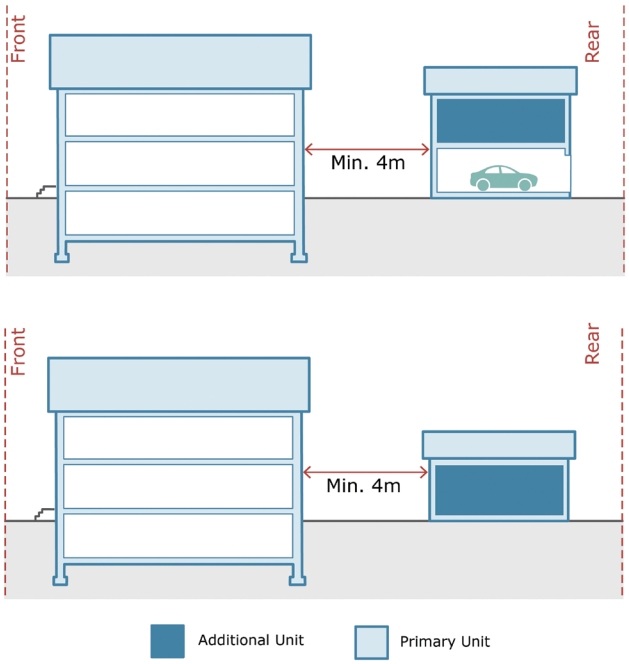
Dark Sky Compliant	Outdoor lighting that meets the International Dark Sky Associations (IDA) requirements for reducing light pollution. Fixtures within this category are fully shielded.
Day Home	**Use** of a **dwelling** as a **home based business, major** that provides regular, ongoing care and supervision for six (6) children or less, not including the residents of the **dwelling**, unless otherwise approved and monitored by the applicable Provincial Agency.
Deck	Unenclosed **structure** that is above or at **grade**, intended as an amenity space and attached to a **building** deemed to be **accessory** to the **principal building** on the **site**. This **use** includes a patio.
Deck, Covered	**Structure** enclosed by a roof, with direct **access** to the ground forming part of the **principal building** on the **site**. This **use** includes a patio.
Density	Number of **dwelling units** on a **site**, expressed as **dwelling units** per hectare or **dwelling units** per **lot**.
Development	As defined in the **Act** as amended.
Development Agreement	Agreement between a developer or **landowner** and the **City** that defines the terms and conditions of a **development**.
Development Authority	Persons appointed by **City Council**, or a designate, responsible for carrying out the responsibilities described within *Subsection 2.1* of this Bylaw.
Development Officer	Persons appointed by the City Manager responsible for carrying out the responsibilities described within *Subsection 2.2* of this Bylaw.
Development Permit	Document that is issued under a Land Use Bylaw and authorizes a **development** or **use**.
Discretionary Use	**Use** that may be allowed in a **district** only at the discretion of, and under the conditions specified by the **Development Authority**.
Distillery, Brewery, and Winery	Facility where beer, wine, spirits or other alcoholic beverages are made **on-site** and sold or distributed. This **use** may be approved as an **accessory use** to a **drinking or eating establishment** provided both **uses** are listed within the **district**.

Distribution Centre	Facility used for receiving, warehousing, loading, offloading, re-packaging, **temporary** storage or distribution of goods, which shall not have detrimental impact, pose potential health or safety hazard or **nuisance** that will negatively impact the intention or **use** of the **site**. a. **Distribution centres** located at the **airport** may or may not include direct taxiway **access**.
District	Defined area of the **City** as required in the **Act** and set out in this Bylaw. **Districts** are shown on the **Land Use District and Overlay Map** (**Figure 3**, **Map 3**).
Drinking or Eating Establishment	**Development** where the primary purpose of the facility is the sale of consumable and edible products, which may include the sale of alcoholic beverages, to the public, for consumption **on-site** or **off-site**. This **use** may include **drive through services** or a **cannabis establishment** as an **accessory use**.
Drinking Establishment, Nightclub	**Development** where: a. the primary purpose of the facility is the sale of alcoholic beverages to the public, for consumption within the premises, b. a license for the sale of liquor, that prohibits minors on the premises at any time, is issued by the appropriate Provincial authority, c. entertainment is provided to patrons, in the forms of a dance floor, live music stage, live performances, or recorded music, in areas greater than 15.0 m^2; and d. food may be prepared and sold for consumption on the premises.
Drive Through Services	**Development** or portion of a **development** that provides service to patrons who typically remain in a vehicle. This **use** may be a **principal** or **accessory use** that includes a self-service or manual **car wash**, a financial institution, drive through pharmacy, or a drive-in theatre. a. **Car Wash** - type of **drive through service** containing facilities for the washing of motor vehicles for a fee, either by production line methods employing mechanical devices or by hand.
Dwelling or Dwelling Unit	Complete **building** or self-contained portion of a **building** used by a household, containing sleeping, cooking and sanitary facilities intended as a permanent residence and having an independent entrance either directly from the outside of the **building** or through a common area inside the **building**.

Dwelling, Additional Unit (ADU)

Self-contained detached **dwelling unit** which is **accessory** to the **principal dwelling unit** on a residential **lot** with a **single-detached dwelling**. This may be a separate stand-alone **building** or attached to or above an **accessory building**. This use may include a **garage** suite or garden suite.

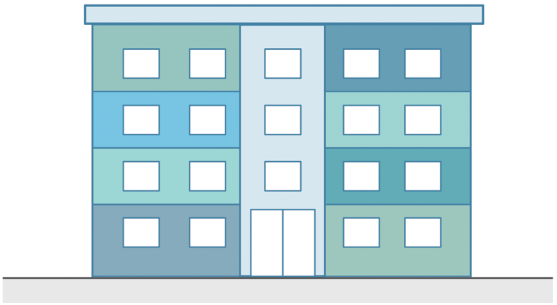
Figure 29: Dwelling, Additional Unit (ADU)



Dwelling, Apartment

Development consisting of multiple **dwelling units** contained within a **building** with shared entrance facilities.

Figure 30: Dwelling, Apartment



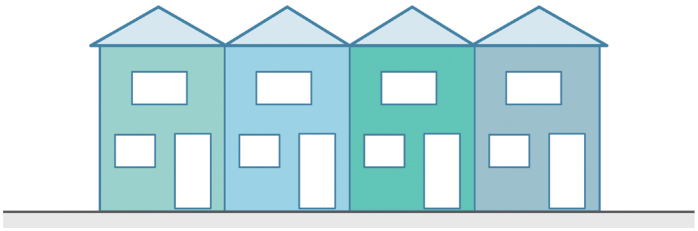
Dwelling, Mobile Manufactured Home

Prefabricated **dwelling unit** that complies with the latest edition of the applicable *Building Code* and meets Canadian Standards Association standards where applicable. **Mobile manufactured homes** do not require a permanent foundation and can be anchored on a concrete or wood block foundation. This **use** does not include recreational vehicles. **Mobile manufactured home dwellings** shall not be considered as **ADUs**.

Dwelling, Multi-unit

Development consisting of a **building** containing three (3) or more **dwellings** in which the **dwellings** are arranged in any horizontal or vertical configuration. Each **dwelling** shall have separate and individual **access**. This **use** includes row houses and fourplexes.

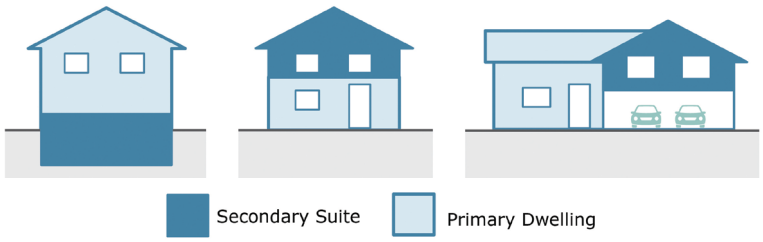
Figure 31: Dwelling, Multi-unit



Dwelling, Secondary Suite

Self-contained **dwelling unit**, such as a basement suite or within an attached **garage**, that is located within a **principal dwelling** (either a **single-detached dwelling** or a **two-unit dwelling**), where the **dwelling units** are registered under the same land title. **Secondary suites** may include shared spaces with the primary **dwelling**, but may also be entirely separate from the primary **dwelling**.

Figure 32: Dwelling, Secondary Suite



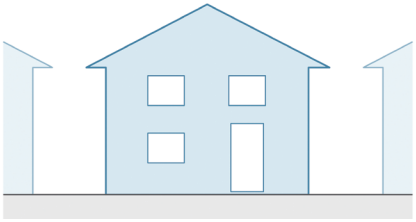
Dwelling, Show Home

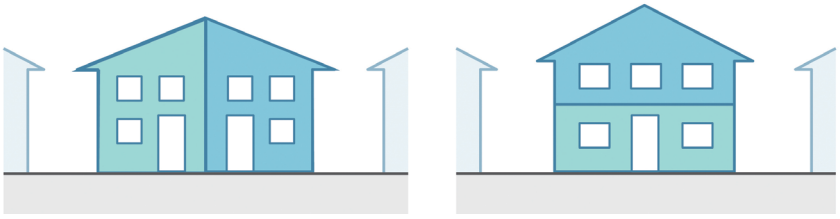
Development consisting of one future **dwelling unit** which is separate from any other **dwelling unit** or **building**, meets the requirements for a residence as specified within the *Building Code*, and is temporarily intended to be used for marketing purposes. A **dwelling, show home** shall not be occupied for any residential purpose prior to the issuance of an Occupancy Permit.

Dwelling, Single-detached

Building, which may be built **on-site** or **off-site**, using prefabricated or modular construction, consisting of one (1) **dwelling unit**. This **use** does not include a **mobile manufactured home** as defined in this Bylaw.

Figure 33: Dwelling, Single-detached



Dwelling, Supportive Housing	**Development** consisting of the use of a **building** as a residential care facility which is recognized, authorized, licensed or certified by a public authority as a care facility which may provide room, board or services to meet the specific needs of residents. The facility may provide for the personal rehabilitation of its residents either through self-help or professional care, guidance or supervision. **Supportive housing** shall only be considered in **dwelling** types that are listed as either **permitted** or **discretionary uses** within the underlying **district** and in all cases the residential character of the **dwelling** shall be primary. This **use** includes senior care facilities, transitional housing with constant staffing, residential treatment facilities and group homes but does not include affordable housing, **community support centres**, boarding houses or hostels, or other similar **developments**.
Dwelling, Two-unit	**Development** consisting of exactly two (2) **dwellings**. Each **dwelling** shall have separate, individual and direct access to **grade**, with no interior access connections, and no common means of access with other **dwellings**. **Figure 34: Dwelling, Two-unit** 

E

Education Services	**Development** that involves assembly for educational, training, or instruction purposes, and may include staff or student housing and administration **offices** required for the provision of such services on the same **site**. This **use** does not include **commercial schools**.
Entertainment Centre	**Development** (or portion thereof) intended for the gathering of persons for entertainment, culture, celebrations, or educational purposes. This **use** includes sporting event venues, concert venues or theatrical performance and recital venues but does not include rodeos, or other activities involving **livestock**. This **use** does not include **adult services**, **exhibition and convention facilities** or **recreation services**, but may include a **drinking or eating establishment** as an **accessory use**.

Exhibition and Convention Facilities	**Development** which provides, but is not limited to, permanent facilities for indoor or outdoor meetings, seminars, conventions, **carnivals**, trade shows, rodeos, or other similar exhibitions which may include an agricultural component. This **use** includes indoor or outdoor rodeo facilities but does not include **recreation services** or **entertainment centres**.

F

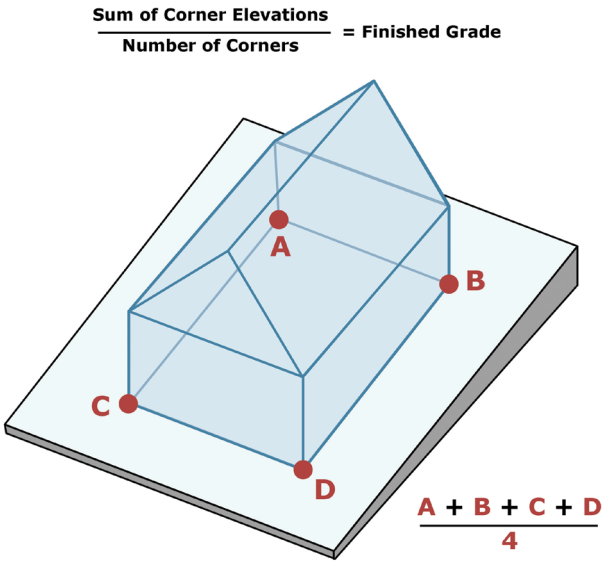
Façade	Exterior outward face of a **building**.
Farming	**Development** for engaging in the practice of raising field crops or **livestock**. This **use** shall not include intensive agricultural operations such as feedlots or abattoirs.
Fitness Studio	**Development** where space, equipment or instruction is provided for activities related to the physical well-being such as dance, martial arts, yoga, and other forms of physical exercise and does not include **recreation services**.
Fleet Services	**Development** using a fleet of vehicles for the delivery of people, goods or services. This **use** includes, but is not limited to, taxi services, bus lines, and messenger and courier services, but may or may not include an **office** or dispatch component.
Floor Area	Total floor area of every room and passageway contained in a **building**, but does not include the floor areas of basements, attics, walls, **sheds**, **decks** or breezeways. Basement and attic floor areas shall be included only when they contain **habitable rooms** or storage.
Floor Area, Gross	Total **floor area** of a **building** or **structure** contained within the outside surface of the exterior wall, excluding attics, **balconies**, boiler rooms, electrical or mechanical rooms, and basement areas used exclusively for parking or storage.
Funeral Services	**Development** where the deceased are prepared for burial or cremation, and the holding of **funeral services**. This **use** includes funeral homes and undertaking establishments but does not include a **crematorium**.

G

Garage	**Accessory building**, or part of a **principal building**, designed and used primarily for the storage of motor vehicles and includes a carport.

Grade	Ground elevation established for the purpose of regulating **building height**. The finished **grade** shall be the level of the ground **abutting** the walls of the **building** if the ground is level. If the ground is not level, the finished **grade** shall be determined by averaging the elevation of the ground for each corner of the **building**, excluding an artificial embankment, as shown in the following figure.

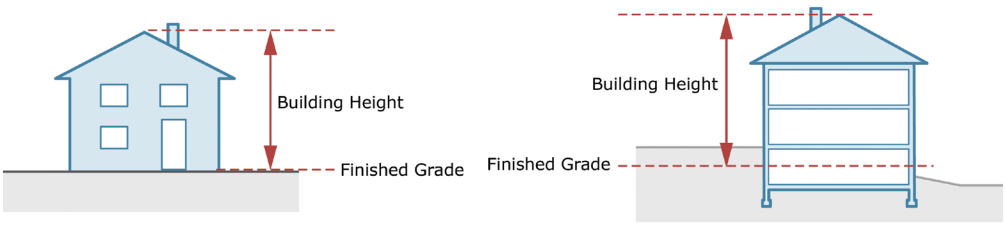
Figure 35: Grade



Grading Certificate	Certificate issued by the **City** for the rough and final grade for all properties that have an approved **Lot** Grading Plan. A **Grading Certificate** submission shall conform to the requirements of the **City's** *Lot Grading and Drainage Bylaw* as amended.
Grain Elevator	**Development** that receives grain directly for storage, transfer, or both. This **development** may include receiving and testing **offices** or weighbridges.
Greenhouses and Plant Nurseries	**Development** used primarily for the raising, storage and sale of plants and related accessories.

H

Habitable Room	Any room in a **dwelling** intended for human occupancy for living, sleeping, eating or cooking. Bathrooms, toilets, hallways, storage areas, closets, or utility rooms and similar areas are not considered habitable spaces.
Hall	Any **building** which is used for the purpose of a communal activity.

Hard Surfacing	Provision of durable, dust-free material constructed and maintained to the satisfaction of the **Development Authority**. Typical materials include concrete, asphalt, interlocking pavers, or similar material.
Hazardous Goods	Any product, substance, or organism which, because of its quantity, concentration or its physical, chemical, or infectious characteristics, either individually or in combination with other substances is an existing or potential threat to the physical environment, to human health or to other living organisms.
Health Services	**Development** used for the provision of physical and psychological **health services** on an in-patient or out-patient basis. Services may be of a preventive, diagnostic, treatment, therapeutic, rehabilitative, or counseling nature provided by a person duly licensed or registered under Alberta or Saskatchewan law. This **use** includes a hospital or extended care facilities but does not include **offices** for private medical practitioners.
Height	Vertical distance between the finished **grade** and the highest point of a **building**. This definition does not apply to **development** within the Airport Protection Overlay. a. The following are not included when measuring **building height**: a ventilating fan, mechanical housing, elevator shaft/ stairwell, skylight, steeple, chimney, smokestack, firewall, parapet wall, flagpole, or any other accessory construction on the roof of the **building** that is not structurally essential. b. Notwithstanding the above, the following are included when measuring **building height: solar collectors, signs,** telecommunication towers, and **wind energy systems**. **Figure 36: Height** 
Highway	Highway 16 or Highway 17 within **City** boundaries.

Home Based Business	Secondary **use** of a portion of a **dwelling** to conduct a business or occupation. This **use** includes: a. **Home Based Business, Limited** which allows for a home **office** by a full-time occupant of the **dwelling**. b. **Home Based Business, Minor** which allows for the operation of a business by a full-time occupant of the **dwelling**, which includes a limited number of business-associated visits to the residence. c. **Home Based Business, Major** which allows for the operation of a business by a full-time occupant of the **dwelling**, which includes a limited number of business-associated visits to the residence, up to one (1) additional non-resident employee, and limited use of a **rear yard** or **accessory building**.
Hotel	**Development** including a motel used for the provision of rooms or suites for **temporary** sleeping accommodation. **Hotels** may include **accessory retail stores**, **drinking or eating establishments**, **personal service shops**, and cleaning, concierge, meeting rooms, or other guest services.

I

Illumination	Lighting by artificial means.
Industrial Uses, General	**Development** used principally for, but not limited to, one (1) or more of the following activities: a. processing of raw materials, b. manufacturing or assembling of semi-finished or finished goods, products or equipment, c. cleaning, servicing, repairing or testing of materials, goods and equipment normally associated with industrial or commercial businesses, d. storage or transshipping of materials, goods and equipment, or e. distribution and sale of materials, goods and equipment to institutions or industrial and commercial businesses. Any indoor display, **office**, technical or administrative support areas or any retail sale operations shall be **accessory** to the **general industrial use**.
Intermunicipal Development Plan (IDP)	**City** of Lloydminster *Intermunicipal Development Plan* as amended.

K

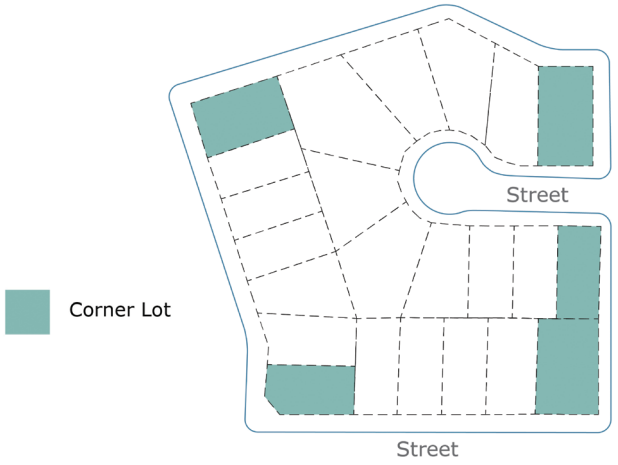
Kennels	**Development** used for the accommodation or breeding of household pets and **uses** associated with the shelter and care of household pets, such as grooming, training, and exercising.

L

Landowner	Person, corporation, or otherwise who is documented on the Provincial Registry Title or the **City's** tax roll as the owner of a property.
Landscaping	Modification and enhancement of a **site** through the use of any or all of the following elements: a. soft **landscaping** consisting of vegetation and xeriscaping such as trees, shrubs, hedges, grass, and ground cover, and b. hard **landscaping** consisting of non-vegetative elements such as fencing, architectural **screening** elements, decorative **hard-surfacing** or features of wood, concrete, stone, brick, steel, or other durable, long-lasting materials.
Landscaping, Xeriscaping	**Landscaping** using native plants, soil grading, and mulching that takes full advantage of rainfall retention and reduces or eliminates the need for supplemental water from irrigation.
Land Use District and Overlay Map	Map delineating the boundaries of the **districts** as set out in this Bylaw and marked by the **Land Use District and Overlay Map** (**Figure 3**, **Map 3**) in *Section 12* of this Bylaw.
Lane	Public roadway that is primarily intended to give **access** to the rear of **buildings** or **lots**.
Legal Non-Conforming	A **use** which does not conform to the requirements of this Bylaw, but legally existed under a previous Bylaw and is allowed to continue. Such **uses** are subject to the provisions of the **Act** regarding these **uses**.
Livestock	Cattle, horses, sheep, pigs, goats, chickens or other animals commonly kept on a farm for agricultural purposes.
Live/Work Unit	Unit that contains one (1) **dwelling**, in addition to dedicated floor space for the purpose of conducting work. The work component may or may not be separate and distinct from the **dwelling**.
Lloydminster Land Use Bylaw	Land Use Bylaw, as used in the *Municipal Government Act, RSA 2000, c.26*, as amended.

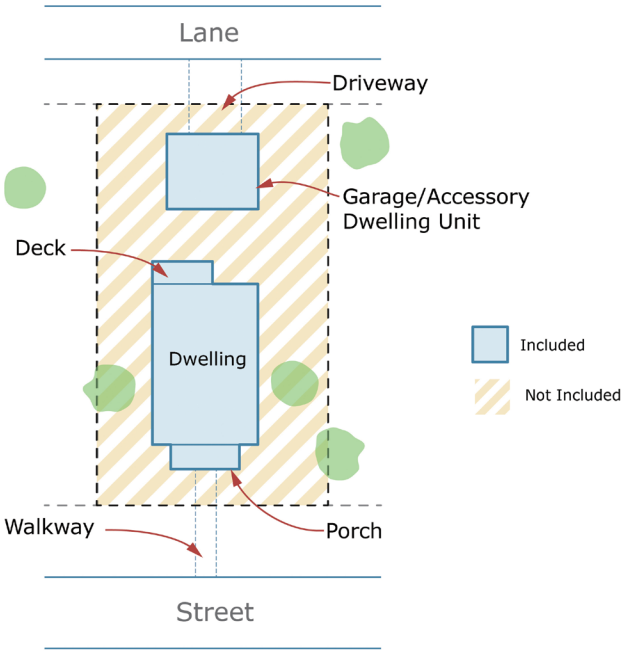
Loading Space	Open area used to provide **access** for vehicles to a loading door, platform, or bay.
Lot	A tract or parcel of land owned by a **landowner**.
Lot, Corner	**Lot** located at the intersection or junction of two (2) or more **roads**.

Figure 37: Lot, Corner



Lot Coverage	Combined area of all **buildings** and **structures** on a **lot**, measured at the greatest horizontal area of a **building** above **grade** within the outside surface of exterior walls and determined as a percentage of the entire **lot** area.

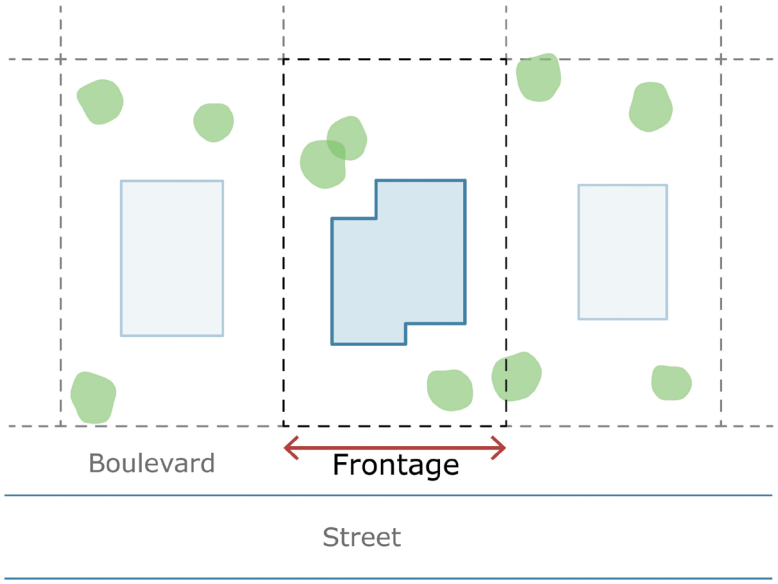
Figure 38: Lot Coverage



Lot Frontage

Width of a **lot** or a **site** where it is **abutting** a **road** excluding a **lane**.

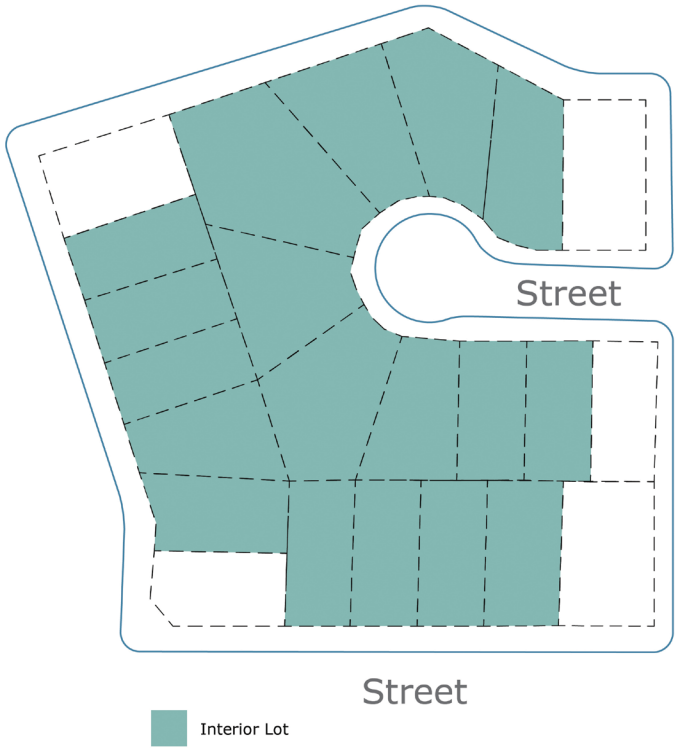
Figure 39: Lot Frontage



Lot, Interior

Any **lot** other than a **corner lot**.

Figure 40: Lot, Interior

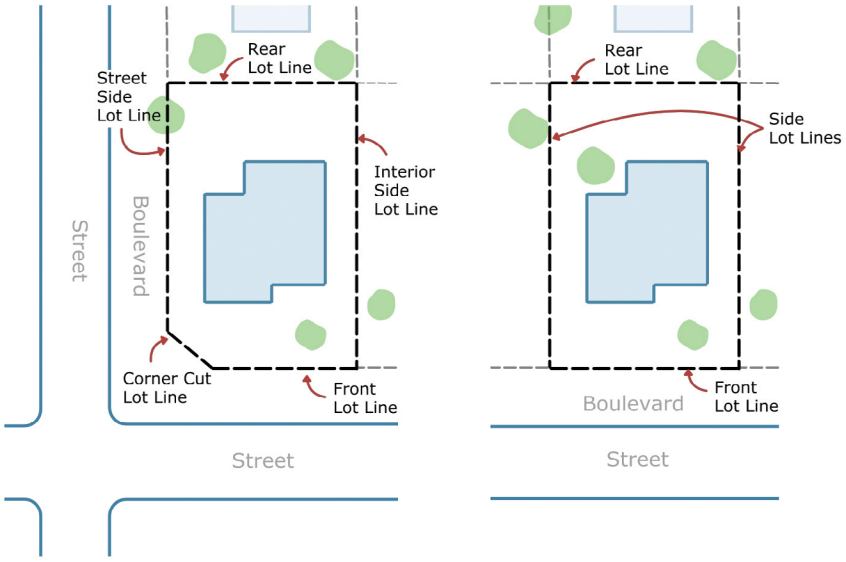


Lot Depth

Length of a line joining the mid points of the front **lot line** and the rear **lot line** as shown in **Figure 42**.

Lot Line	Legally defined limits of any **lot**.
Lot Line, Corner Cut	**Lot line** on a **corner** or double fronting **lot** that is connected from a street side **lot line** and a front or rear **lot line** a**butting** a **road**. **Lots** containing a **corner cut lot lines** shall be required to maintain a minimum **setback** of 4.0 m (13.0 ft) from the **corner cut lot line**. Such **setbacks** shall be measured perpendicularly from the **corner cut lot line** to the portion of the **building** or **structure** nearest to the **corner cut lot line** in accordance with **Figure 44** (**Setbacks**).

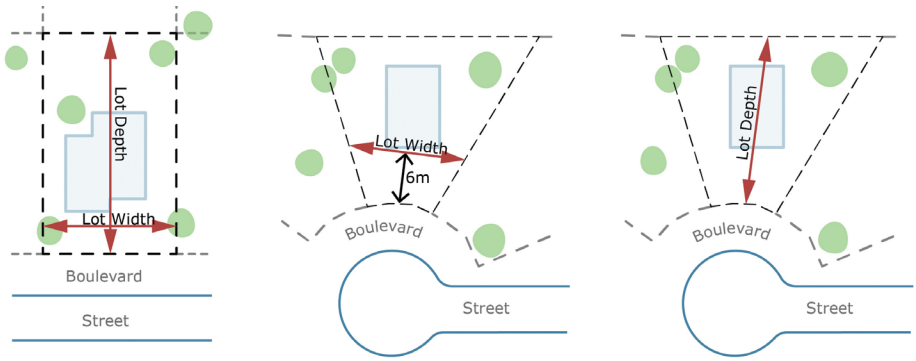
Figure 41: Lot Lines



Corner Lot Lines (With Corner Cut) **Interior Lot Lines**

Lot Width	Shortest horizontal distance between the side **lot line**, or, in the case of **corner lots**, the shortest distance between the side **lot line** and the flanking side **lot line**. For irregular or pie shaped **lots** the width shall be measured at 6.0 m (19.5 ft) back from the center of the front property line.

Figure 42: Lot Width & Depth



M

Manufacturing Establishment	Small-scale facility used for the manufacturing, fabrication, assembly, distribution of products or any industrial activities primarily within a **building** that does not produce noise, heat, glare, dust, smoke, fumes, odours, vibrations, or other external impacts. **Outdoor storage** shall not be included as part of the **use**. Typical **developments** may include: small scale manufacturing, artisan workshops, commercial kitchens, or small-scale electronics manufacturing or assembly.
Manufactured Home Community	As defined as per the **Act** as amended.
Market	**Development** used for the sale of new or used goods by multiple vendors in an enclosed **building** or outdoor space. Such operations are usually conducted on weekends and holidays.
Mixed Use Building	Multi-**storey building** with commercial **uses** on the lower **storeys** and **dwelling units** above.
Municipal Development Standards (MDS)	Most current provisions issued by the **City** which provide information regarding standards governing the subdivision design, servicing standards, and the construction process.
Municipal Development Plan (MDP)	**City** of Lloydminster's *Municipal Development Plan*, as amended.

N

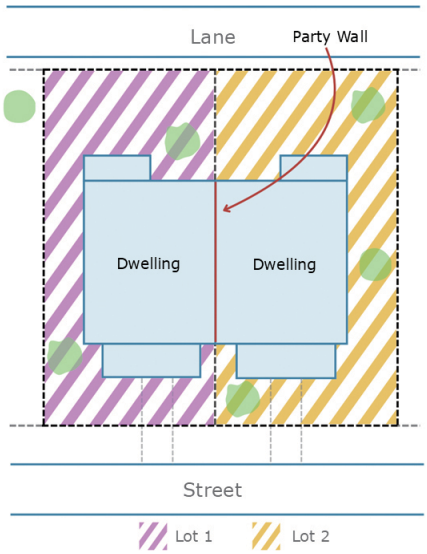
Non-Habitable Room	Space in a **dwelling** providing a service function and not intended primarily for human occupancy.
Nuisance	Anything that in the opinion of the **Development Authority** interferes with the use or enjoyment of property, endangers personal health or safety, or is offensive to the senses.

O

Office	**Development** primarily used for the provision of professional services. Typical uses include, but are not limited to, financial institutions, lawyers, accountants, municipal, provincial or federal government services, engineers, architects, private medical practitioners, and dispatch services where no fleet vehicles are stored **on-site**.
Official Community Plan (OCP)	**City** of Lloydminster *Official Community Plan*, as amended.

Off-site	Location other than the **site** which is the subject of a **development**.
On-site	Location on the **site** which is the subject of a **development**.
Outdoor Storage	Outdoor **development** used for the storage of equipment, goods, materials, motor vehicles, recreation vehicles, or products. This **use** does not include a **building**.

P

Parking Lot or Structure	Area of a **lot**, **structure**, or any other area, the primary purpose of which is to provide off-street parking.
Party Wall	Wall or dividing partition between two (2) **abutting dwelling units** erected at, or upon, a property line such that each **dwelling unit** is capable of being a separate, legal **lot** subdivided under the **Act**. **Figure 43: Party Wall** 
Pawn Shop	**Development** where: a. money is lent in conjunction with the exchange of merchandise, b. merchandise may be sold to the public according to the agreement with the owner of the merchandise.
Permitted Use	**Uses** which are allowed in a **district**, provided that the **use** conforms to the provisions of this Bylaw.
Personal Service Shop	**Development** used for the provision of personal services to an individual, which are related to the care and appearance of the body, or the cleaning and repair of personal effects. This **use** does not include **health services**, **office**, or **adult services**.

Pet Care Facility	**Development** where household pets such as dogs or cats are washed, groomed, trained, or boarded during the day. This **use** includes training facilities such as dog agility training or other similar **developments** and may include the incidental sale of products relating to services provided to the **development**. This **use** does not include **kennels** but may include an outdoor **amenity** area for the purpose of exercising the animals.
Principal Building	**Building** that is, in the opinion of the **Development Authority**, where the **site's principal use** is intended to occur.
Principal Use	Main purpose for which, in the opinion of the **Development Authority**, a **building** or **site** is used.
Private Outdoor Skating Rink	Artificially created outdoor ice surface intended for personal use on private property. **Private outdoor skating rinks** do not include large scale arenas.
Private Swimming Pool	Artificially created water-filled basin lined with concrete, fiberglass, vinyl, metal or similar material, intended for swimming, diving, wading or other similar activity, which is at least 0.6 m (2.0 ft) in depth, and includes pools situated above **grade** and hot tubs.
Protective and Emergency Services	**Development** which is required for the public protection of persons and property and includes the storage of emergency equipment and vehicles. This **use** may include ambulance or police stations, and fire halls, and may contain living quarters and **offices**.
Public Library or Cultural Exhibit	**Development** for the collection of literary, artistic, musical and similar reference materials in the form of books, manuscripts, recordings or films for public use; or a **development** for the collection, preservation and public exhibition of works or objects of historical, scientific or artistic value.
Public Park	**Development** of public land specifically designed or reserved for the general public for active or passive recreational use.

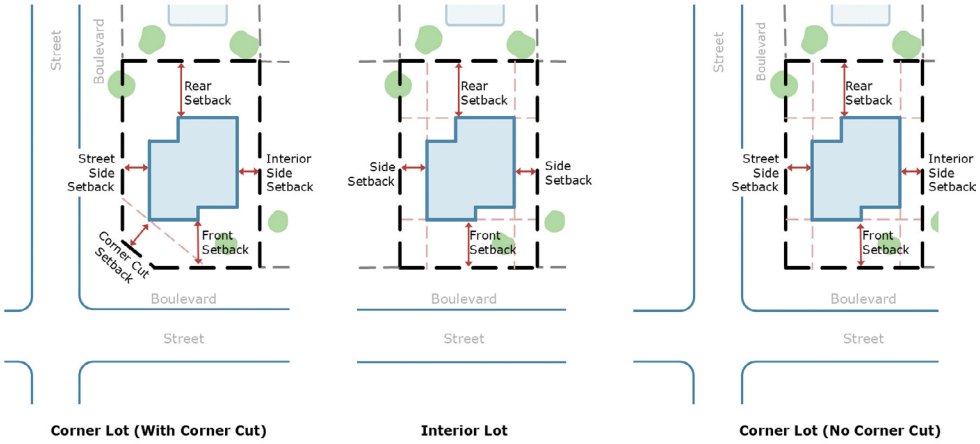
R

Radial Separation Distance	The distance established by a radial measurement from the property line of the **site** to the radial separation extent boundary.
Recreation Services	**Development** providing facilities for sports or active or passive recreation where patrons are predominantly participants. This **use** includes skating rinks, sports fields, indoor horse riding arenas, establishments for playing table or electronic games, or other similar amusement activities. This **use** does not include **casinos**, **carnivals**, **entertainment centres**, rodeos, or **exhibition and convention facilities**, but may include a **drinking or eating establishment** as an **accessory use**.

Recycling Depot	**Development** for collecting, sorting, and temporarily storing recyclable materials, such as bottles, cans, paper, boxes, and small household goods. This **use** class includes: a. **Recycling Depot, Major - Development** where municipally operated spaces are used for the collection and **temporary** storage of recyclable materials within movable waste containers. Recyclable materials include, but are not limited to, cardboard, metal, plastics, paper, and similar household items. Recyclable materials left at a **recycling depot, major** are periodically removed and taken to larger, permanent recycling facilities for final recycling. b. **Recycling Depot, Minor** - **Building** or **site** used for the buying and **temporary** storage of bottles, cans, newspapers, metals and household goods for reuse. This **use** includes bottle depots.
Religious Assembly	**Development** used for worship, philanthropic or social activities and includes, but is not limited to, accessory rectories, manses, meeting rooms, and classrooms on the same **site**.
Resource Extraction	**Development** for the **on-site** removal, extraction, and primary processing of raw materials found on or under the **site**.
Retail Store	**Development** used for the retail sale of goods and services from within an enclosed **building**. This **development** includes grocery, hardware and home improvement stores, the sale of second-hand goods, and convenience stores, and may include a warehouse component. Outdoor displays are permitted, however, if **outdoor storage** is required, it shall be **screened** from public view. This **use** does not include **pawn shops**, **automotive and equipment sales or rentals** or **cannabis establishment**.
Road	Land shown as a **road** on a plan of survey that has been filed or registered in a Land Titles Office, or used as a public **road**. This **use** may include any **structure** incidental to a public **road** including the median, boulevard, or ditch.

S

Screening	Total or partial concealment of a **structure**, **yard**, or activity by a solid fence, wall, berm, architectural feature, or **landscaping**.
Separation Distance	Distance as measured from the edge of one (1) **development** or property line to another.

Service Window	Window through which a customer receives goods or services from a **drive through service**.
Setback	Distance between a **building** or **structure** and a **lot line**. A **setback** is not a **yard** or **amenity area**. **Figure 44: Setbacks** 
Shed	Single-**storey** portable **structure**, freestanding and not attached to a larger **structure**, measured 10.0 m^2 (108 ft^2) and with a maximum wall **height** of 2.4 m (8.0 ft). **Structures** larger than **sheds** are classified as **accessory buildings**.
Shipping Container/Sea Can	Metal freight container that is used for the storage of materials and equipment that is considered to be an **accessory building or structure**. **Shipping containers/sea cans** do not include semi-trailer units.
Shopping Centre	Group of commercial establishments, planned, developed, owned and managed as a unit, with off-street parking provided on the property and related in size and type of shops to the trade area that it serves. This is intended for the overall **development** and may not include each **use** contained within the complex.
Short Term Rental	**Dwelling** which may or may not be occupied by the owner and used to provide accommodation to travelers for commercial purposes. Parking must be provided **on-site**.
Site	**Lot**, area of land, parcel or one (1) or more **abutting lots** developed or intended to be developed as one (1) unit.
Sign	For a complete list of **sign** definitions refer to *Subsection 16.10* of this Bylaw.

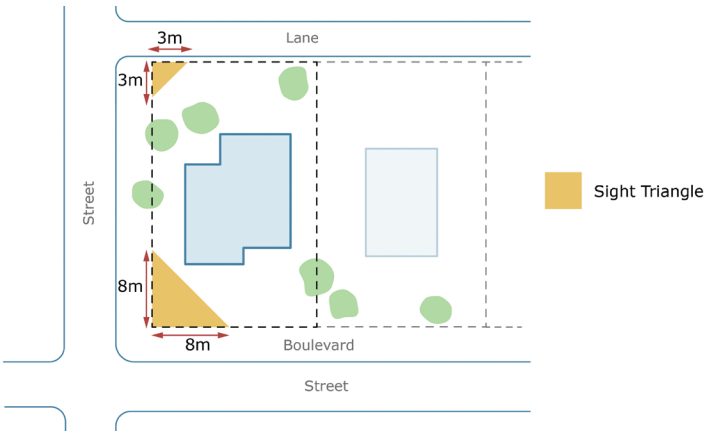
Sight Triangle

Corner on a **site** where two (2) public **roads** intersect which is part of a **site** boundary and identified as follows:

a. straight line drawn between two (2) points on the exterior boundaries of a **site** measured 3.0 m (10.0 ft) from the corner where they intersect at a **lane**, or

b. straight line drawn between two (2) points on the exterior boundaries of a **site** measured 8.0 m (26.0 ft) from the corner where they intersect at a **road**.

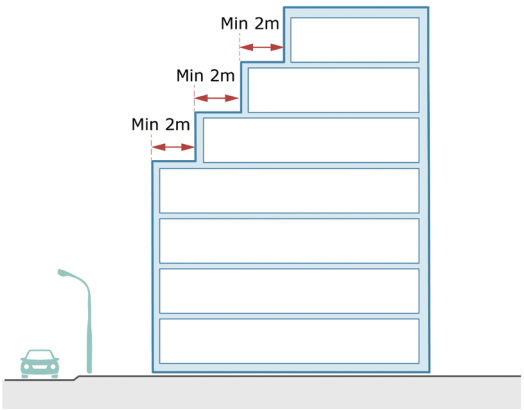
Figure 45: Sight Triangle



Stepback

Horizontal distance a **building façade** is stepped back or recessed, on a horizontal plane, from the **building façade** immediately below it.

Figure 46: Stepbacks



Storey

Portion of any **building** which is situated between the top of any floor and the top of the floor next above it.

Storey, Half

Living space contained under a peaked roof.

Structure

Any **building**, **accessory** or otherwise.

Structural Alteration	Any change to the roof, foundation, supporting walls or exterior walls of a **structure** that results in the expansion of the **structure**.
Subdivision and Development Appeal Board (the Board)	The group of individuals appointed by **Council** responsible for appeals regarding various issues as determined by the **Act**. The nature of these appeals may include **Development Permit** or subdivision application decisions made by the **Development Authority**. **The Board** is not responsible for subdivision appeals located in Saskatchewan.
Subdivision Authority	A person or committee appointed by **Council** to exercise subdivision powers and duties on behalf of the municipality.
Surveillance Suite	**Dwelling unit** whose function is to provide surveillance, maintenance or security for a **development**. The suite shall form part of the **development** and clearly be an **accessory use** of the **site**.

T

Temporary	Means only lasting for a limited period of time.
Temporary Commercial Services	**Temporary** or seasonal **development** which operates no more than one hundred eighty (180) total days per calendar year. This may be calculated as consecutive days or spread over a twelve (12) month period. A **temporary commercial service** is used for the retail sale of goods, services, food or beverage to the public. This **use** may include but is not limited to fruit and vegetable stands, farmers markets, tree lots, pop up **retail stores** or windshield chip repair tents.

U

Use	The purpose or activity for which a piece of land or its **buildings** are developed or intended, or for which it is occupied or maintained.
Utility Services, Major	**Development** for utility infrastructure purposes, which are likely to have a major impact on the environment or **abutting uses** by virtue of their potential emissions, effects, or appearance. Typical **developments** include compost facilities, cooling plants, eco stations, garbage transfer stations, incinerators, power generating stations, power terminals and distributing substations, sanitary landfills, sewage lagoons, snow dumping **sites**, switching centres, and sewage treatment plants.

Utility Services, Minor	**Development** for utility infrastructure purposes, which is likely to have limited effect on the environment or **abutting uses** by virtue of its appearance, noise, size, traffic generation or operational characteristics. **Typical developments** include district heating plants, water towers, or water treatment plants.

V

Variance	A variation, relaxation or waiver of a **development** regulation or other requirement of this Bylaw.
Veterinary Services, Major	**Development** used for the care and treatment of animals where the **veterinary services** primarily involve in-patient care and major medical procedures involving hospitalization for extended periods of time. This **use** does not include **kennels** or **pet care facilities** but may include an outdoor corral for the purpose of convalescing the animals.
Veterinary Services, Minor	**Development** used for the care and treatment of animals where the **veterinary services** primarily involve out-patient care and minor medical procedures. All animals shall be kept within an enclosed **building**. This **use** does not include **kennels** or **pet care facilities** but may include an outdoor **amenity area** for the purpose of exercising the animals.

W

Walkway	Public **access** designated for use by pedestrian traffic.

Y

Yard	The portion of a **site** not occupied by **buildings**. **Sites** may have **front**, **rear**, or **side yards**. This does not include a **site's** boulevard.
Yard, Front	Narrowest portion of a **site** that is **abutting** a r**oad** excluding a **lane** extending across the full width of the **site** from the furthermost exterior wall of the **principal building** to the front property boundary of the **site**, unless otherwise determined by the **Development Authority** in accordance with *Subsection 13.17.2.*
Yard, Rear	Portion of a **site** extending across the full width of the **site** from the furthermost rear exterior wall of the **principal building** to the rear property boundary of the **site**.

Yard, Side

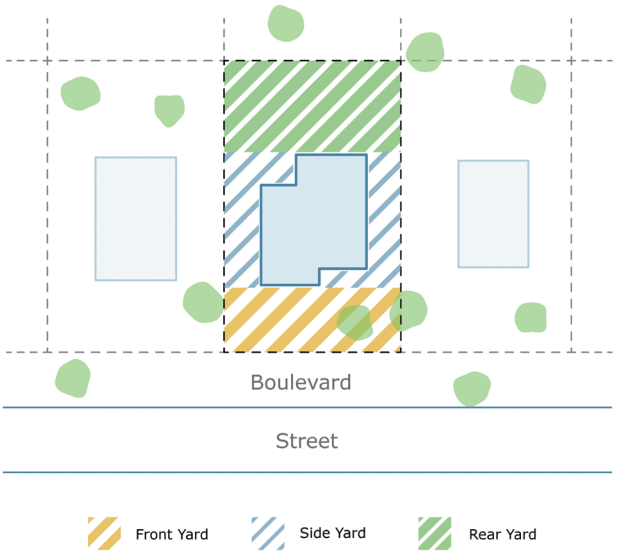
Portion of a **site** extending from the **front yard** to the **rear yard** from the side exterior wall of the **principal building** to the side property boundary of the **site**.

a. **Interior Side** means, on **corner** or double fronting **sites**, the **side yard** that is **abutting** another **site**.

b. **Street Side** means, on **corner** or double fronting **sites**, the **side yard** that is **abutting** a **road**.

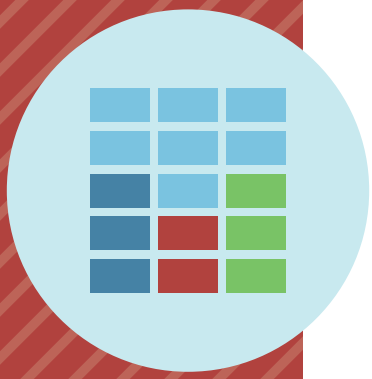
Figure 47: Corner Site Yards

Figure 48: Interior Site Yards



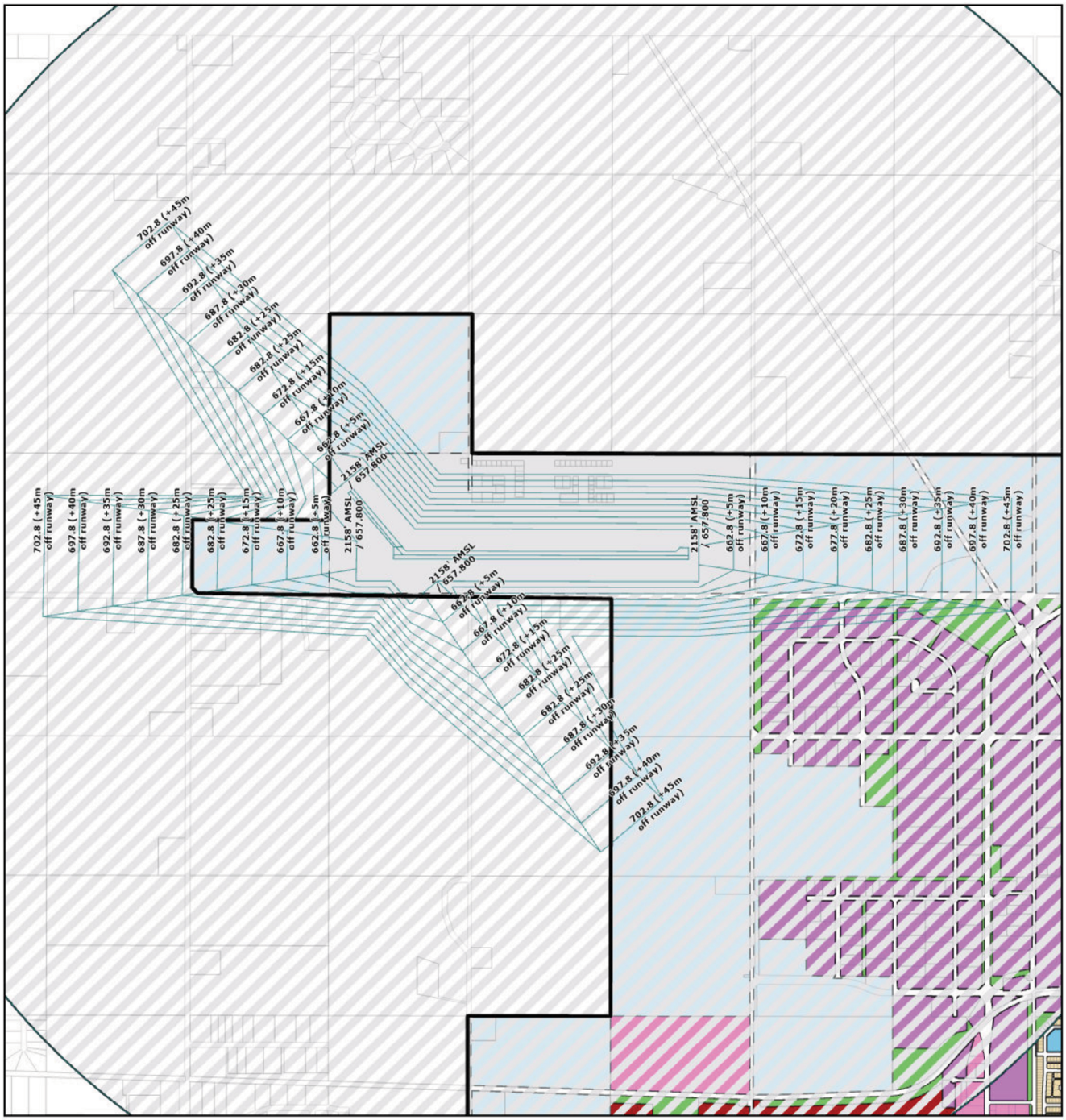
Yard, Zero Side

Development permitted to be built on the side property boundaries of the **site** with no required **side yard**.



Part 9:
Maps

Map 1: Airport Height Limitation Contour Map



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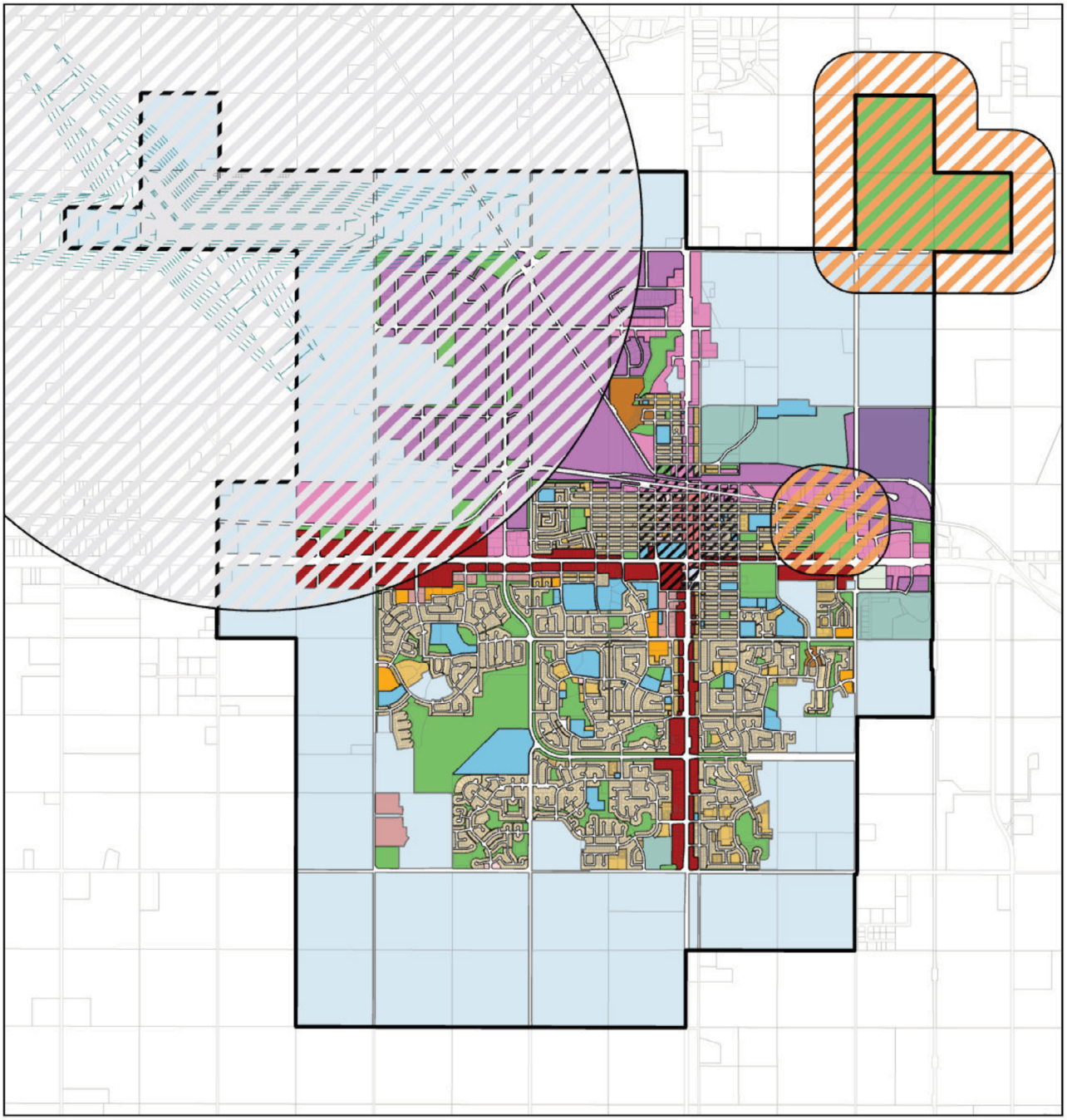
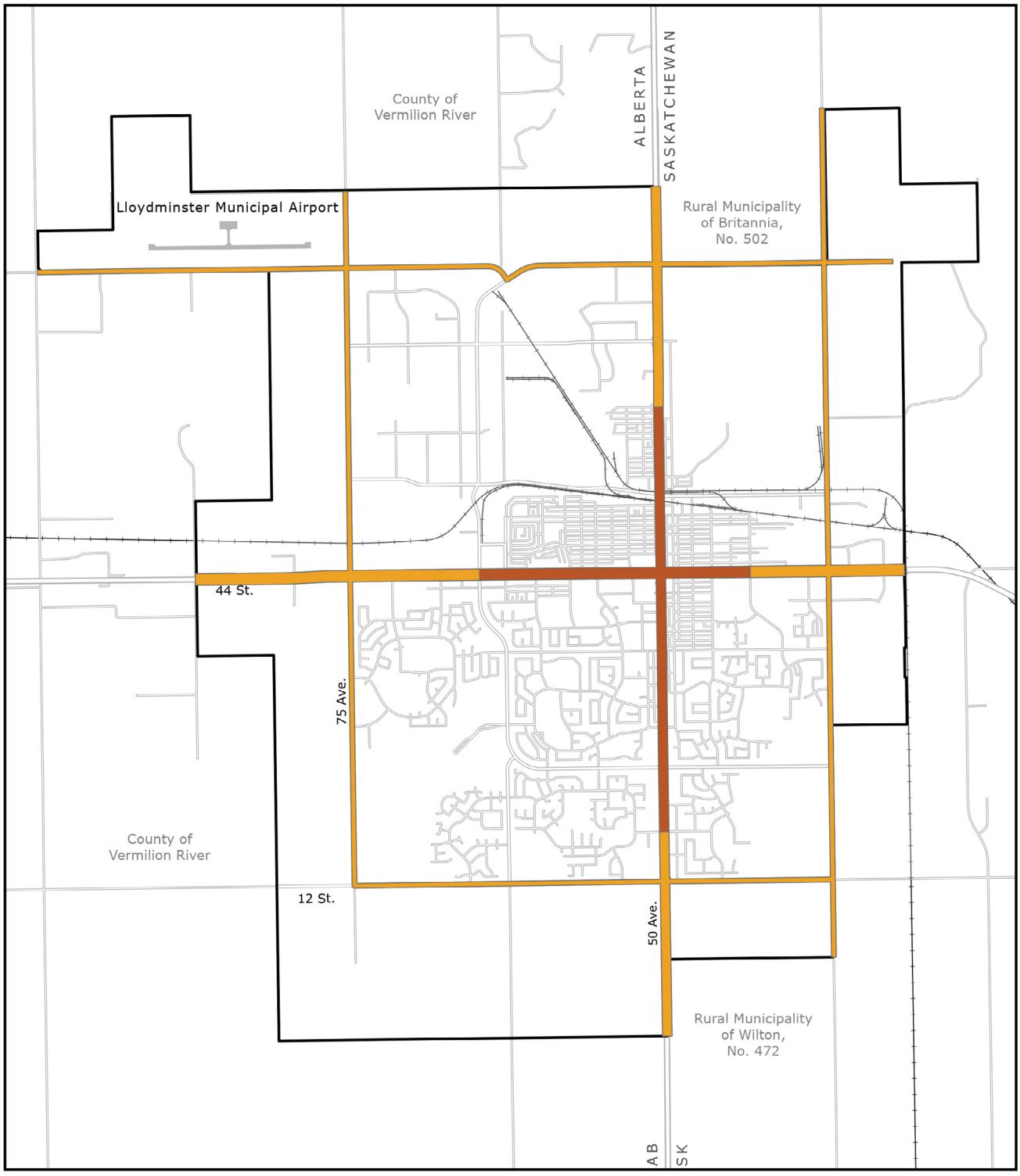
Overlays and Buffers
- Airport Protection Overlay
- Downtown Area Redevelopment Plan (DARP) Overlay

Map 2: Downtown Area Redevelopment Plan (DARP) Map

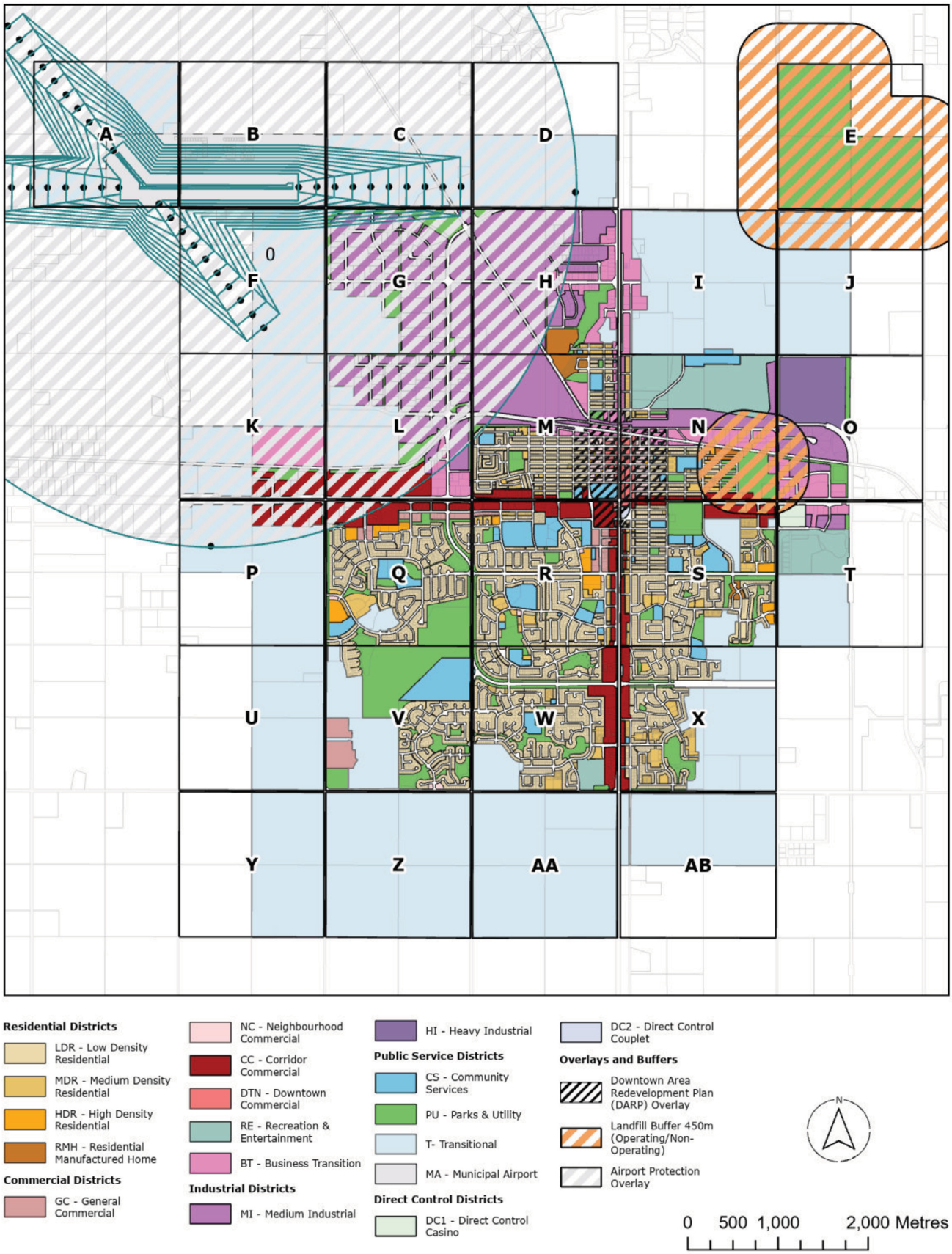
Map 3: Land Use District and Overlay Map



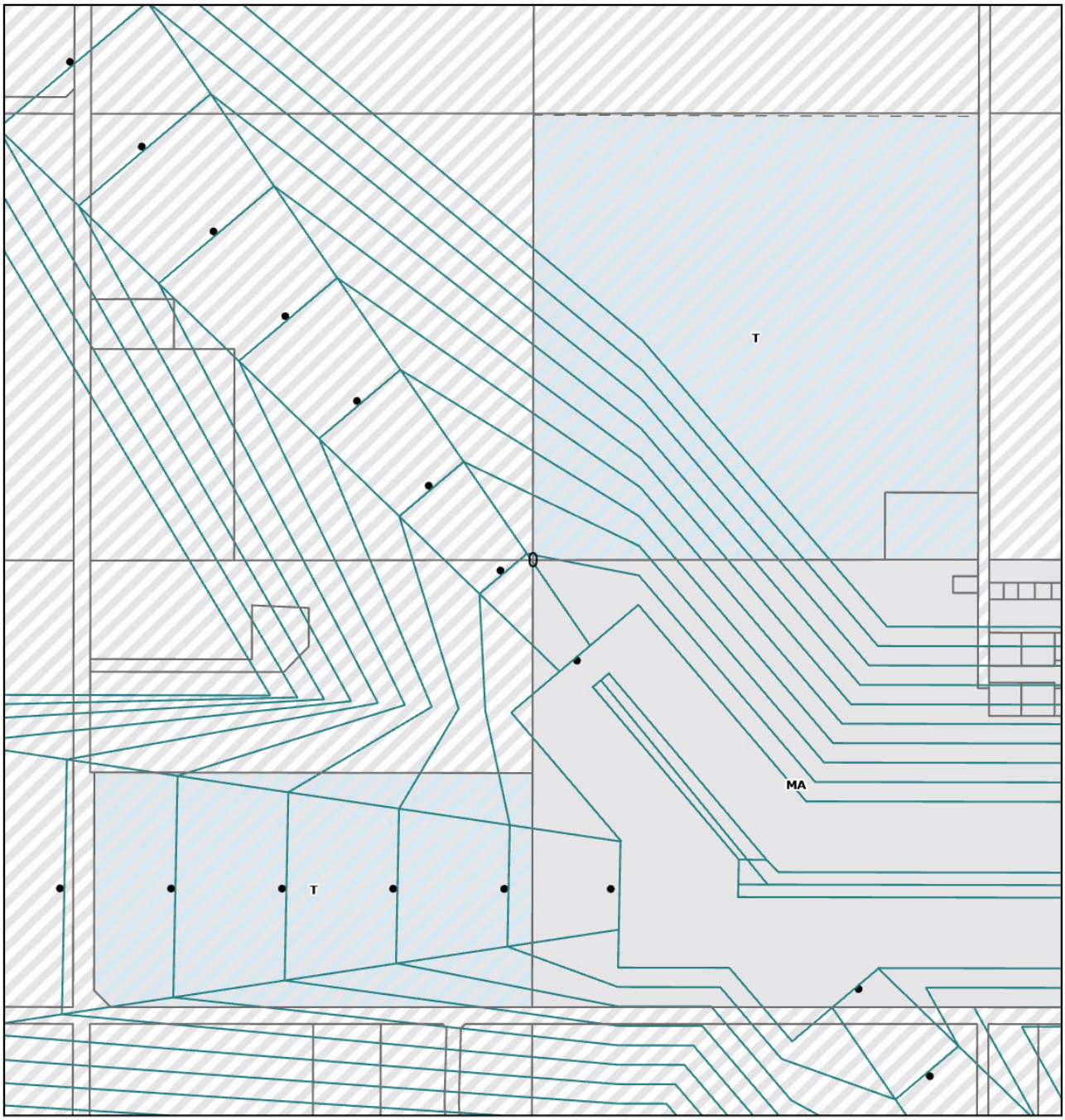
Map 4: Road Right-of-Way Portable Sign Approval Map



Map 5: Land Use District and Overlay Map: City Index



Map 5: Land Use District and Overlay Map: Section A



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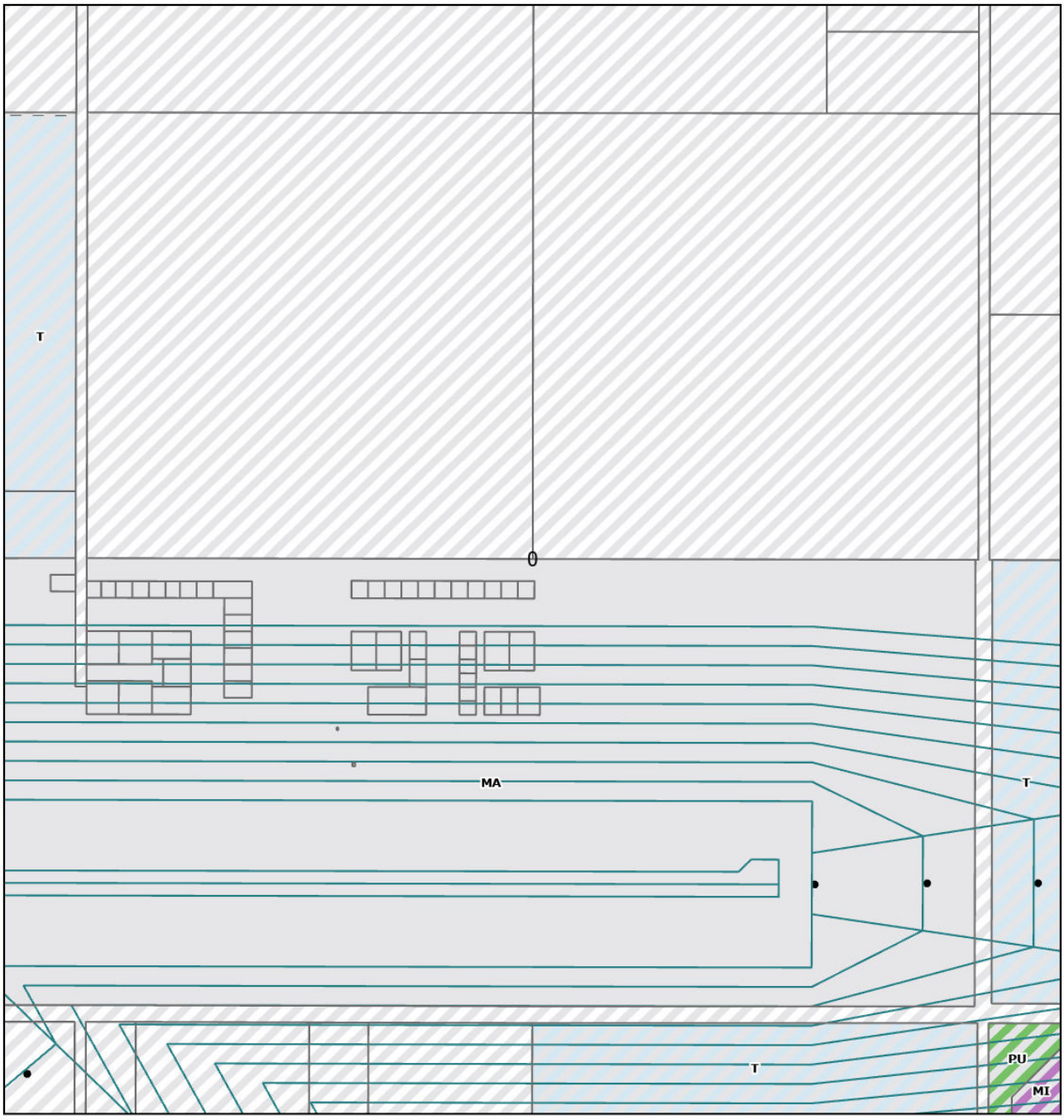
N

0 112.5 225 450 Metres

Map 5: Land Use District and Overlay Map: Section B



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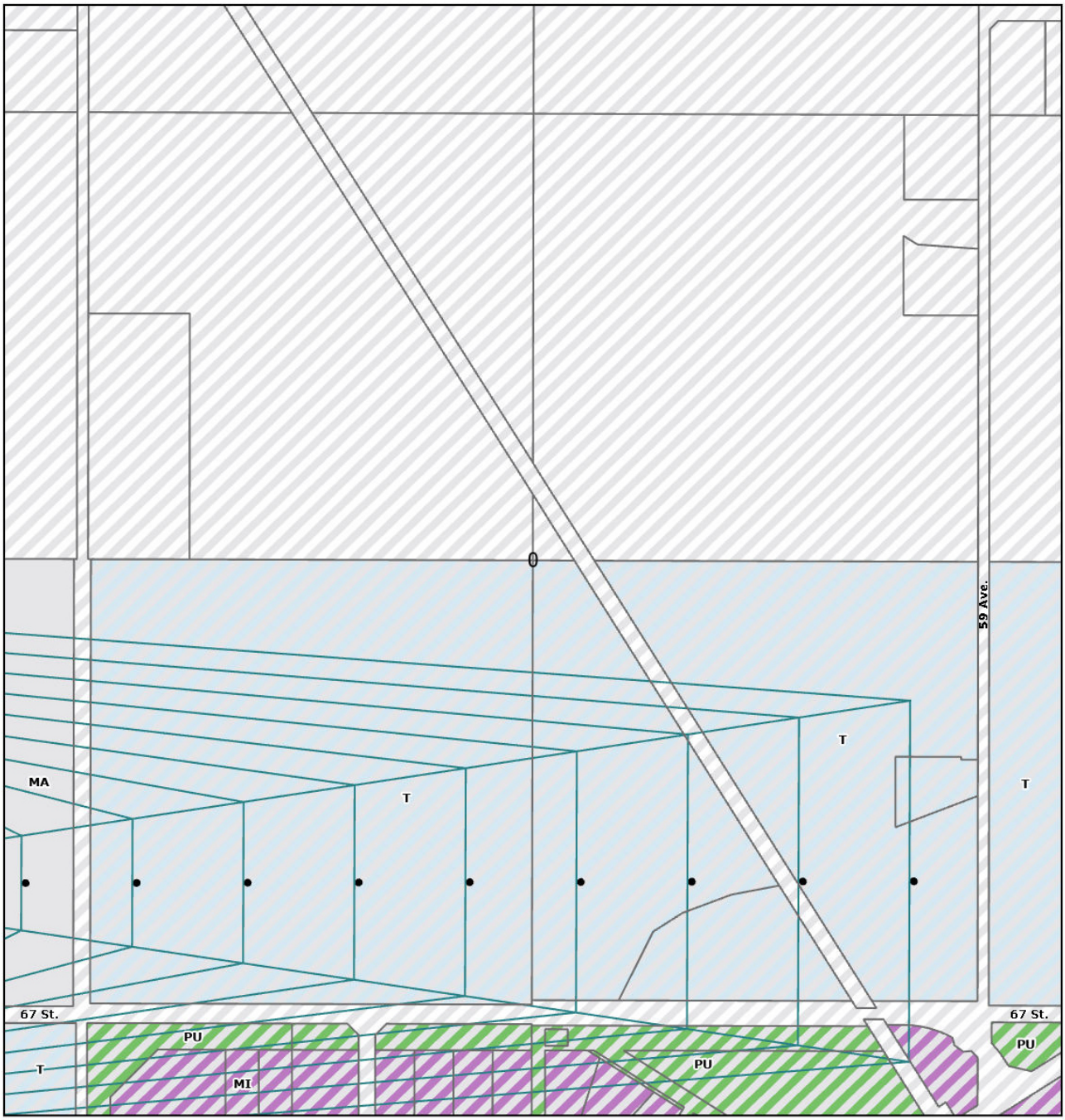
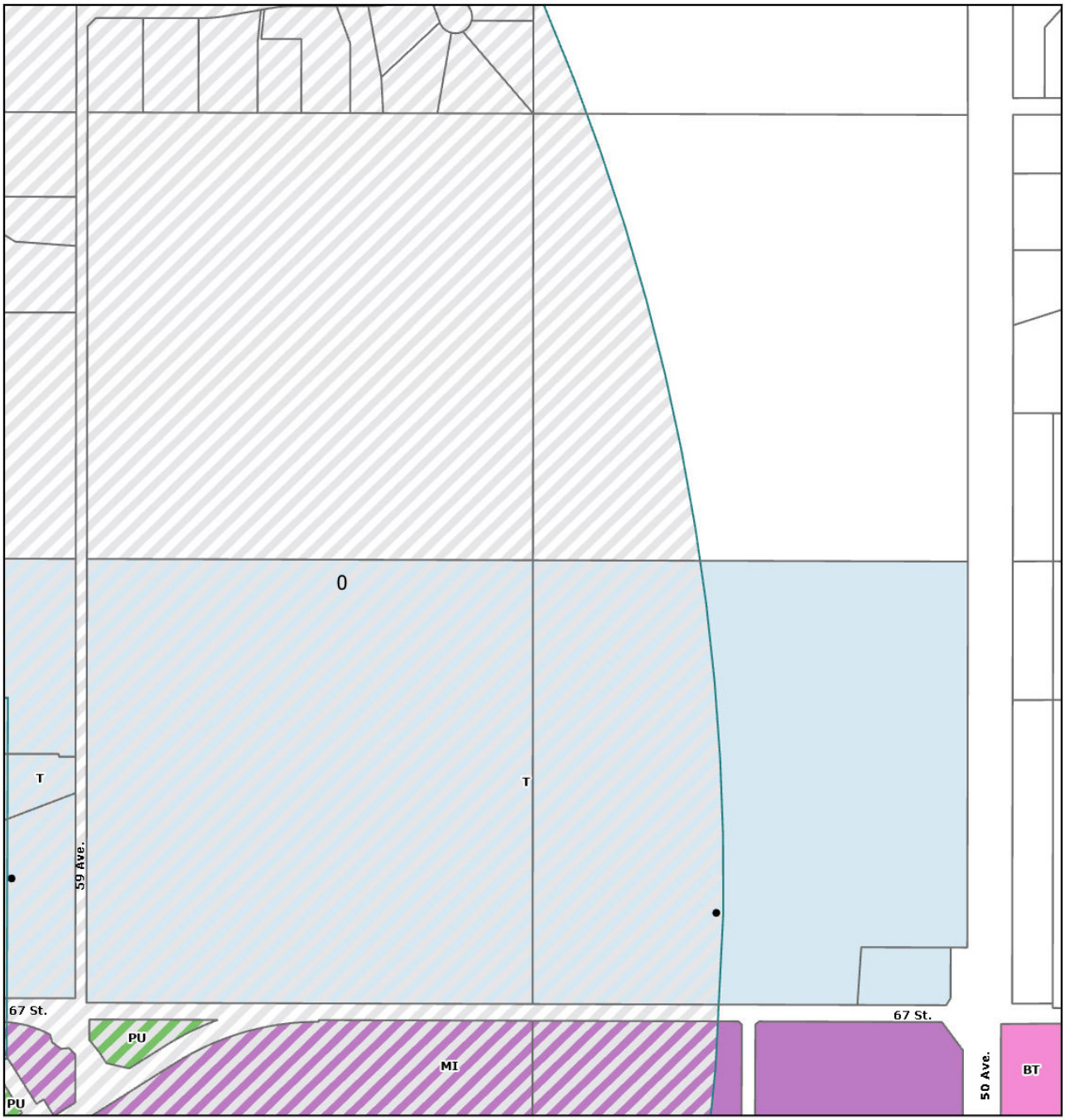
N

0 112.5 225 450 Metres

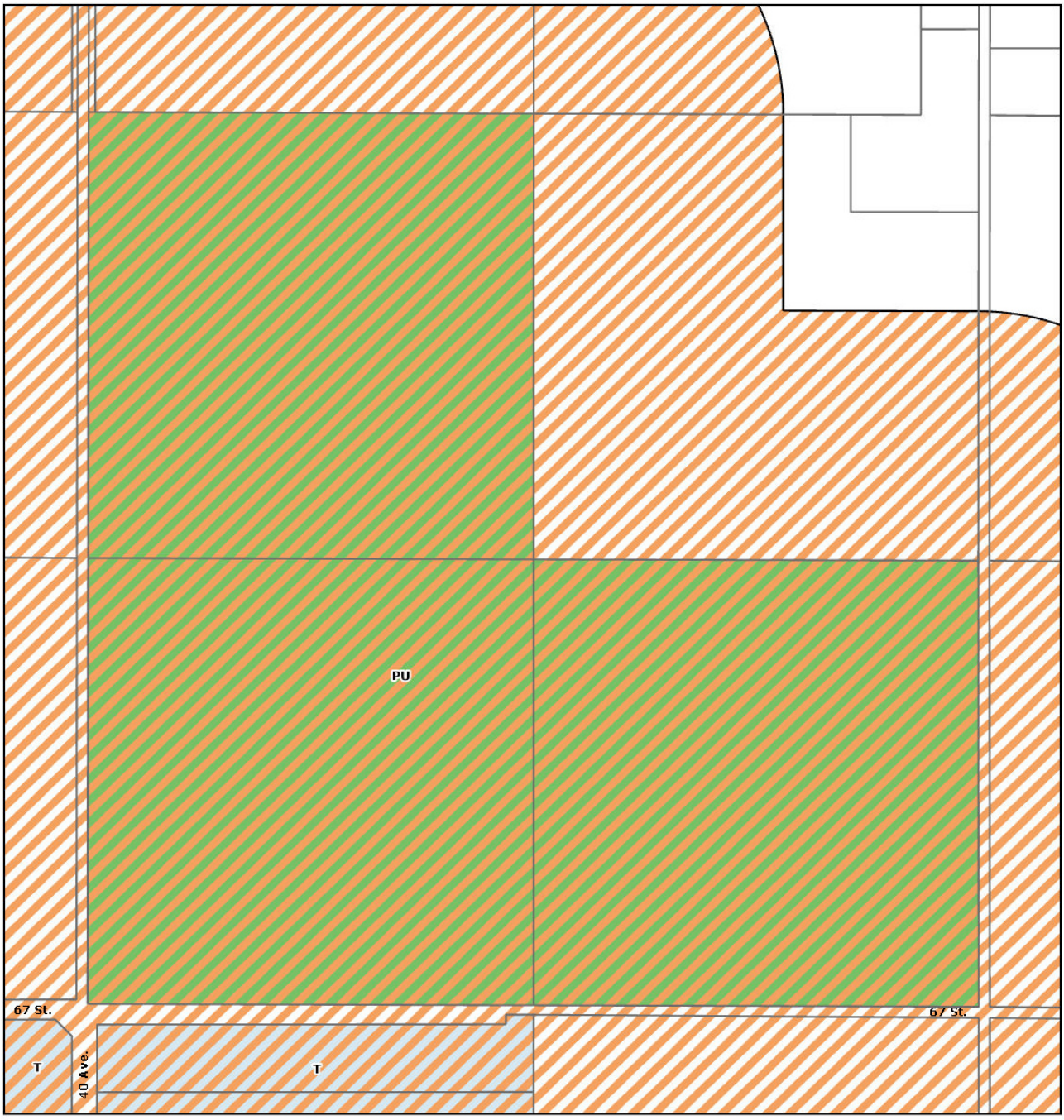
Map 5: Land Use District and Overlay Map: Section C



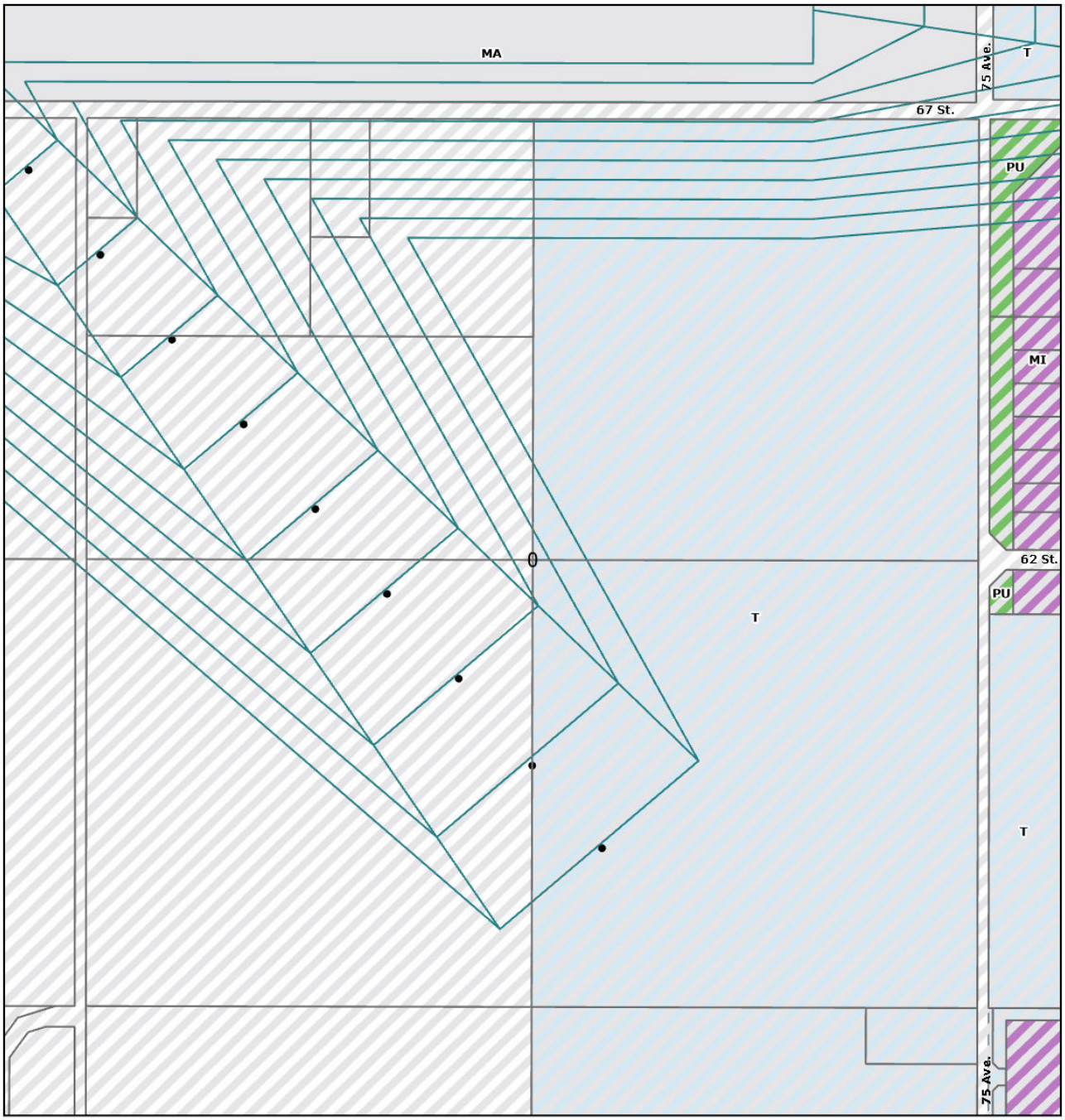
Map 5: Land Use District and Overlay Map: Section D



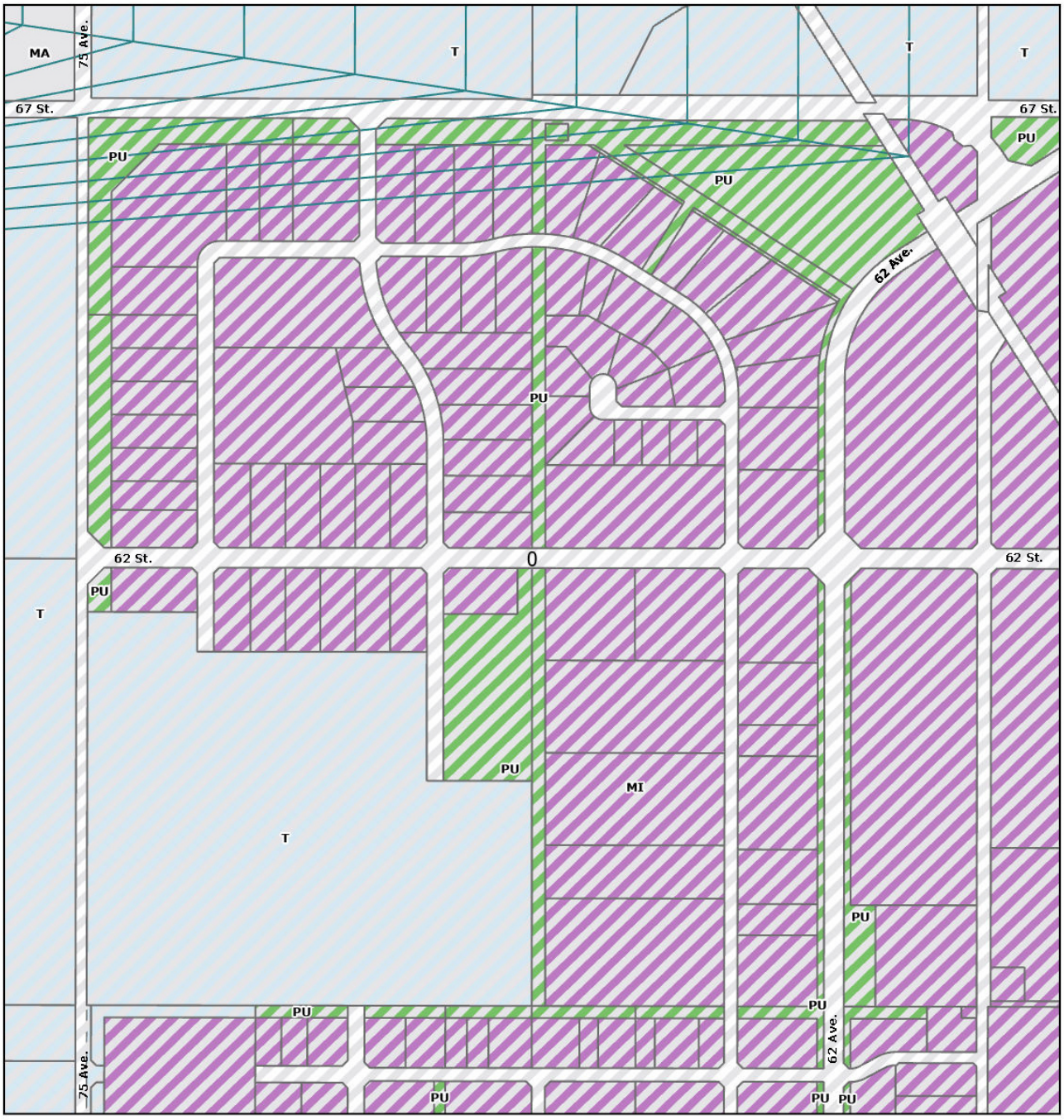
Map 5: Land Use District and Overlay Map: Section E



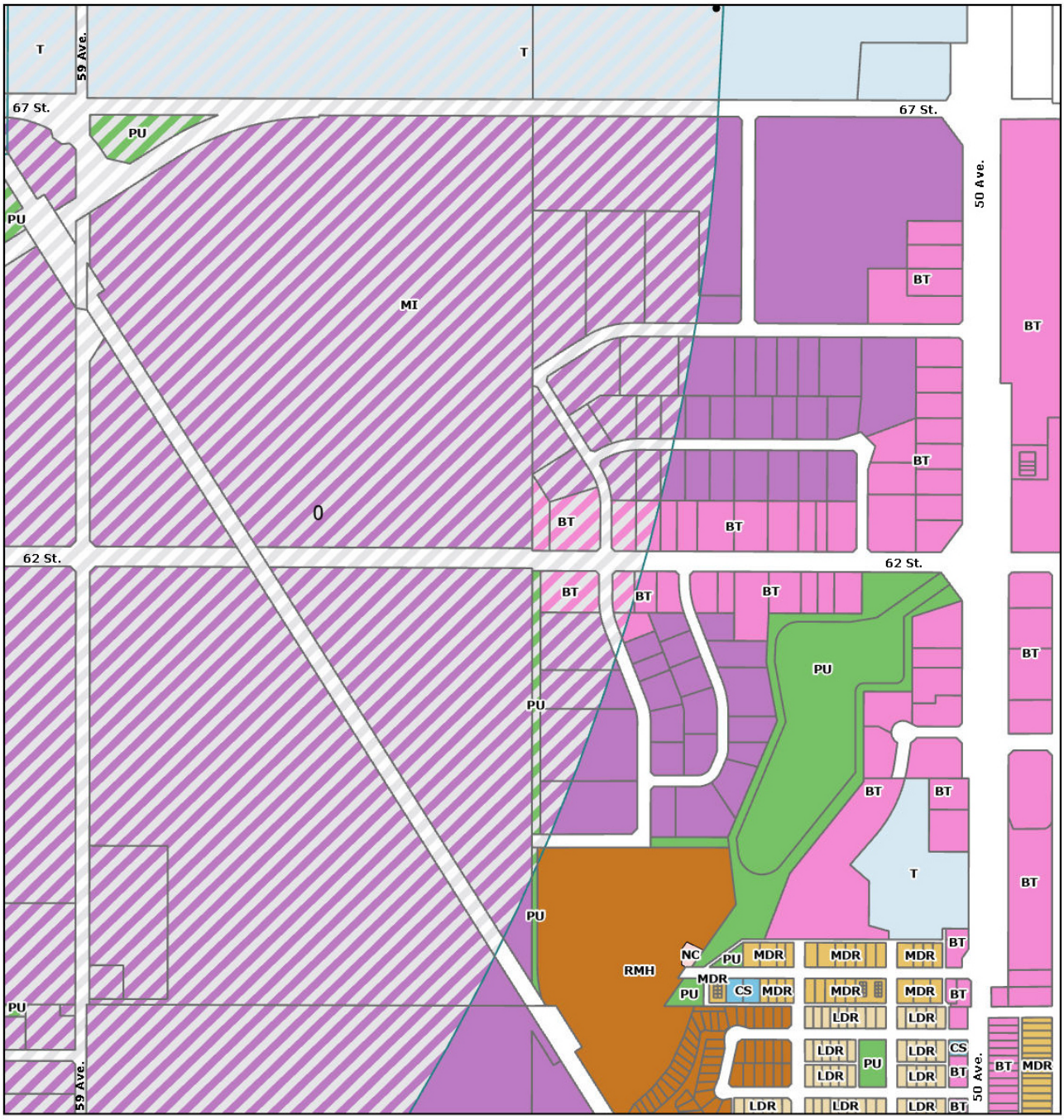
Map 5: Land Use District and Overlay Map: Section F



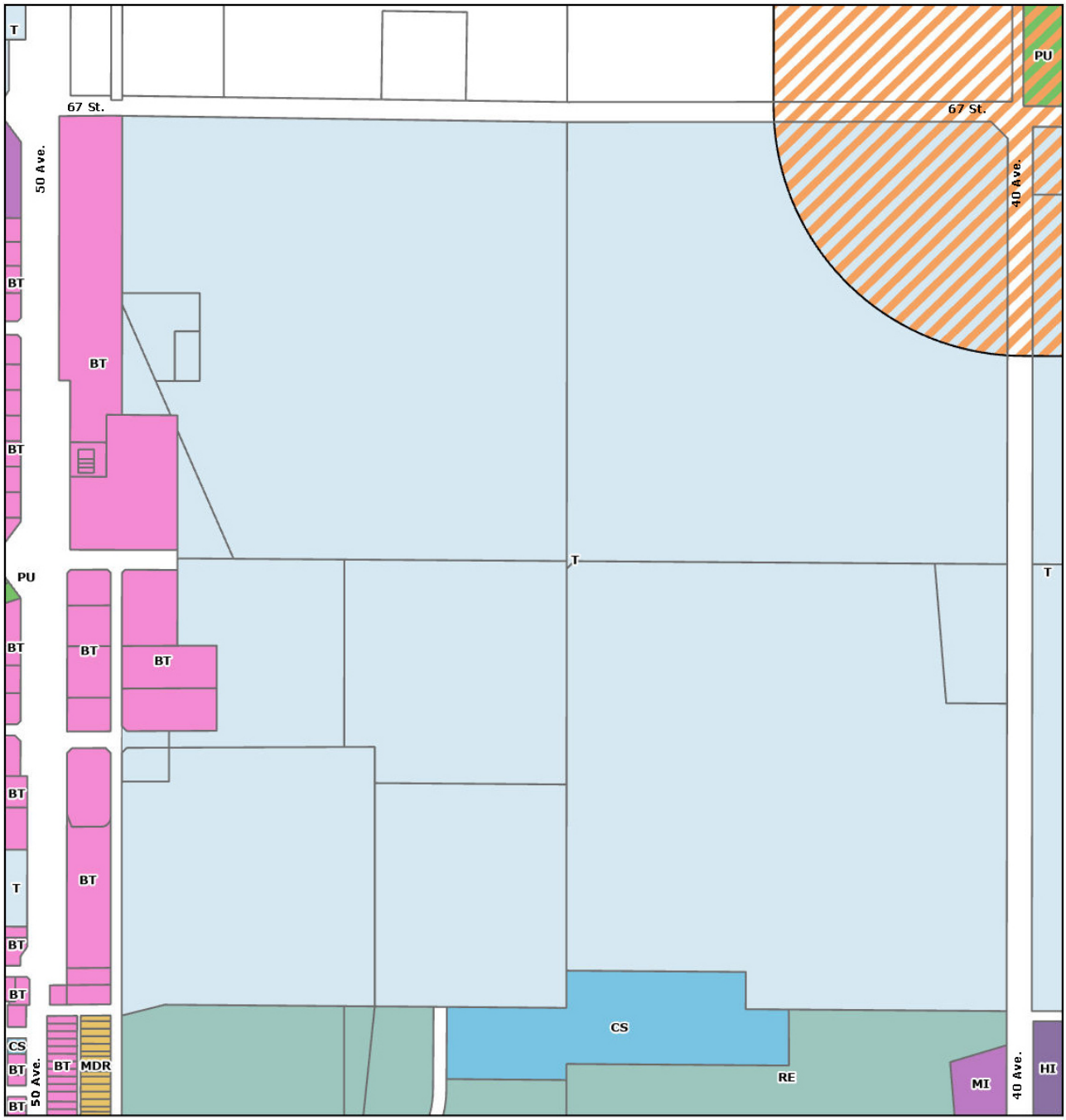
Map 5: Land Use District and Overlay Map: Section G



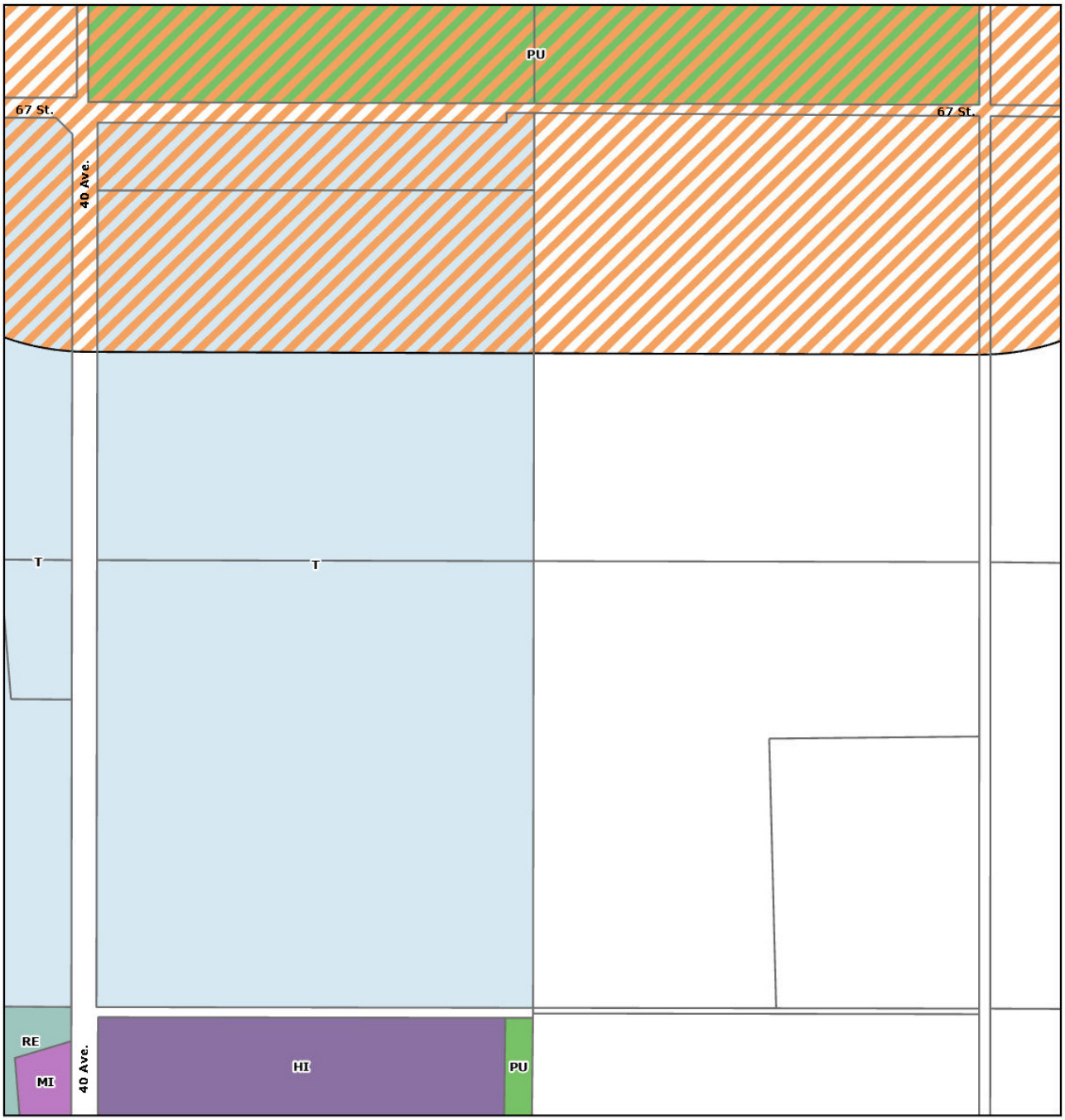
Map 5: Land Use District and Overlay Map: Section H



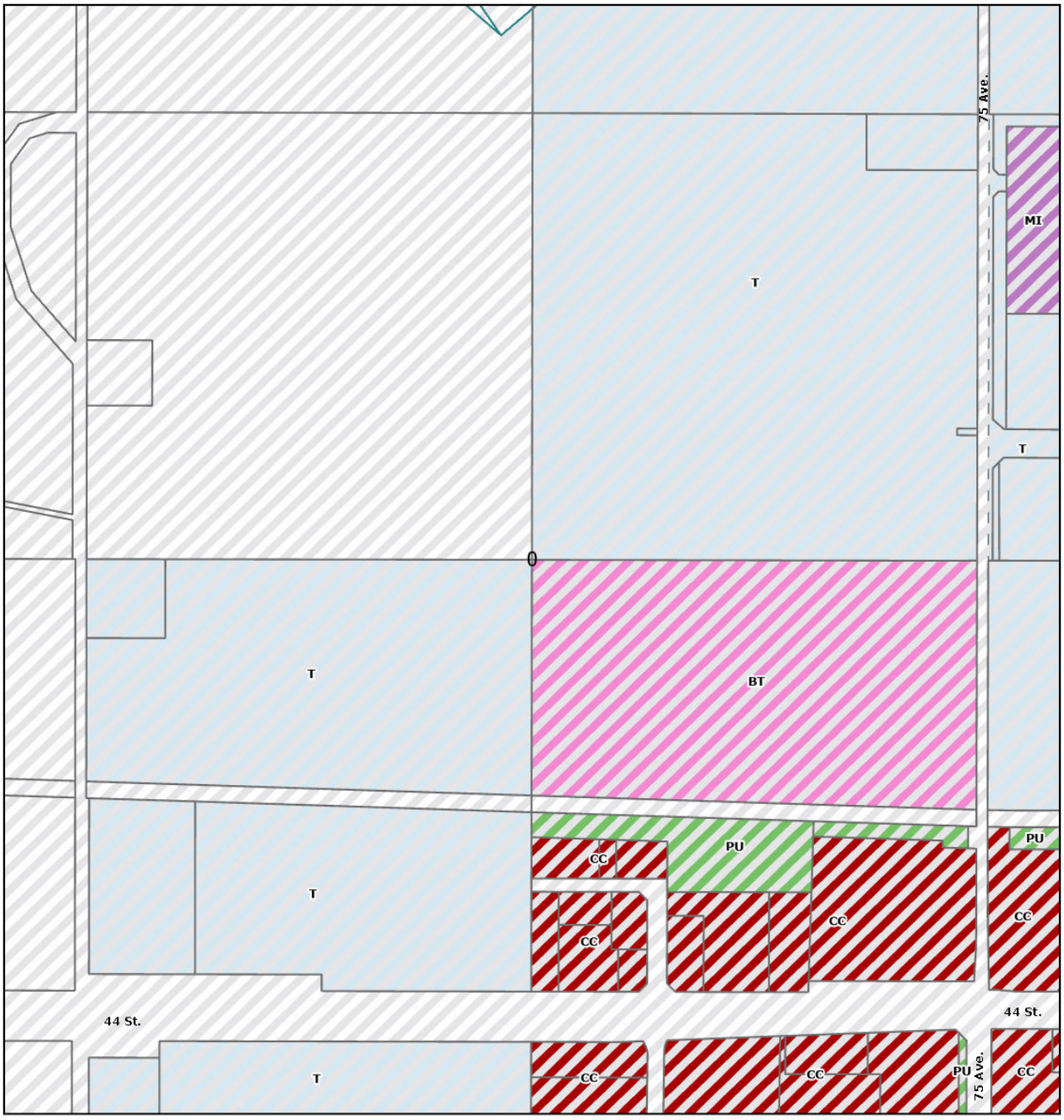
Map 5: Land Use District and Overlay Map: Section I



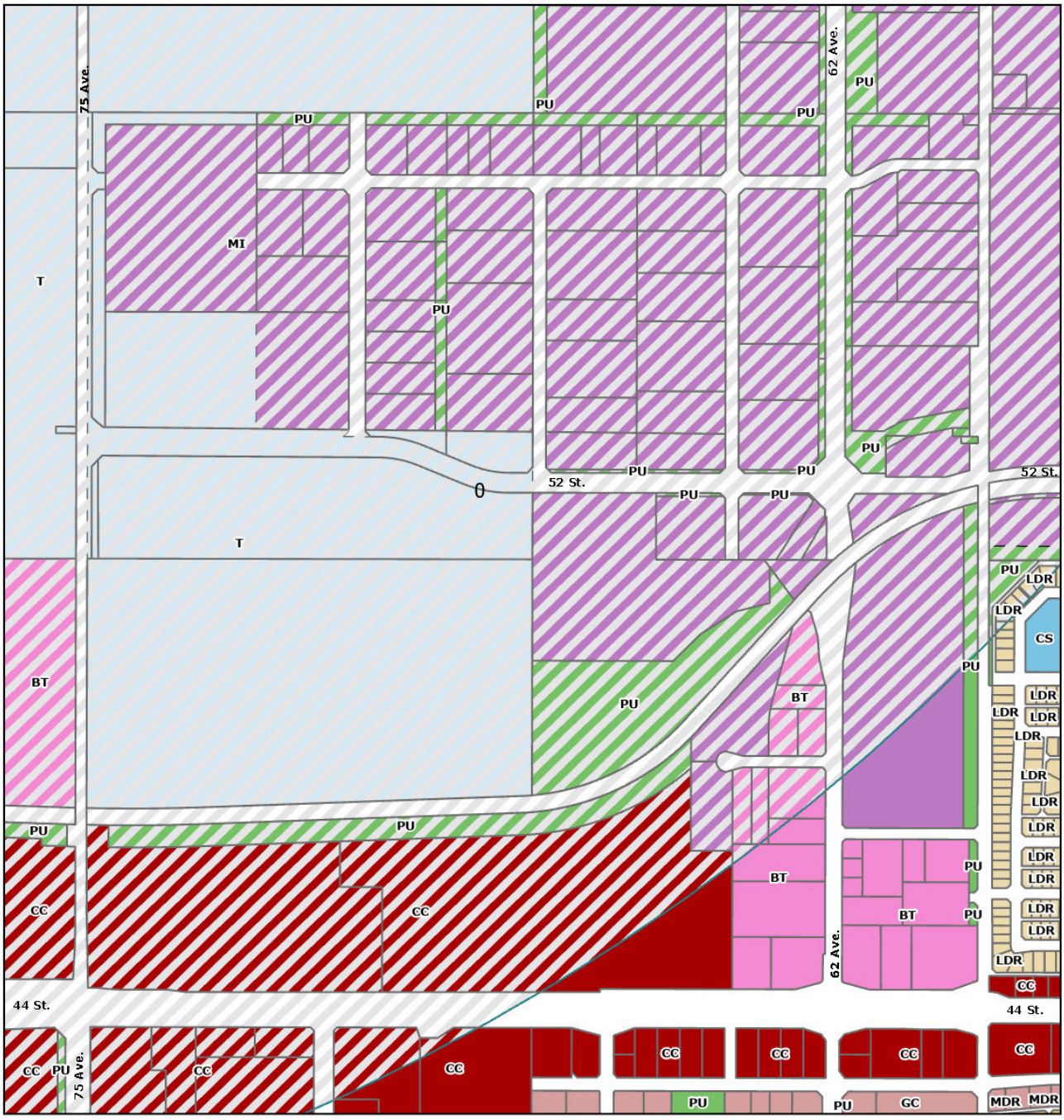
Map 5: Land Use District and Overlay Map: Section J



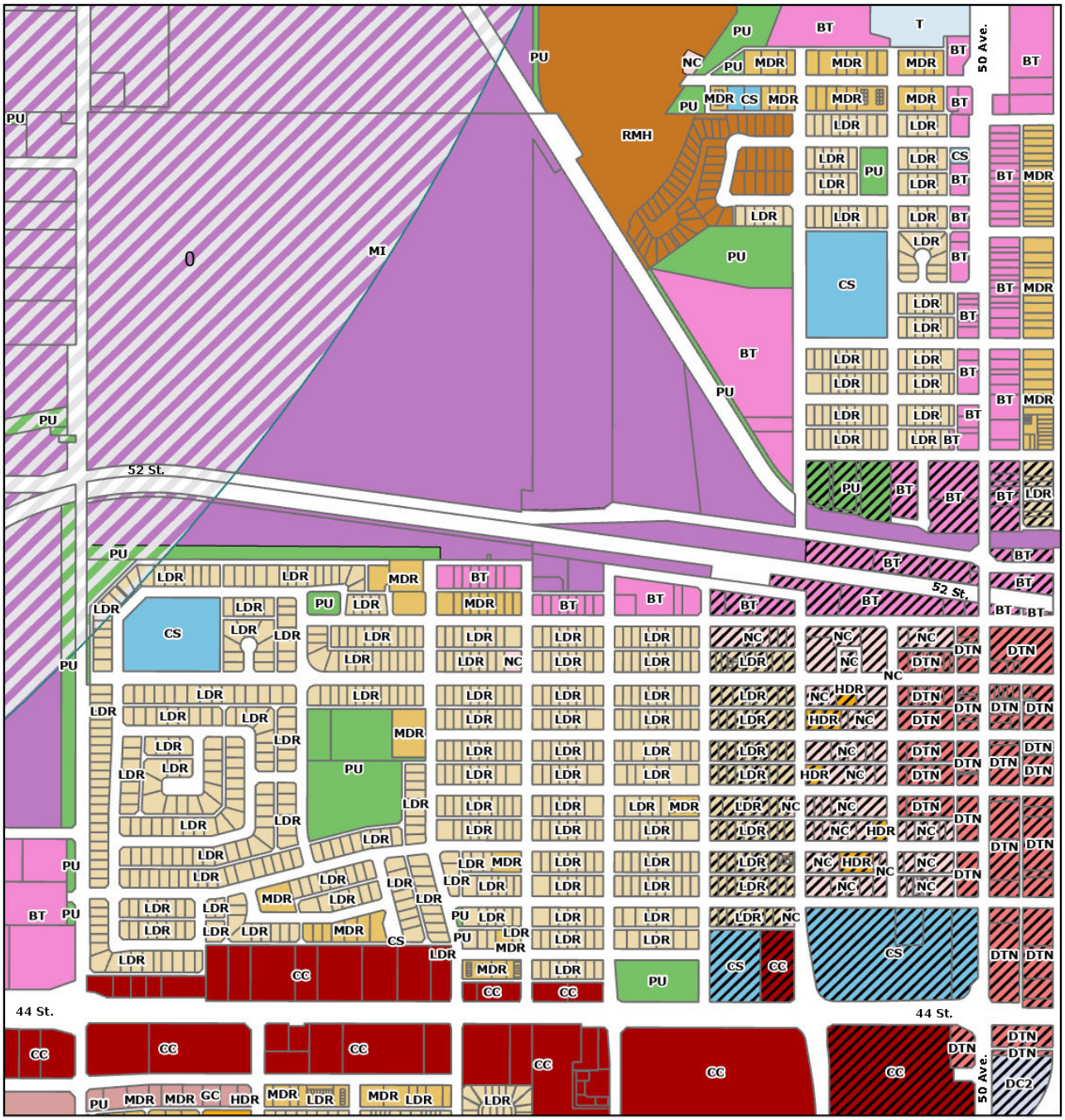
Map 5: Land Use District and Overlay Map: Section K



Map 5: Land Use District and Overlay Map: Section L



Map 5: Land Use District and Overlay Map: Section M



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- Downtown Area Redevelopment Plan (DARP) Overlay
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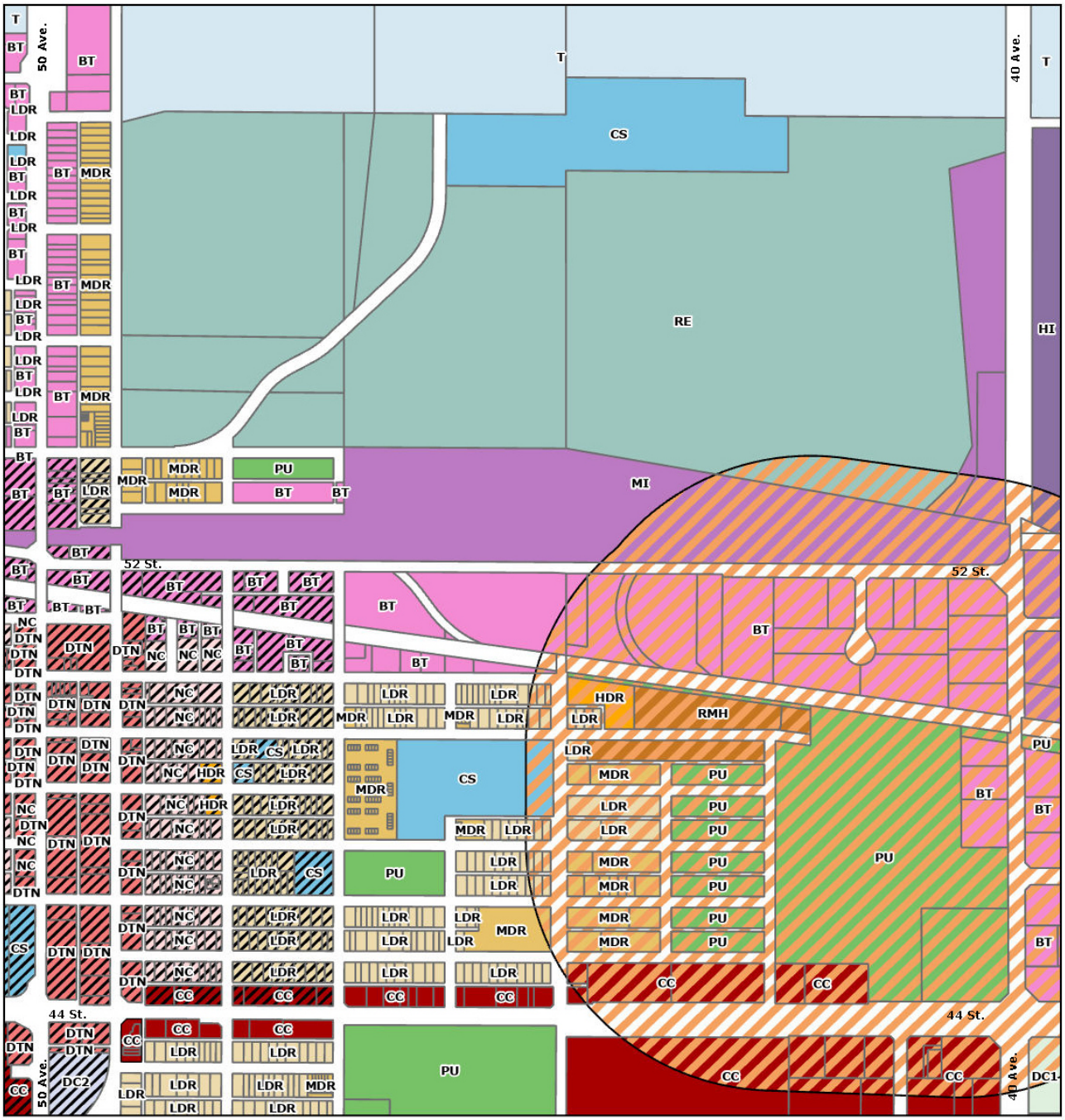
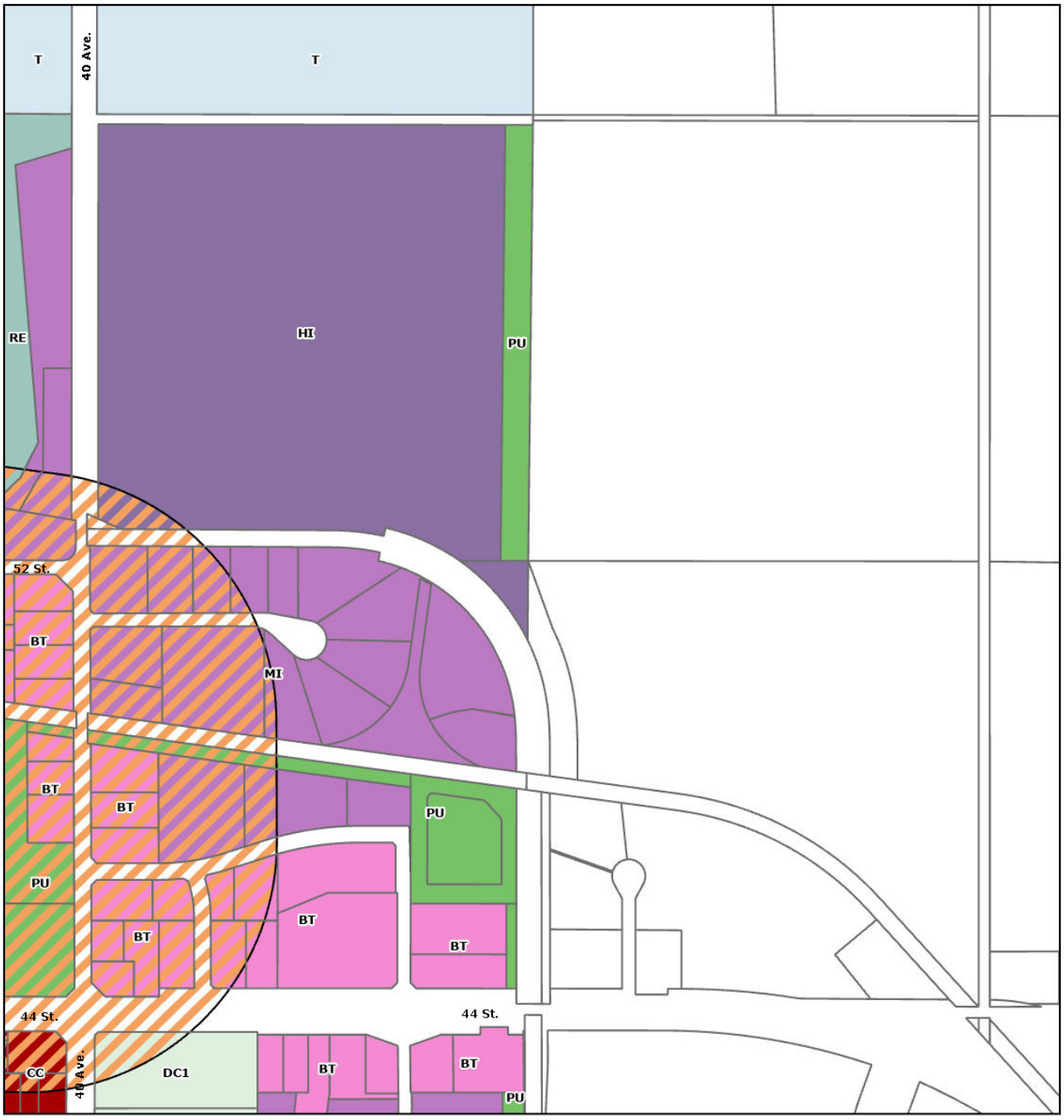
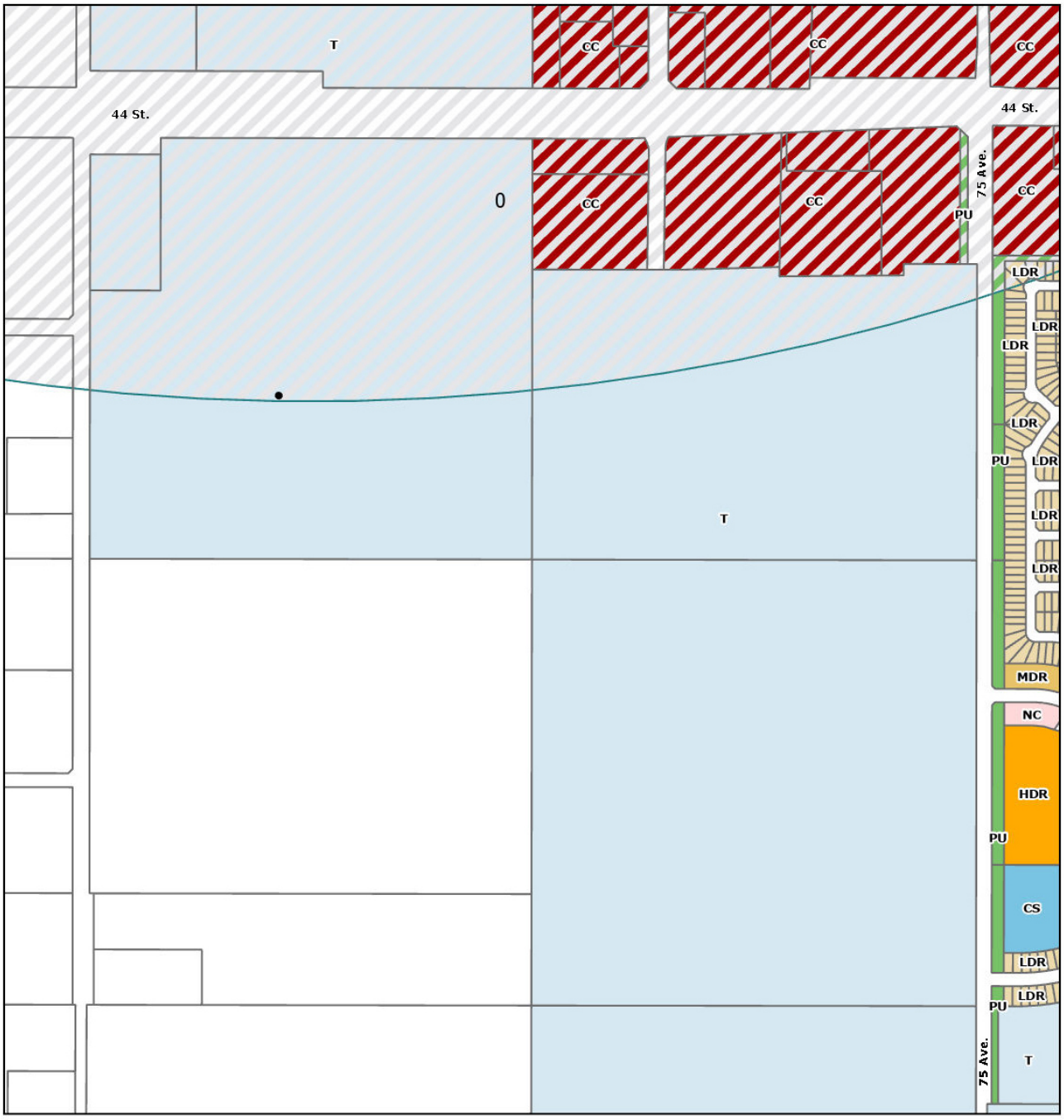
Map 5: Land Use District and Overlay Map: Section N



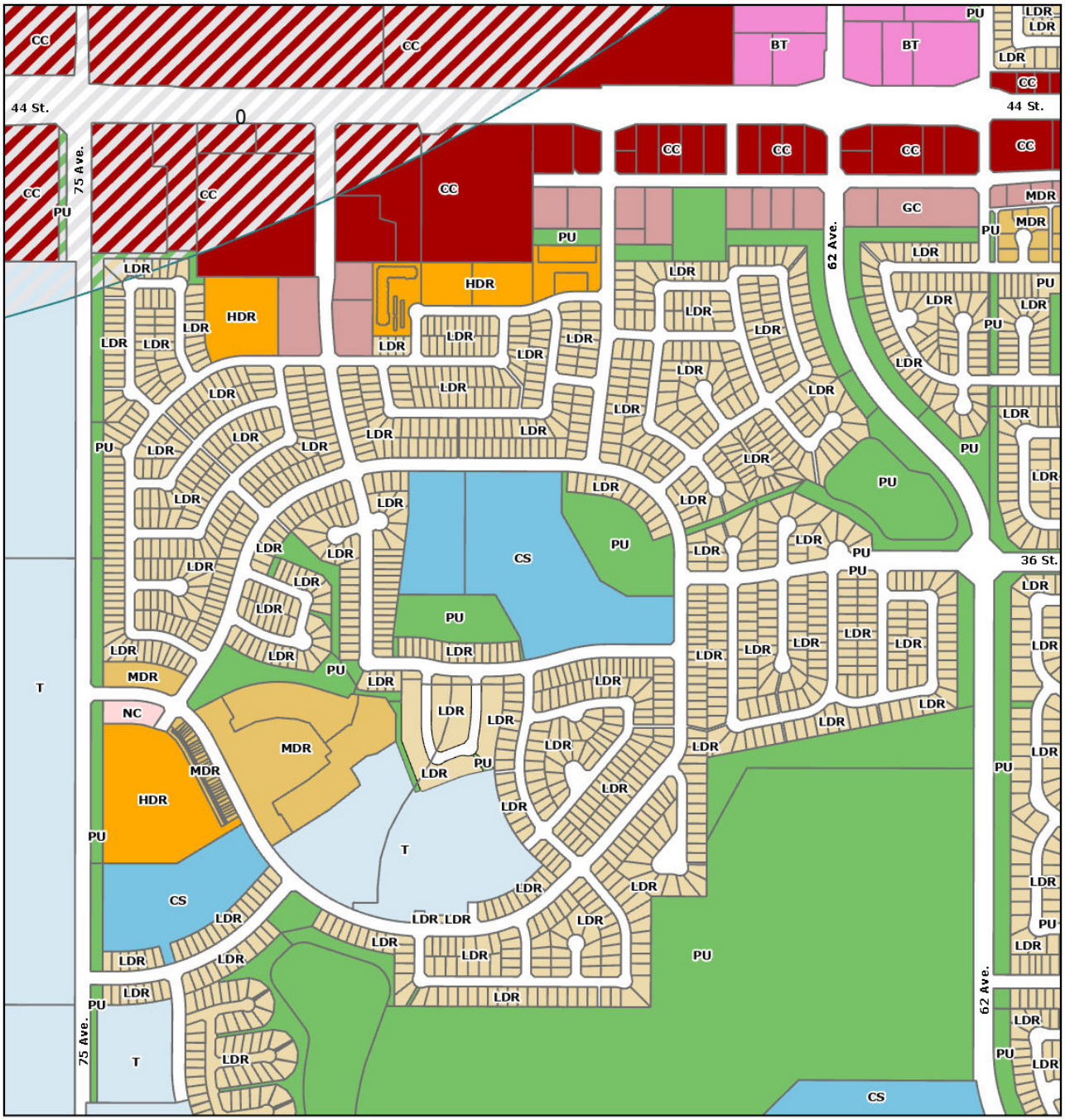
Map 5: Land Use District and Overlay Map: Section O



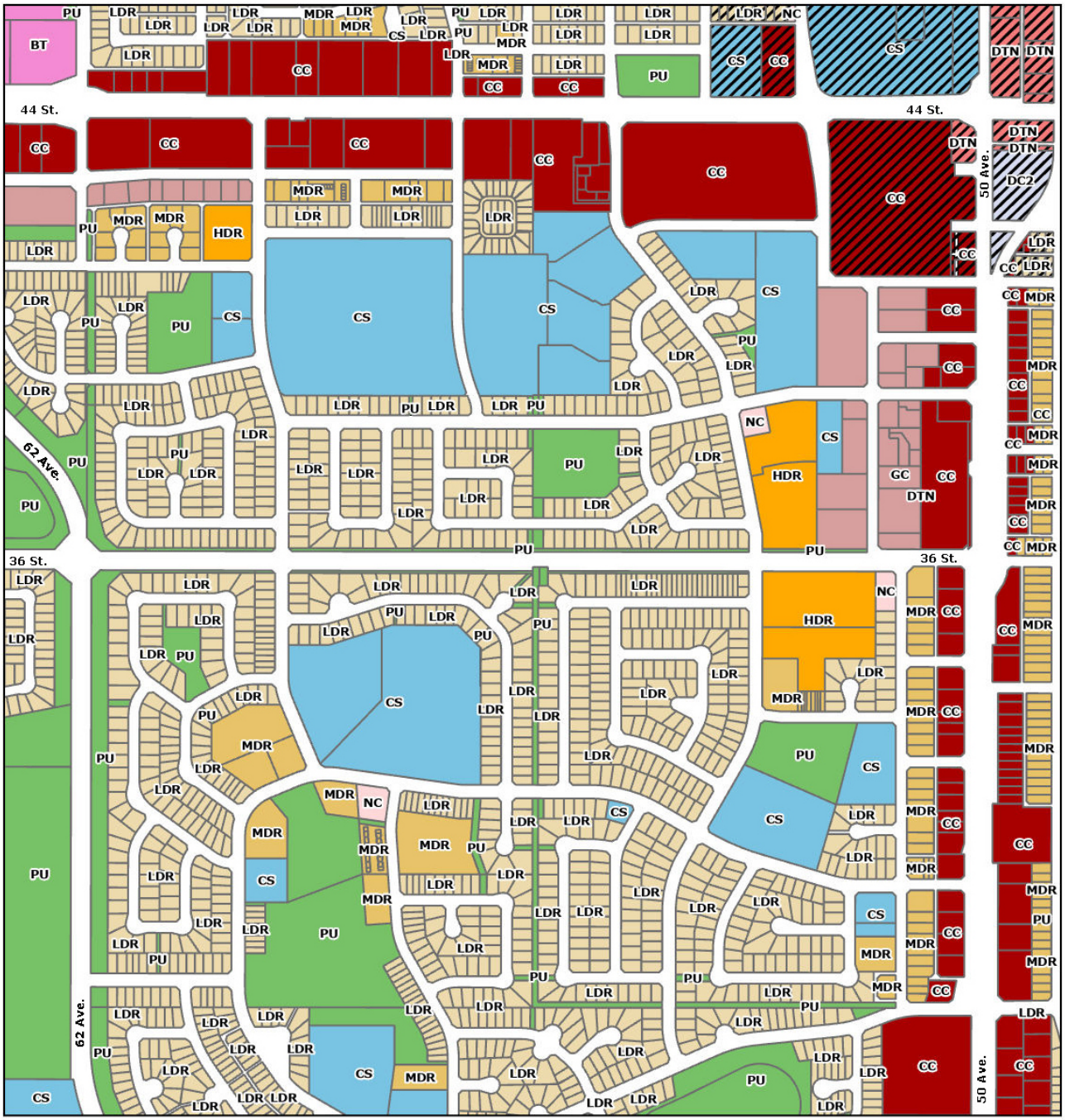
Map 5: Land Use District and Overlay Map: Section P



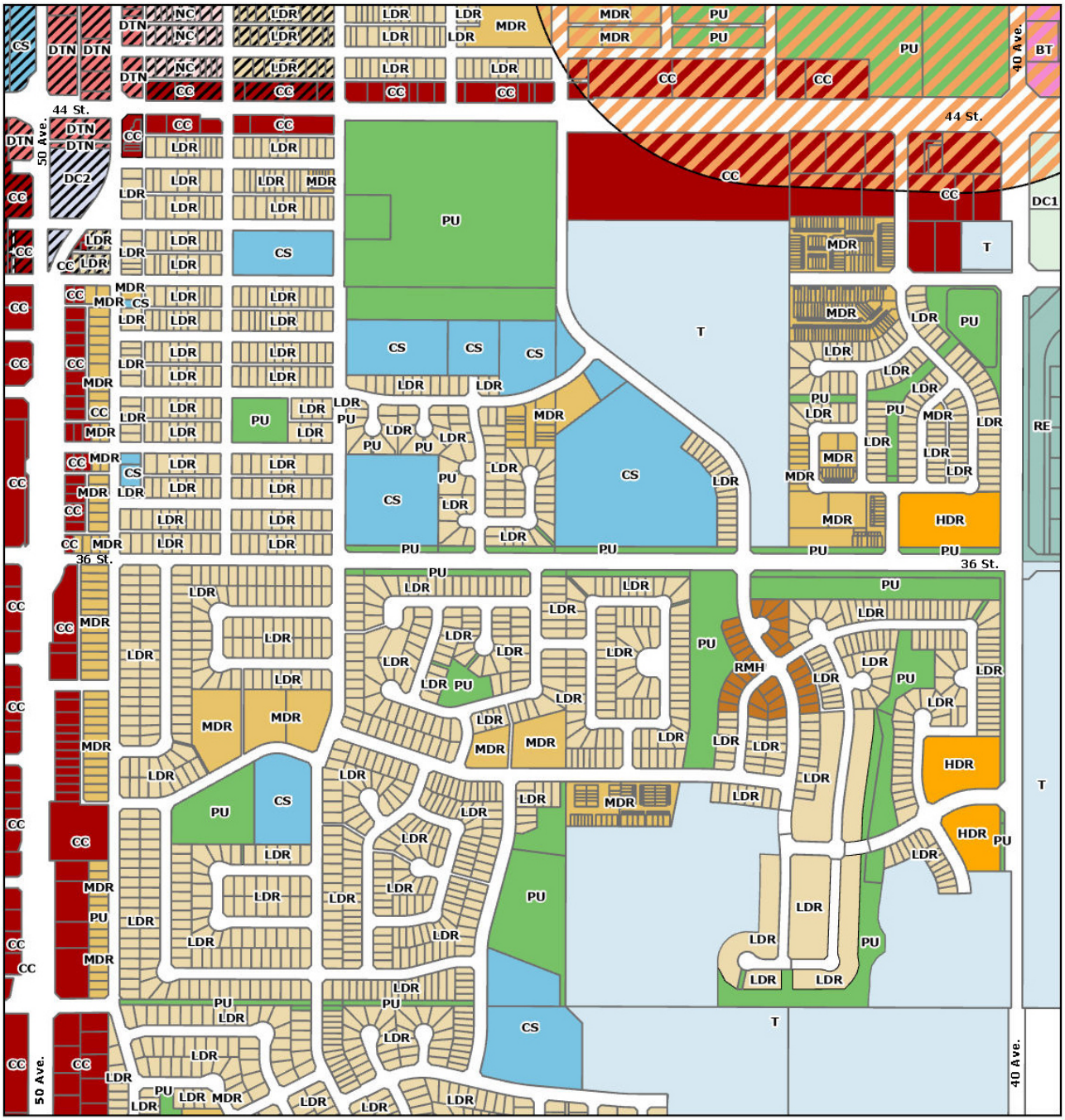
Map 5: Land Use District and Overlay Map: Section Q



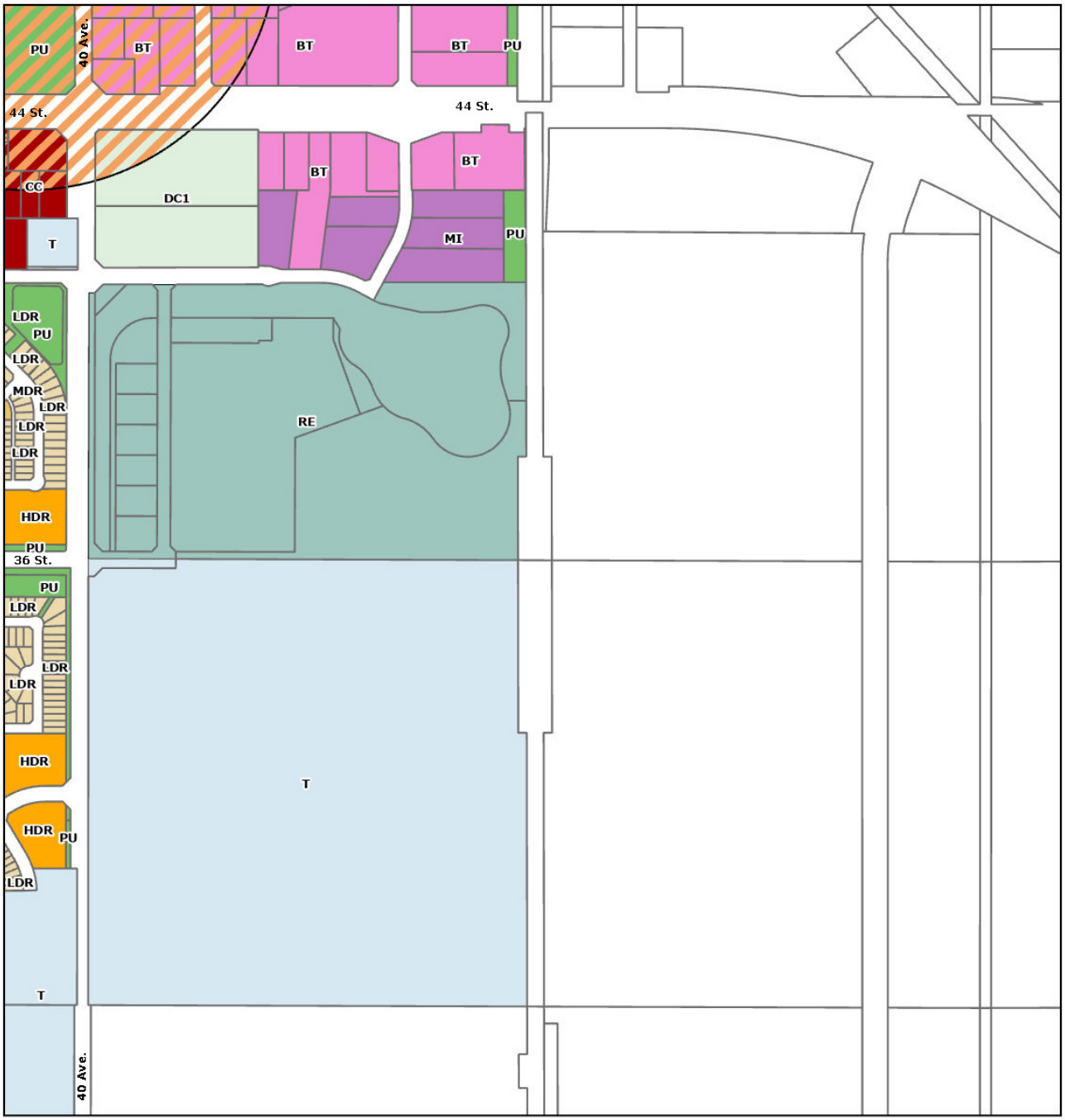
Map 5: Land Use District and Overlay Map: Section R



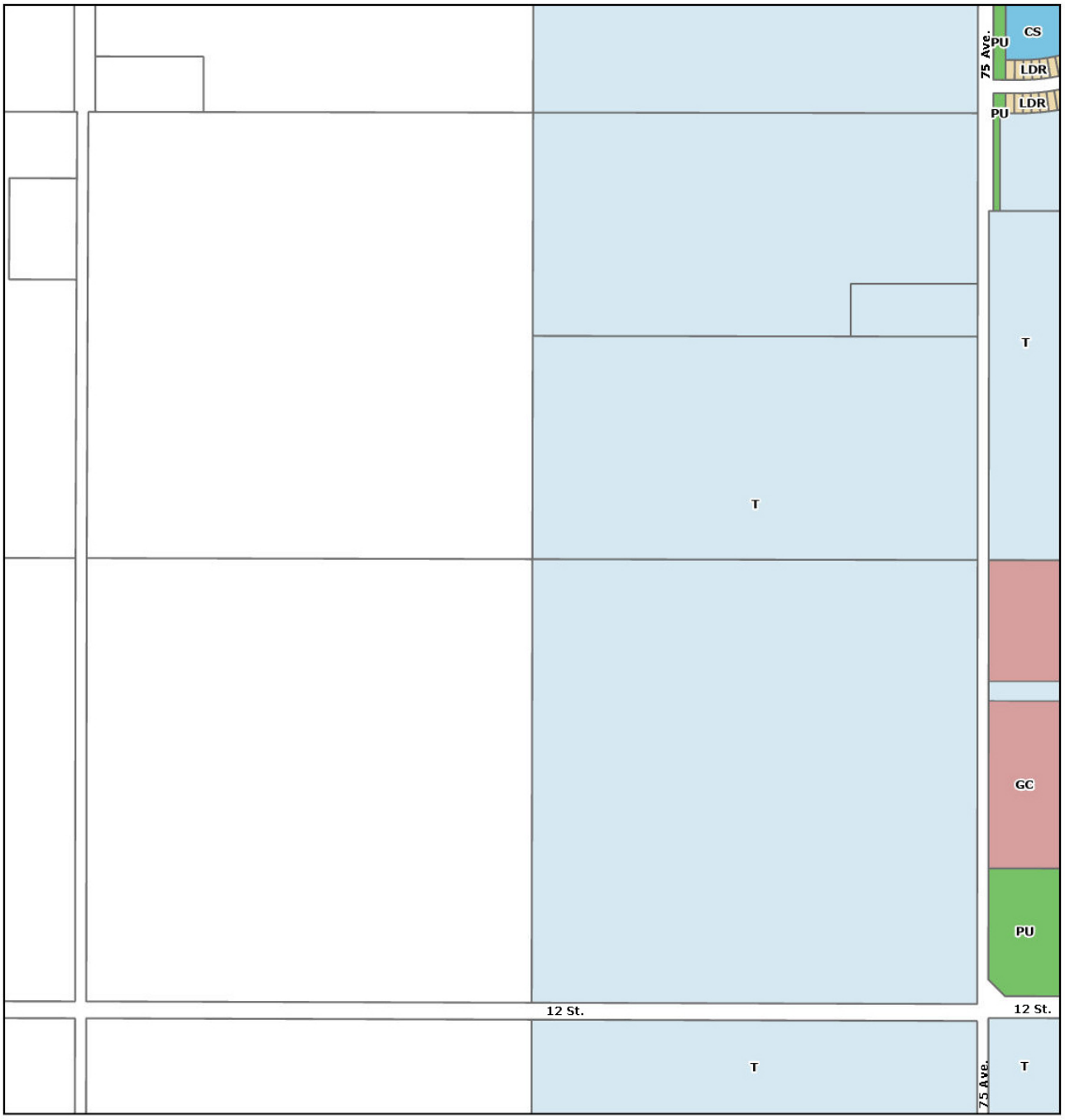
Map 5: Land Use District and Overlay Map: Section S



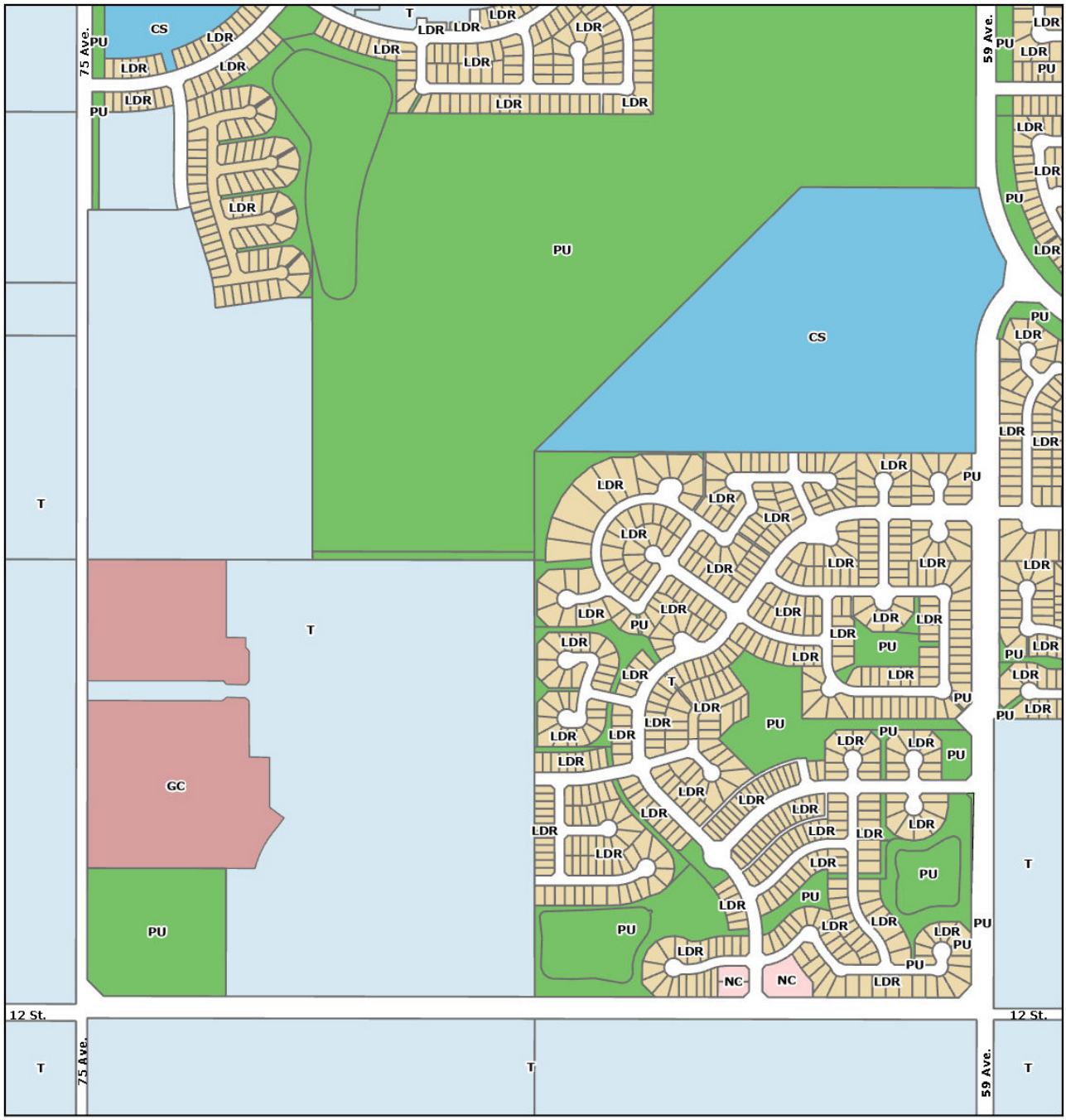
Map 5: Land Use District and Overlay Map: Section T



Map 5: Land Use District and Overlay Map: Section U



Map 5: Land Use District and Overlay Map: Section V



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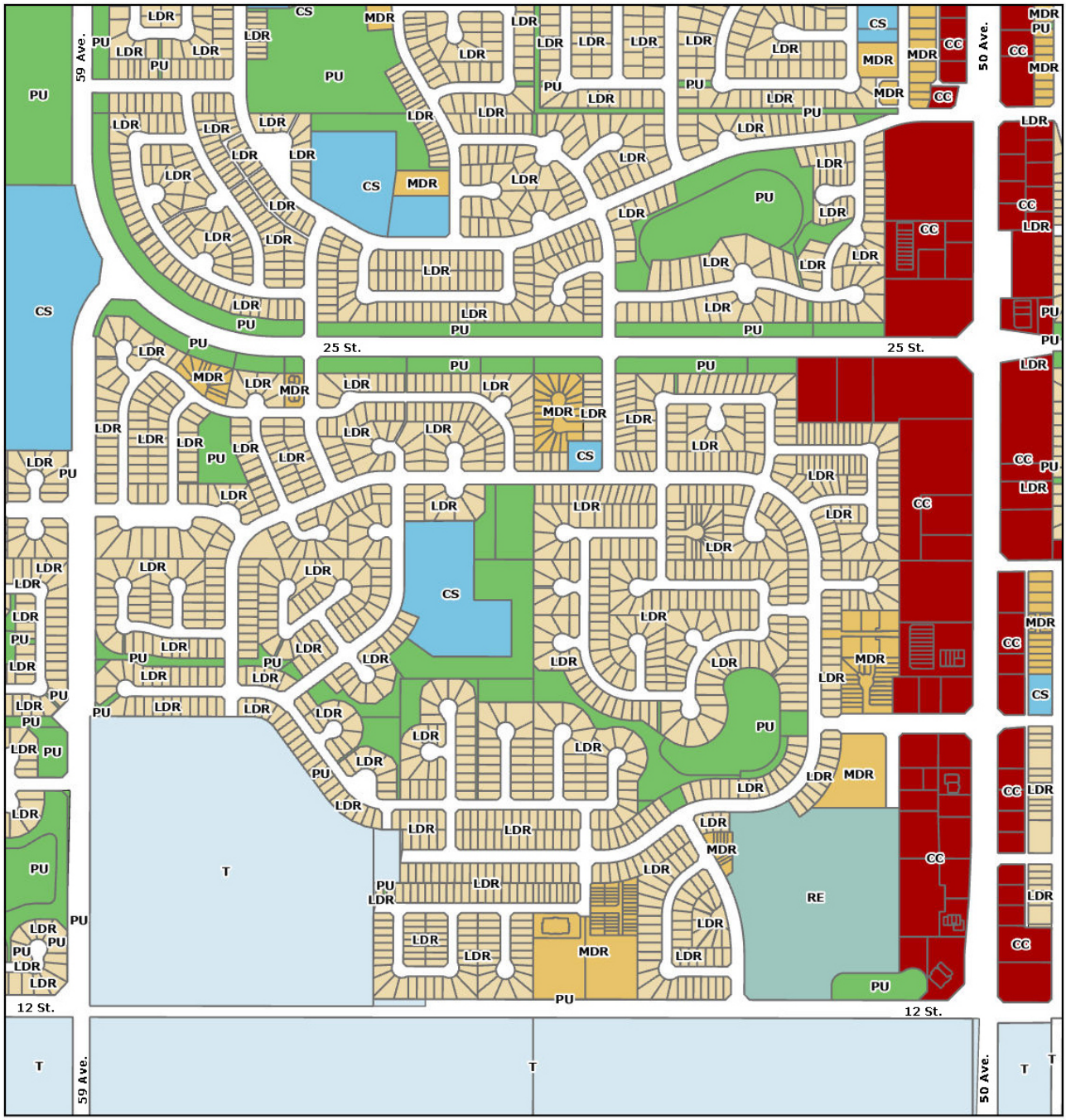
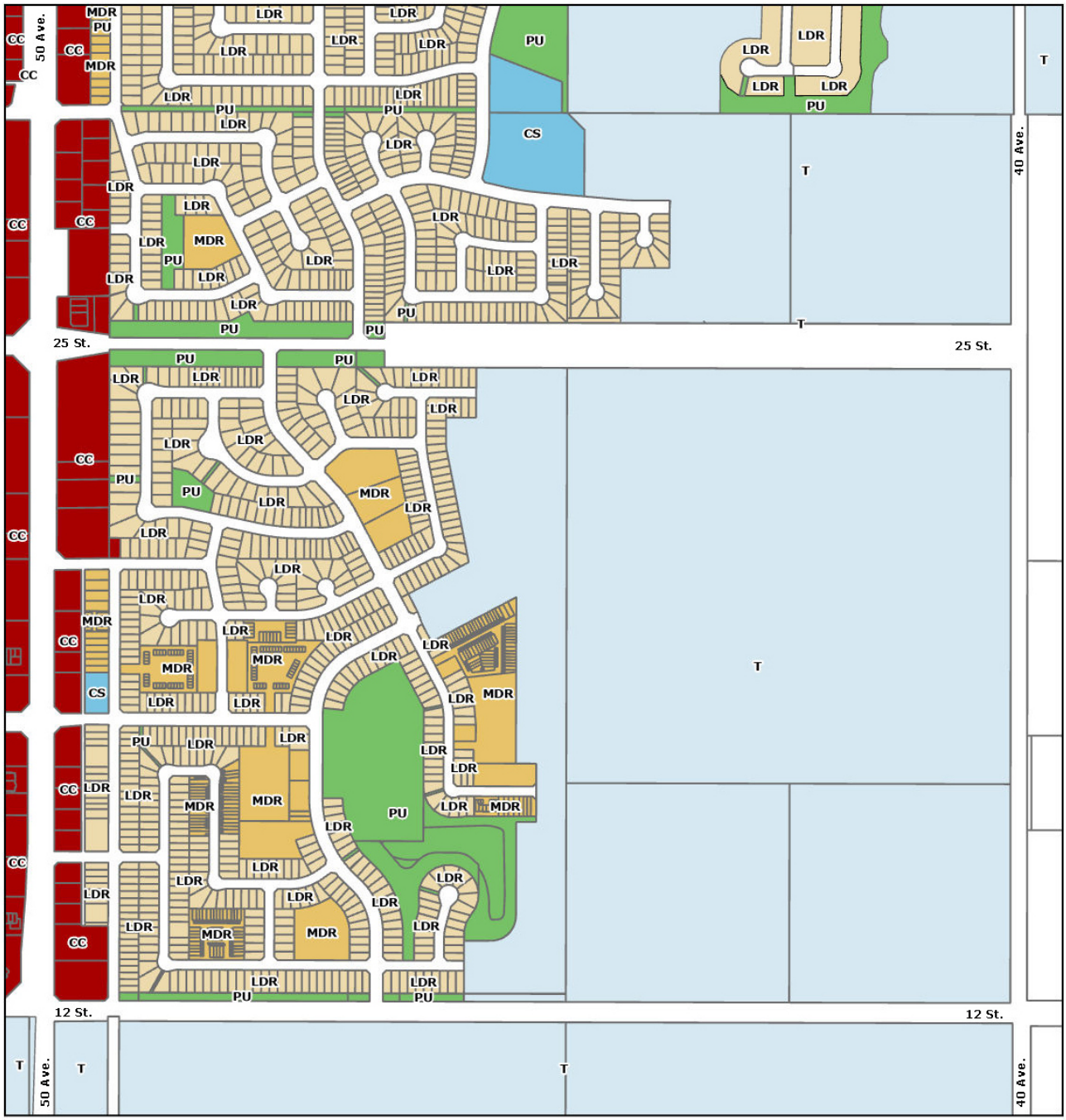
N

0 112.5 225 450 Metres

Map 5: Land Use District and Overlay Map: Section W



Map 5: Land Use District and Overlay Map: Section X



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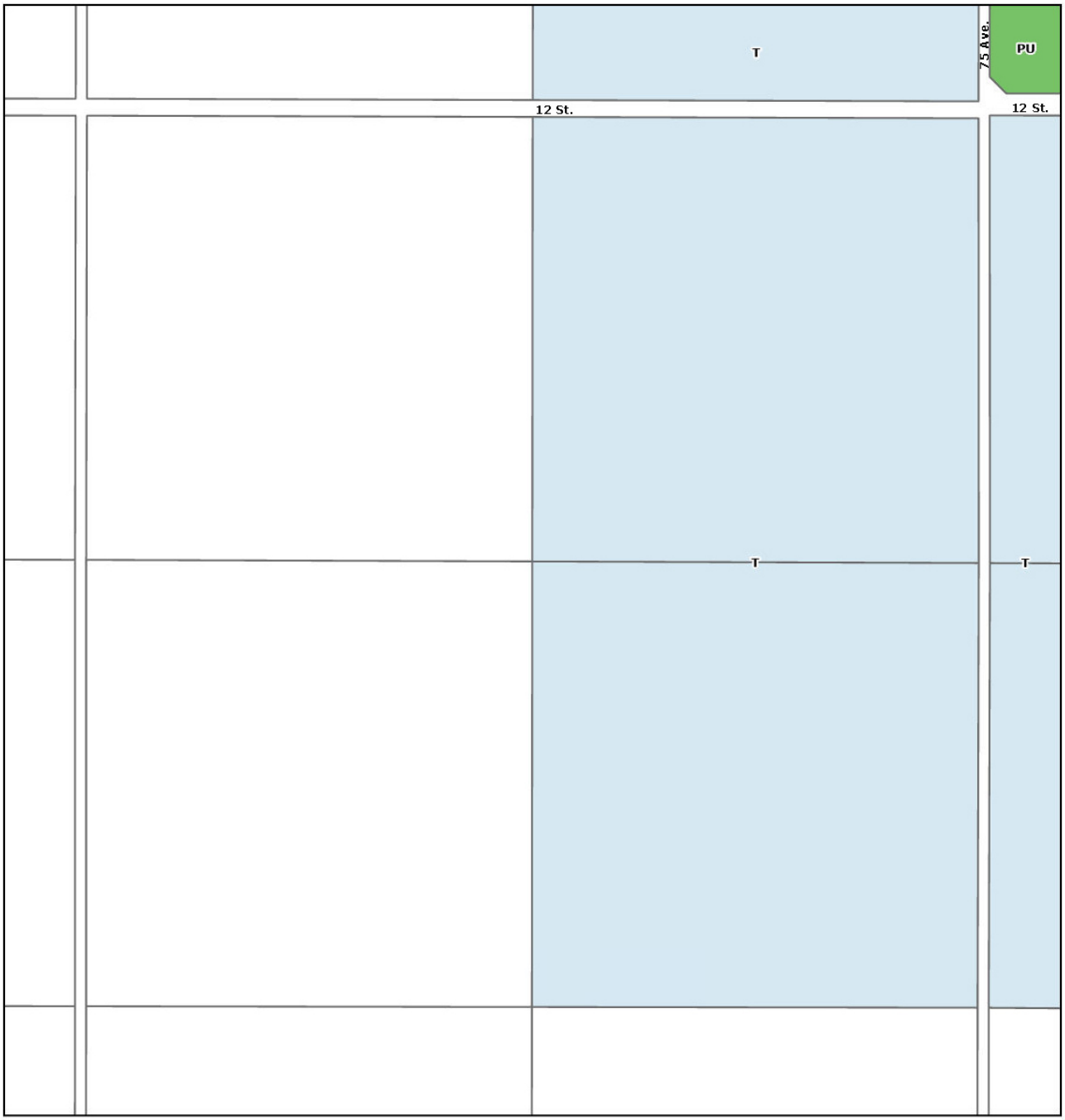
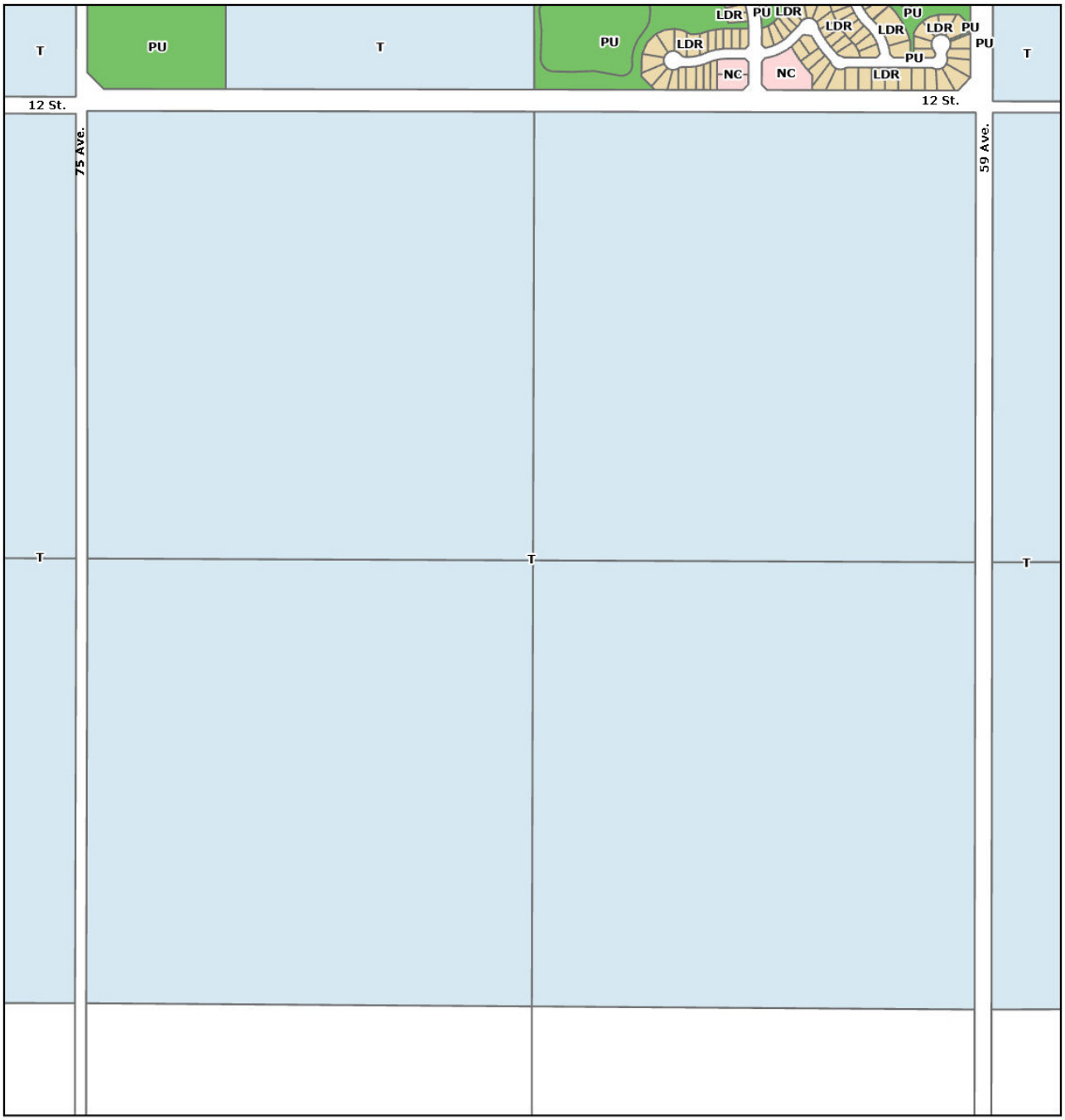
0 112.5 225 450 Metres

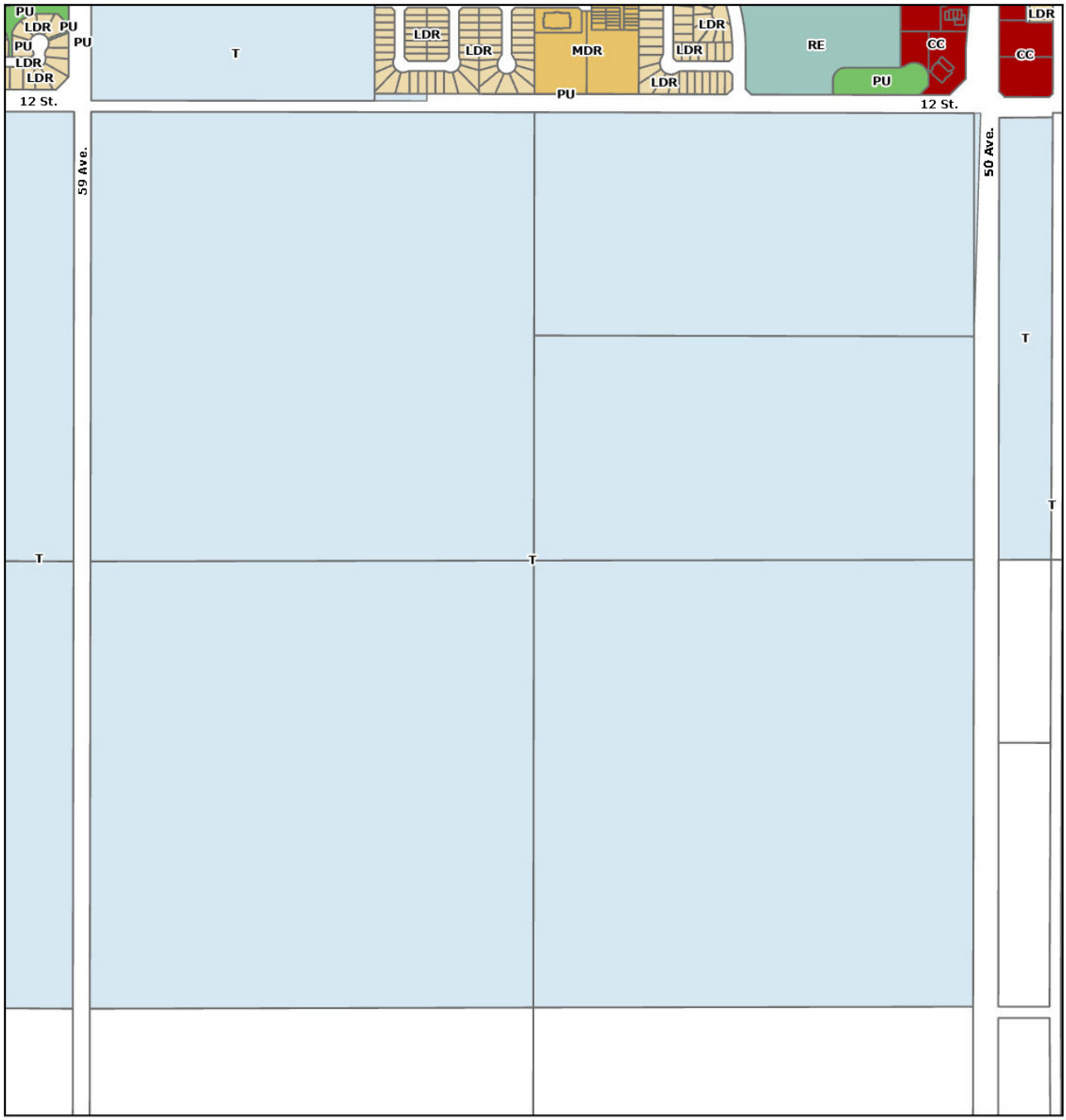
Map 5: Land Use District and Overlay Map: Section Y



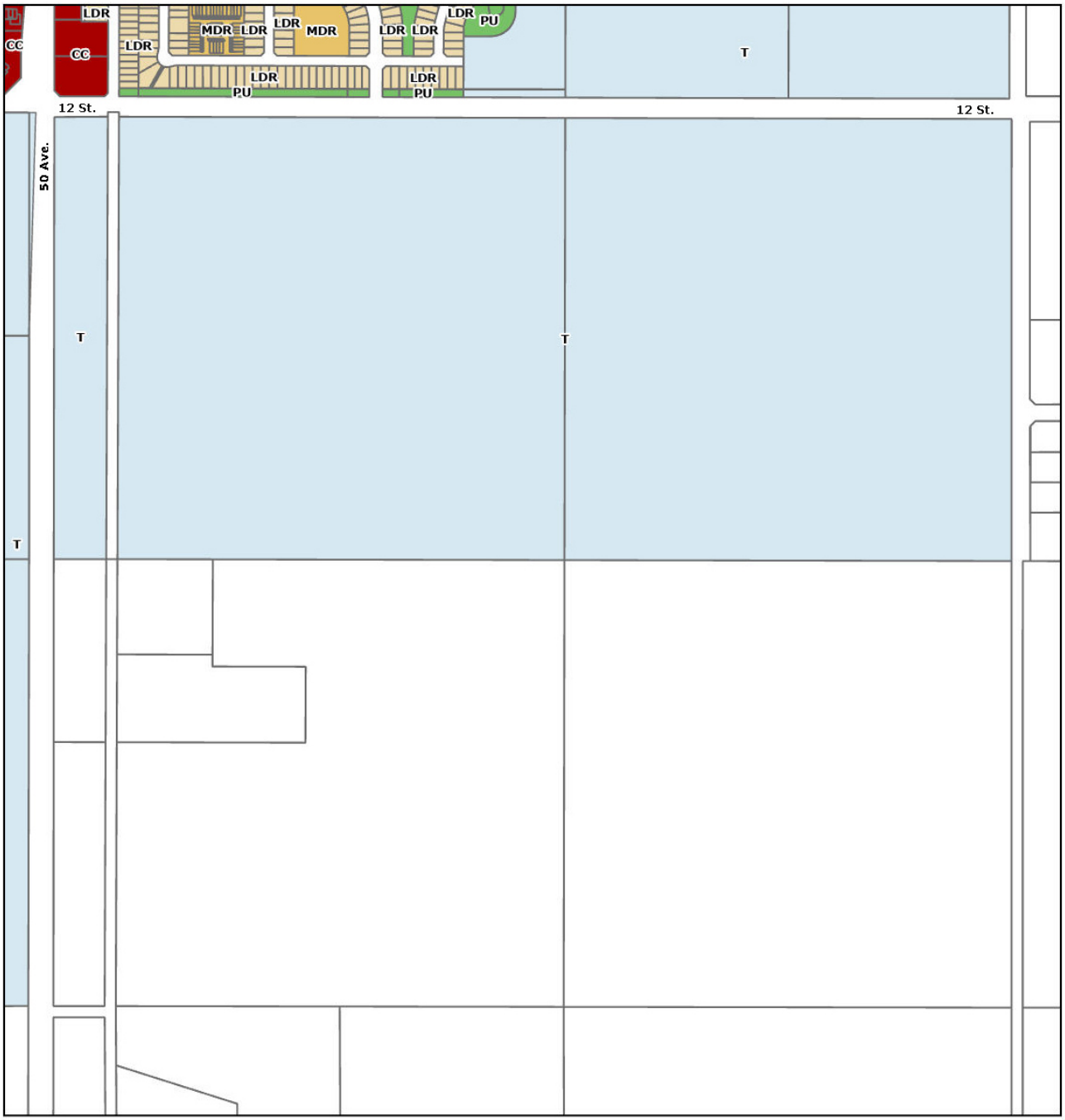
Map 5: Land Use District and Overlay Map: Section Z



Map 5: Land Use District and Overlay Map: Section AA



Map 5: Land Use District and Overlay Map: Section AB



From: Terry Burton
To: Scott Nelson
Cc: Natasha Pidkowa
Subject: 5109 - 41 Street
Date: Thursday, November 13, 2025 3:51:31 PM
Attachments: image001.png

Scott, as discussed today.

Planning Services as the City of Lloydminster's Development Authority, continues to review and provide solutions that support you and your development proposal. As the Development Authority, we are bound to enact and enforce Land Use Bylaw 5-2025 (Link to Land Use Bylaw 5-2025) as approved by City Council.

In our discussion on Wednesday, November 5, we provided you with a copy of the current land use district (General Commercial) that is in place for the property, which also outlines the permitted and discretionary uses thereof. As mentioned, indoor and outdoor storage is not listed as an approved use in the district. An indication was provided that there may be opportunities to accept an application for indoor storage, however outdoor storage would be more complicated or not a viable option. The email sent on November 6, outlined this review.

The email outlined the only solution that although not perfectly in alignment with the definitions of the bylaw that would be considered, that being a use approval of 'Contracted Services' along with the inclusion of 'Parking Lot or Structures'. Although, as noted the definition for 'Parking Lot or Structures' requires that the area be hard surfaced (such as asphalt of concrete).

While the 'Parking Lot or Structures' use is an option to allow for outdoor storage, the conditions are not ideal as you mention.

The following outlines further options for you to consider:

1. Apply for a Development Permit as per above. A notice of decision would be provided that outlines the conditions as indicated above.

a. You can choose to follow the outlined conditions, in this case being the hard surfaced parking area; **or**

b. File an appeal to the Subdivision and Development Appeals Board (SDAB), specifically regarding the condition to hard surfacing of the parking lot.

e SDAB is responsible for appeals regarding various issues as determined by the Alberta unicipal Government Act. The nature of these appeals includes, but not limited to, minor riances that exceed the Development Authorities power, demolition, architectural controls, sapplication of the LUB 5-2025 in issuing a development permit, refusal to issue a velopment permit, refusal of a subdivision application, and any condition of a land use stop der issued on a property.

pursue an application to the SDAB, you must have first received a Notice of Decision on a velopment Permit, and then you can make an application to the City Clerk's Office.

is application fee is $400.

hearing is conducted by the SDAB, which is open to the public. Anyone can come to speak for against the proposal.

u will also be given the opportunity to make a presentation to the Board.

e board is required to hold the hearing within 30 days of the Appeal being filed.

ould you have any additional questions pertaining to the SDAB, please contact the City Clerk cityclerk@lloydminster.ca

2. An alternative to Option 1, is applying to amend the Land Use Bylaw. There are **two** different amendments that can be made:

a. You can make an application to amend the map of the bylaw to change the land use district to one that matches your current development, such as MI – Medium Industrial which allows for outside storage.

te that if this is the path you choose, that you take into consideration your future plans for e property and the redevelopment thereof. Changing the district will provide alignment with ur current use but may pose challenges to the future development of the property.

b. The other amendment that you can make is to amend the text of the 'General Commercial" land use district to include outdoor storage as a discretionary use.

te that this change affects all properties that are within this district and as such other nditions may be considered in addition to the inclusion as a discretionary use.

Please note the following regarding requesting amendments to the Land Use Bylaw:

- Both a Map or Text Amendment to Land Use Bylaw 5-2025, requires a Bylaw to be prepared and presented to Council for consideration.
- Amendments to Planning Bylaws require three readings of Council and a Public Hearing.
- Anyone who wishes to speak for or against the proposed amendments will be allowed to speak during the Public Hearing which is scheduled and held during Regular Council Meetings.
- Application fees to amend the map or text are $1,500 plus $952.38 (x2 - for advertising) plus GST for a total of $3,500.00 –as per the Fees and Charges Bylaw 6-2025 (Link to Fees and Charges Bylaw 6-2025)
- Processing of an amendment (either map or text) is subject to the scheduling of Council meetings and could take approximately 3 months.
- Should either a map or text amendment be approved, you will then be able to submit for a Development Permit under LUB 5-2025 as amended by Council.
- Either application can be made on the City's website here: https://www.lloydminster.ca/planningapplications

Regarding the current use of the property, Planning Services has reviewed the active and past business licenses issued as well as completed a review of the Property File. From our records, there have been no active Business license since the end of 2023. With the site not having an approved Business license, it is our interpretation that the site has not been active since that time. We acknowledge that during recent years, there may or may not have been operations or businesses conducted out of the site, however they would have been done so without the necessary approvals in place.

Planning Services remains committed to supporting you in obtaining the necessary permits in accordance and alignment with Land Use Bylaw 5-2025. If you have any questions pertaining to the information presented above, please do not hesitate to reach out to either myself and/or Natasha. We are happy to also schedule a meeting to go over the details regarding processing, timing requirements, etc.

Finally, Planning Services has received notice of your Application for a Business License, please note that Use approvals to support this Application will be processed as outlined in the email forwarded on November 6, 2025, from Natasha, or in alignment with the option that is chosen as outlined above.

Terry Burton, P.L. (Eng.), Engineering Licensee
Director, Planning & Engineering
Operations Centre

P: 780-874-3700 Ext. 8332
www.lloydminster.ca

From: Scott Nelson
To: Natasha Pidkowa
Cc: Terry Burton; Roxanne Shortt; Amy Moore
Subject: RE: Nelson Site - 5109 41 Street; Lloydminster Alberta
Date: Thursday, November 06, 2025 3:24:02 PM
Attachments: image002.png
image003.png
image004.png
image005.png

EXTERNAL SENDER: Do not click links or open attachments unless you recognize the sender and know the content is safe.

Natasha,

This does not work for me, particularly because you are tying my hands as far as any kind of exterior storage, or any use at all of the yard area. The property has been in *constant use* since Lufkin vacated in early 2024, as a permitted use under the grandfathered zoning.

I'm willing to work with the City, but what you are proposing is not reasonable in any way. If you wish for the outdoor portion of the property to not be used, should I expect there will be no property taxes for land I cannot use, or enjoy?

If you have an option which allows me to continue to use the outdoor area for an agreed upon amount of time, I'm open to such a discussion. It is my opinion this has been the City's objective from day one, and the delays by the City in processing the rezoning application made it impossible for me to make any plans. Any perceived inactivity (for which there is no basis in fact) is directly related to the City's refusal to deal with the application for rezoning in a timely and professional manner. What the City has done is try to sterilize the property, to suit its own agenda, without compensation. The City has the option to purchase the property if it has some grand vision for what it would like to see developed there.

I look forward to hearing from you, with a more reasonable proposal. At some point it would be most helpful if someone at the City would tell me exactly what they want, and perhaps we can meet somewhere in the middle. Up to now, it's been a game of whack a mole, trying to hit a moving target. All this has done has delayed any redevelopment of the property and wasted a considerable amount of money trying to satisfy the City when there clearly is no way to do so unless I acquiesce to what can only be described as extortion.

One more thing – there wasn't even an apology for the petty and unprofessional choice you and Terry made to ghost me last week. Unfortunately, The Mayor and Dion didn't seem to think there was any problem with it. That being said, there are options I have when Professionals conduct themselves improperly.

Thanks

From: Natasha Pidkowa <npidkowa@lloydminster.ca>
Sent: Thursday, November 6, 2025 2:20 PM
To: Scott Nelson <snelson@nelsondevco.com>
Cc: Terry Burton <tburton@lloydminster.ca>; Roxanne Shortt <rshortt@lloydminster.ca>; Amy Moore <aphee@lloydminster.ca>

Subject: Nelson Site - 5109 41 Street; Lloydminster Alberta

Good afternoon Scott;

Thank you for taking the time to meet with myself and Terry on November 3, 2025.

Following our discussions and review of the Land Use Bylaw 5-2025, in conversation with our Development Officer, although it is not perfectly in alignment with the definition, we comfortable with your proposing a Use Approval Application for Contractor Services in conjunction with Parking Lot of Structure.

Being that Parking Lot or Structure, is a Discretionary Use, this Application will be processed in accordance with the criteria od Discretionary Use.

Discretionary Use Applications, in summary:

- Require notice to adjacent landowners within 200m and to be published in the local newspaper with 14 days allowed for public comments;
- Development Officer renders a decision;
- Notice of the decision to the adjacent landowners and publicized in the local newspaper; and
- 21 day appeal period.

The decision is not valid until the 21 day appeal period has ended.

While Administration at this time is supporting the proposed Uses, the decision rendered will be based off of planning related concerns received during the referral process and the Discretionary Use Considerations listed within Land Use Bylaw 05-2025 and this Application may be Approved, Refused or subject to additional regulations based on the information received.

As we discussed, your lands are within the GC – General Commercial District, even with processing this application, the District Regulations clearly state as per 7.1.3.h:

This would prohibit the outdoor storage on your stie from storing items including but not limited to: materials of any kind, vehicles, ATV, sheds, trailers (campers and utility trailers) etc.

Should you wish to extend the approval of the parking structure to the exterior component of

your property, to allow for outdoor storage of vehicles, trailers, etc. the surface in which the parking is used, MUST be hard surfaced.

Prior to making your application, please ensure you are clear with the restriction around outdoor storage. This will be a condition of your Notice of Decision, and once your Decision is final, should you be found in contravention of any condition, your approval may be revoked, and you could be subject to enforcement measures. Please let me know if you have any questions regarding this matter.

To process your Application, you will require a Business License (as there is no active Business License on this site) as well as a Use Approval. This all can be initiated at the link I've provided:
https://webforms.lloydminster.ca/Business-Licence/Business-Licence-Application

This process will naturally flow you through both approvals and you may be contacted by both a representative in Finance (for the Business License) as well as Planning Services. Since I am away next week, I have cc'd both of our Development Officer on this email so they are aware of our correspondence and direction so they can support you accordingly during my absence.

Application fees, will be charged accordingly. The Business License fee I am unsure of however the Discretionary Use fee is $590 broken out as follows ($90 Use Approval + $200 Discretionary Use + $300 Advertising). In accordance with the Fee and Charges Bylaw 06–2025 as approved by City Council, development approvals after the Use has already commenced are subject to double the permit fees $1,180. In this individual instance, as you were unaware of your requirements, we will waive the additional fees; charging $590. Moving forward, development without the necessary approvals may be subject to double the permit fees.

Should you have any additional questions, please reach out accordingly.

Outside this, as you begin to put together any additional proposals for the future development of this site, I am always open to Pre-Application meetings to ensure you are understanding of process, requirements, timing, etc.

Thanks!

Natasha Pidkowa, RPP, MCIP
Manager, Planning
Operations Centre

P: 780-874-3700 ext. 2606
F: 780-871-8347
www.lloydminster.ca

****
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****
****

W
NW
240
270
300
330
299°W (M) 12U 566056 5903136 ±10m ▲ 657m
Site conditions
5109 41 St - Nelson Property
2026-04-29 2:04:04 p.m.

N
NE
E
0
30
60
90
46°NE (M) ◉ 12U 566057 5903137 ±5m ▲ 657m
Site conditions
5109 41 St - Nelson Property
2026-04-29 2:04:16 p.m.

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300
NW
330
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Site conditions
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2026-04-29 2:06:39 p.m.

SW
240
W
270
300
NW
330
271°W (M) ◉ 12U 566102 5903166 ±5m ▲ 653m
Weyerhaeuser
Weyerhaeuser Lumber
Kiln Dried
4 SQUARE
Site conditions
5109 41 St - Nelson Property
2026-04-29 2:19:03 p.m.

W
270
NW
300
330
N
0
328°NW (M) ◉ 12U 566102 5903160 ±4m ▲ 653m
Site conditions
5109 41 St - Nelson Property
2026-04-29 2:19:25 p.m.

Site conditions

Province of Alberta

CITY OF LLOYDMINSTER ACT

THE LLOYDMINSTER CHARTER

Alberta Regulation 212/2012

With amendments up to and including Alberta Regulation 76/2023

Current as of April 1, 2023

Office Consolidation

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Application of Alberta and Saskatchewan law

6 The approved enactments apply to the whole City

(a) except to the extent that they are made inapplicable, either directly or by implication, by this Charter or by complementary orders in council, and

(b) with the modifications provided, either directly or by implication, by this Charter or by complementary orders in council.

Application of municipal governance enactments

7(1) Subject to subsections (1.1) to (5), the following Acts and regulations are declared to cease to operate in any part of the City:

(a) the *Municipal Government Act* (Alberta);

(b) *The Cities Act* (Saskatchewan);

(c) *The Municipalities Act* (Saskatchewan);

(d) regulations made under an Act referred to in clause (a), (b) or (c).

(1.1) Subject to Part 9, Part 9 of the *Municipal Government Act* (Alberta), all regulations made under Part 9 of that Act and all of the Alberta Minister's Guidelines made under Part 9 of that Act are declared to be approved enactments and to apply to the whole City.

(1.2) Subject to Part 10, with the exception of regulations made under sections 381 and 381.5 of the *Municipal Government Act* (Alberta), all regulations made under Part 10 of the *Municipal Government Act* (Alberta) are declared to be approved enactments and to apply to the whole City.

(1.3) Subject to Part 11, Part 11 of the *Municipal Government Act* (Alberta) and all regulations made under Part 11 of that Act are declared to be approved enactments and to apply to the whole City.

(1.4) Subject to Part 12,

(a) Part 12 of the *Municipal Government Act* (Alberta) and all regulations made under Part 12 of that Act are declared to be approved enactments and to apply to the whole City, and

(b) the *Land and Property Rights Tribunal Act* (Alberta) and all regulations made under that Act are declared to be approved enactments and to apply to the whole City in

accordance with Parts 12 and 15.1 of the *Municipal Government Act* (Alberta).

(1.5) Subject to section 69.1, Part 15.1 of the *Municipal Government Act* (Alberta) and all regulations made under that Part are declared to be approved enactments and to apply to the whole City.

(2) Part 17 of the *Municipal Government Act* (Alberta) and all regulations made under that Part are declared to be approved enactments and to apply to the whole City, except in respect of

(a) disputes referred to in section 9, and

(b) subdivision and replotting in respect of land situated in the part of the City located in Saskatchewan.

(3) Subject to section 69.2, Part 17.2 of the *Municipal Government Act* (Alberta) and all regulations made under that Part are declared to be approved enactments and to apply to the whole City.

(4) Part V.1 of *The Cities Regulations* (Saskatchewan) is declared to be an approved enactment for the purpose of public reporting on municipal waterworks and to apply to the whole City.

(5) For greater certainty, regulations incorporated into this Charter by sections 15.1, 29(2), 185(1), 227.1(7) and 358 are declared to be approved enactments and to apply to the whole City as specified.

AR 212/2012 s7;252/2022

Other enactments

8(1) The following Acts and regulations of Saskatchewan are declared to cease to operate in any part of the City:

(a) *The Fire Departments Platoon Act;*

(b) *The Pest Control Act;*

(c) regulations made under an Act referred to in clause (a) or (b).

(2) The following Acts and regulations of Alberta are declared to be approved enactments and to apply to the whole City:

(a) the *Agricultural Pests Act*;

(b) the *Emergency Management Act*;

(c) regulations made under an Act referred to in clause (a) or (b).

Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of December 18, 2025

Office Consolidation

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(a) authorizing a municipality to enter into an agreement under section 5.81 of the *Aeronautics Act* (Canada);

(b) specifying the terms and conditions under which a municipality may enter into the agreement.

(3) The *Aeronautics Act Agreements (City of Medicine Hat and Cypress County) Regulation* (AR 33/2014) is deemed to have been made under this section.

2015 c8 s60

Part 17
Planning and Development

Definitions

616 In this Part,

(a) "adjacent land" means land that is contiguous to a parcel of land that is being subdivided or redesignated and includes

(i) land that would be contiguous if not for a highway, road, river or stream, and

(ii) any other land identified in a land use bylaw as adjacent land for the purpose of notification under sections 653, 679, 680 and 692;

(a.01) "agricultural operation" means an agricultural operation as defined in the *Agricultural Operation Practices Act*;

(a.1) "building" includes anything constructed or placed on, in, over or under land, but does not include a highway or road or a bridge that forms part of a highway or road;

(a.11) "community recreation facilities" means indoor municipal facilities used primarily by members of the public to participate in recreational activities conducted at the facilities;

(a.2) "community services reserve" means the land designated as community services reserve under Division 9;

(a.3) "conservation reserve" means the land designated as conservation reserve under Division 8;

(b) "development" means

(i) an excavation or stockpile and the creation of either of them,

(ii) a building or an addition to or replacement or repair of a building and the construction or placing of any of them on, in, over or under land,

(iii) a change of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the use of the land or building, or

(iv) a change in the intensity of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the intensity of use of the land or building;

(c) "development authority" means a development authority established pursuant to Division 3;

(d) "development permit" means a document that is issued under a land use bylaw and authorizes a development;

(e) "environmental reserve" means the land designated as environmental reserve under Division 8;

(f) "environmental reserve easement" means an easement created under Division 8;

(g) "former Act" means the *Planning Act*, RSA 1980 cP-9, *The Planning Act, 1977*, SA 1977 c89, *The Planning Act*, RSA 1970 c276 or *The Planning Act*, SA 1963 c43;

(h) "highway" means a provincial highway under the *Highways Development and Protection Act*;

(i) "instrument" means a plan of subdivision and an instrument as defined in the *Land Titles Act*;

(j) "intermunicipal service agency" means an intermunicipal service agency established under Division 3;

(j.1) "joint use and planning agreement" means an agreement under section 670.1;

(k) "land use bylaw" means a bylaw made under Division 5 and a bylaw made under section 27 of the *Historical Resources Act*;

(l) "land use policies" means the policies referred to in section 618.4;

(m) "lot" means

(i) a quarter section,

(ii) a river lot shown on an official plan, as defined in the *Surveys Act,* that is filed or lodged in a land titles office,

(iii) a settlement lot shown on an official plan, as defined in the *Surveys Act*, that is filed or lodged in a land titles office,

(iv) a part of a parcel of land described in a certificate of title if the boundaries of the part are described in the certificate of title other than by reference to a legal subdivision, or

(v) a part of a parcel of land described in a certificate of title if the boundaries of the part are described in a certificate of title by reference to a plan of subdivision;

(m.1) "mediation" means a process involving a neutral person as a mediator who assists the parties to a matter that may be appealed under this Part and any other person brought in with the agreement of the parties to reach their own mutually acceptable settlement of the matter by structuring negotiations, facilitating communication and identifying the issues and interests of the parties;

(n) "municipal planning commission" means a municipal planning commission established under Division 3;

(o) "municipal reserve" means the land designated as municipal reserve under Division 8;

(p) "municipal and school reserve" means the land designated as municipal and school reserve under Division 8;

(q) "non-conforming building" means a building

(i) that is lawfully constructed or lawfully under construction at the date a land use bylaw affecting the building or the land on which the building is situated becomes effective, and

(ii) that on the date the land use bylaw becomes effective does not, or when constructed will not, comply with the land use bylaw;

(r) "non-conforming use" means a lawful specific use

(i) being made of land or a building or intended to be made of a building lawfully under construction at the date a

land use bylaw affecting the land or building becomes effective, and

(ii) that on the date the land use bylaw becomes effective does not, or in the case of a building under construction will not, comply with the land use bylaw;

(r.1) "non-profit", in respect of a day care, senior citizens or special needs facility, means that the facility is owned or operated by a corporation or other entity established under a law of Canada or Alberta for a purpose other than to make a profit;

(r.2) "off-site levy" means a levy referred to in subsection 648(1.1)(a);

(s) "parcel of land" means the aggregate of the one or more areas of land described in a certificate of title or described in a certificate of title by reference to a plan filed or registered in a land titles office;

(t) "*Planning Act*" means the *Planning Act*, RSA 1980 cP-9;

(u) "plan of subdivision" means a plan of survey prepared in accordance with the *Land Titles Act* for the purpose of effecting a subdivision;

(v) "public utility" means a public utility as defined in section 1(1)(y), excluding residential and commercial street lighting, and includes telecommunications;

(w) "public utility lot" means land required to be given under Division 8 for public utilities;

(x) "redevelopment area" means an area of land that is the subject of an area redevelopment plan;

(y) "Registrar" means Registrar as defined in the *Land Titles Act*;

(z) "reserve land" means environmental reserve, conservation reserve, municipal reserve, community services reserve, school reserve or municipal and school reserve;

(aa) "road" means road as defined in section 1(1), but does not include highway as defined in this Part;

(bb) "school board" means the board of trustees of a school division;

(bb.1) "school building project" has the same meaning as in the *Education Act*;

(bb.2) "school division" has the same meaning as in the *Education Act*;

(cc) "school reserve" means the land designated as school reserve under Division 8;

(dd) "statutory plan" means an intermunicipal development plan, a municipal development plan, an area structure plan and an area redevelopment plan adopted by a municipality under Division 4;

(ee) "subdivision" means the division of a parcel of land by an instrument and "subdivide" has a corresponding meaning;

(ff) "subdivision authority" means a subdivision authority established under Division 3;

(gg) "subdivision and development appeal board" means a subdivision and development appeal board established under Division 3;

(hh) "subdivision and development regulations" mean regulations made under section 694(1).

RSA 2000 cM-26 s616;RSA 2000 c21(Supp) s3;2004 cH-8.5 s69; 2008 c37 s4;2012 cE-0.3 s279;2016 c24 s91;2019 c22 s10; 2020 c39 s10(3);2023 c9 s19(17);2025 c13 s2(15)

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,

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

1995 c24 s95

(3) A decision of a development authority on an application for a development permit must be in writing, and a copy of the decision, together with a written notice specifying the date on which the written decision was given and containing any other information required by the regulations, must be given or sent to the applicant on the same day the written decision is given.

(4) If a development authority refuses an application for a development permit, the development authority must issue to the applicant a notice, in the form and manner provided for in the land use bylaw, that the application has been refused and provide the reasons for the refusal.

(5) Despite subsections (1) and (2), a development authority must not issue a development permit if the proposed development does not comply with the applicable requirements of regulations under the *Gaming, Liquor and Cannabis Act* respecting the location of premises described in a cannabis licence and distances between those premises and other premises.

RSA 2000 cM-26 s642;2016 cs24 s102;2017 c13 s1(58) ; 2017 c21 s28;2018 c11 s13;2020 c39 s10(31)

Non-conforming use and non-conforming buildings

643(1) If a development permit has been issued on or before the day on which a land use bylaw or a land use amendment bylaw comes into force in a municipality and the bylaw would make the development in respect of which the permit was issued a non-conforming use or non-conforming building, the development permit continues in effect in spite of the coming into force of the bylaw.

(2) A non-conforming use of land or a building may be continued but if that use is discontinued for a period of 6 consecutive months or more, any future use of the land or building must conform with the land use bylaw then in effect.

(3) A non-conforming use of part of a building may be extended throughout the building but the building, whether or not it is a non-conforming building, may not be enlarged or added to and no structural alterations may be made to it or in it.

(4) A non-conforming use of part of a lot may not be extended or transferred in whole or in part to any other part of the lot and no additional buildings may be constructed on the lot while the non-conforming use continues.

(5) A non-conforming building may continue to be used but the building may not be enlarged, added to, rebuilt or structurally altered except

(a) to make it a conforming building,

(b) for routine maintenance of the building, if the development authority considers it necessary, or

(c) in accordance with a land use bylaw that provides minor variance powers to the development authority for the purposes of this section.

(6) If a non-conforming building is damaged or destroyed to the extent of more than 75% of the value of the building above its foundation, the building may not be repaired or rebuilt except in accordance with the land use bylaw.

(7) The land use or the use of a building is not affected by a change of ownership or tenancy of the land or building.

1995 c24 s95

Acquisition of land designated for public use

644(1) If land is designated under a land use bylaw for use or intended use as a municipal public building, school facility, park or recreation facility and the municipality does not own the land, the municipality must within 6 months from the date the land is designated do one of the following:

(a) acquire the land or require the land to be provided as reserve land;

(b) commence proceedings to acquire the land or to require the land to be provided as reserve land and then acquire that land within a reasonable time;

(c) amend the land use bylaw to designate the land for another use or intended use.

(2) Subsection (1) does not apply if the Crown in right of Canada, the Crown in right of Alberta, an irrigation district, a board of a drainage district or a local authority, within 6 months from the date the land is designated under that subsection,

(a) acquires that land, or

(b) commences proceedings to acquire that land or requires that land to be provided as reserve land and then acquires it within a reasonable time.

(3) Subsection (1) does not apply to land designated by the municipality as conservation reserve.

RSA 2000 cM-26 s644;2016 cs24 s103

Stop order

645(1) Despite section 545, if a development authority finds that a development, land use or use of a building is not in accordance with

(a) this Part or a land use bylaw or regulations under this Part, or

(b) a development permit or subdivision approval,

the development authority may act under subsection (2).

(2) If subsection (1) applies, the development authority may, by written notice, order the owner, the person in possession of the land or building or the person responsible for the contravention, or any or all of them, to

(a) stop the development or use of the land or building in whole or in part as directed by the notice,

(b) demolish, remove or replace the development, or

(c) carry out any other actions required by the notice so that the development or use of the land or building complies with this Part, the land use bylaw or regulations under this Part, a development permit or a subdivision approval,

within the time set out in the notice.

(2.1) A notice referred to in subsection (2) must specify the date on which the order was made, must contain any other information required by the regulations and must be given or sent to the person or persons referred to in subsection (2) on the same day the decision is made.

(3) A person who receives a notice referred to in subsection (2) may appeal the order in the notice in accordance with section 685.

RSA 2000 cM-26 s645;2017 c13 s1(59);2022 c16 s9(80)

Enforcement of stop order

646(1) If a person fails or refuses to comply with an order directed to the person under section 645 or an order of a subdivision and development appeal board under section 687, the municipality may, in accordance with section 542, enter on the land or building and take any action necessary to carry out the order.

(2) A municipality may register a caveat under the *Land Titles Act* in respect of an order referred to in subsection (1) against the certificate of title for the land that is the subject of the order.

In the Court of Appeal of Alberta

Citation: Shannon v Shannon, 2023 ABCA 79

Date: 20230306
Docket: 2101-0069AC
Registry: Calgary

2023 ABCA 79 (CanLII)

Between:

Roxana Camelia Shannon

Appellant

- and -

Kevin Lee Shannon

Respondent

The Court:

The Honourable Justice Peter Martin
The Honourable Justice Jack Watson
The Honourable Justice Bernette Ho

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice S.L. Kachur
Dated the 8th day of March, 2021
Filed on the 19th day of March, 2021
(Docket: 4801-176311)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellant challenges an Order of Kachur J of the Court of Queen's Bench (as it was). That Order was dated the 8th of March of 2021 and was filed on the 19th of March of 2021 ("Final Order"). That Final Order was made consequent to a Binding Judicial Dispute Resolution process ("Resolution Process") conducted before Kachur J pursuant to a Binding Judicial Dispute Resolution Agreement ("Resolution Agreement"). That Resolution Agreement was dated the 16th of February 16, 2021, and was signed by the parties both of whom, at that time, had legal counsel. Neither has counsel on appeal in this Court.

[2] The appellant's grounds of appeal were set out in her factum as follows:

> 1. Justice Kachur should have recused herself from acting as the parties' Binding JDR Judge because she was not able to approach the parties' case with an impartial and open mind due to her prior role as the parties' Arbitrator, which gave rise to an objectively reasonable apprehension of bias.
>
> 2. All agreements made by the parties and all determinations made by Justice Kachur at or arising from the Binding JDR are invalid and void because Ms. Shannon was not competent to participate in the Binding JDR and did not have the capacity to understand her lawyer's recommendations, to instruct her lawyer or to enter into agreements due to a panic attack which she suffered on the day of the Binding JDR.

[3] The further submissions in the appellant's factum elaborate on these grounds in a manner which effectively sets out additional grounds. The appellant also brings a fresh evidence motion related to the second ground of appeal regarding her state of mind during the Resolution Process. In addition, the appellant has sought to file a large quantity of additional information which is not in a form constituting fresh evidence.

[4] In response to the proposed fresh evidence and additional material offered by the appellant, the respondent has filed to introduce fresh evidence of his own, although he has no objection to the admission of a medical report which the appellant offers as to her state of mind at the relevant time. She describes having "Post Traumatic Stress Disorder" because of which she avers to having suffered a panic attack at some stage during the Resolution Process. She maintains she was in no position to 'consent' to the resolution of the case by the Resolution Process.

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[5] It is also clear from the material that the respondent does not accept several assertions made by the appellant in her materials notably as to whether the respondent made proper disclosure and whether proper evidence existed as to earlier steps in the proceedings. Also, some of the material appears to be, arguably, within the scope of common law settlement privilege and thus not to be admitted into evidence. Along the same line, there is also a rule-based privilege under the *Alberta Rules of Court*: see discussion of the Rules below.

[6] Further still, the appellant makes some assertions about her interaction with her counsel at different stages of this case and not merely during the Resolution Process although her complaints focus largely on the Resolution Process. One such criticism relates to alleged failure of counsel to ensure that one feature of the earlier Arbitration Award by Kachur QC, as she then was – see Ground of Appeal No 1 – should have had more influence, if not controlled, a date of property division in the Resolution Process and the Final Order. The appellant contends that she did not consent to what she describes as a change from the Arbitration Award of Ms Kachur to the Final Order of Kachur J. Moreover, in her Prayer for Relief in her factum, it seems apparent that the appellant is content with major elements of that Final Order, but that she believes some of the numbers related to the Final Order should be recalculated in her favour.

[7] In passing, it is worth noting that howsoever brief the Resolution Agreement was, it was a contract. Well-established principles of contract law hold that the parties' subjective intentions are not relevant to the determination of whether a contract was formed: see ***Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp***, 2020 SCC 29 at paras 29-33, 450 DLR (4th) 105. Relatedly, a release based on a settlement is also a contract: ***Corner Brook (City) v Bailey***, 2021 SCC 29 at para 21, 460 DLR (4th) 169. The Supreme Court of Canada went on in ***Bailey***, at para 27, to add that the aim of releases was that "the parties bargain for finality, or as Lord Nicholls put it, "to wipe the slate clean"." The Court also says, at para 43, that as to interpretation of a release, "[t]he ultimate question is whether the claim is of the type of claim to which the release is directed." And not exclusively to whether the claim is known.

[8] As to her allegations respecting counsel's handling of her representation, the appellant has not filed a Waiver of Privilege and there is no affidavit from her counsel. Failure to provide such material ordinarily impedes the ability of this Court to consider complaints about ineffectiveness of counsel: compare ***R v Meer***, 2015 ABCA 141 at para 36, 401 DLR (4th) 417, affirmed 2016 SCC 5, [2016] 1 SCR 23. The evidence must also establish that there was actual prejudice to the party asserting counsel ineffectiveness: compare ***Meer***, 2016 SCC 5 at paras 2-3; ***R v White***, 2022 SCC 7 at para 9, 467 DLR (4th) 23. Hindsight is not a persuasive basis for impugning the effectiveness of counsel.

[9] During the hearing of the appeal, the appellant was invited to quantify the difference between what she now suggests would have been her reasonable expectations as an outcome in the Final Order as compared to what actually ended up in the Final Order. The appellant had not quantified her claims in her factum. The appellant suggested to this Court a relatively modest

shortfall based on her calculations, although she emphasized that her ballpark figure turned in part on what she contended was inadequate disclosure by the respondent over time.

[10] Before turning to the grounds of appeal it is necessary to discuss the jurisdiction of this Court on appeal. The parties were unrepresented by counsel, so they would not necessarily have understood this issue and its significance.

II. Jurisdiction of this Court

[11] The Final Order is described in its content as a "Consent Order". This characterization of a Consent Order emanates in part from Part 4 "Managing Litigation" in the *Alberta Rules of Court*, AR 124/2010 and AR 194/2020, of which Division 3 entitled "Dispute Resolution by Agreement" and Subdivision 2 entitled "Judicial Dispute Resolution" form part. Those parts and Rules 4.17 to 4.21 provide the framework under which a Justice of the Court of King's Bench – in this case Kachur J – is guided as to the conduct of Judicial Dispute Resolution.

[12] Not merely by reason of the wording, "by Agreement" in Division 3, but also because of multiple references within the language of the Rules as to the purpose of each provision, the Judicial Dispute Resolution process was designed to "facilitate a process in which the parties resolve all or part of a claim by agreement": Rule 4.17. The concept of a 'Binding' Judicial Dispute Resolution, as occurred here, raises the question – addressed below - whether the Final Order following upon such a Resolution Process can be properly characterized as a "Consent" Order if at the time it is created, it is not shown that all the parties expressly consented to each and every specific element of the Final Order.

[13] Two other points about the Resolution Process should be made. The first concerns the role of the judge. As noted, the relevant *Alberta Rules of Court* were created to allow for such a Resolution Process so that a judge could "*actively* facilitate a process in which the parties resolve all or part of a claim by agreement": see r 4.17 (emphasis added). The word "actively" is not surplusage there.

[14] Statutory language, which includes the *Alberta Rules of Court*, should not be read as "mere surplusage": see ***British Columbia (Forests) v Teal Cedar Products Ltd***, 2013 SCC 51 at para 28, [2013] 3 SCR 301; ***British Columbia v Philip Morris International Inc***, 2018 SCC 36 at para 29, [2018] 2 SCR 595. As Gorsuch J (albeit dissenting) observed in ***Patel v Garland, Attorney General***, 596 US (2022), "We do not normally suppose that Congress blithely includes words in its laws that perform no work". Plainly, the word "actively" is an adverb relating to the actions of the judge. It connotes that the judge can do things during the Resolution Process without being asked or having to seek permission to do so in advance. As it refers to proceedings involving a judge, the immanent attributes of the judge's authority include determining the scope and manner of conduct of the proceedings.

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[15] Judicial Dispute Resolution which can produce a Consent Order under the Rules is an alternative method for providing expedient and effective justice in the modern era. Along with methods such as summary judgment, summary trial and trial with simplified procedures, not to mention traditional trial, Judicial Dispute Resolution provides options to help disputants reach a conclusion and move on. But Judicial Dispute Resolution is not a trial process and should not be faulted for its departure from usual trial methods.

[16] Nor should Judicial Dispute Resolution be confused or conflated with arbitration under the *Arbitration Act*, RSA 2000 c A-43. Accordingly, in assessing the fairness of this Resolution Process, the fact that it was not governed by procedures used in arbitration is likewise no automatic reason to condemn the Resolution Process as unfair.

[17] As for the procedures in the Resolution Process here, one distinction from a trial process was that Kachur J was evidently prepared to conduct what has come to be called "caucusing" with the parties. This concept refers to a situation where the judge has separate meetings with parties in exploration of the circumstances and seeking common ground. Caucusing does not occur in all forms of Judicial Dispute Resolution, but its availability in some instances shows the flexibility of Judicial Dispute Resolution amongst the resolution alternatives.

[18] The appellant in oral argument raised some concerns about following what was going on with respect to caucusing – which was complicated by the events being virtual during the Covid pandemic – but her contention about unfairness did not specifically fix on caucusing as a specific form of denial of fundamental justice. Rather, her position was that, when the Resolution Process was underway, she had begun at some stage to become stressed, unable to focus and unable to completely follow what was happening as she did not see that some of the questions she had been concerned about were being fully addressed. There is nothing in the Record before us that suggests Kachur J acted improperly during the caucusing that impacted the fairness of the Resolution Process.

[19] The second point about how Judicial Dispute Resolution works is the absence of a transcript or admissible record. Under the Rules, it appears that there is no general practice to retain a recording of submissions or discussions whether during a caucus session or during any other part of the Resolution Process. Indeed, r 4.19 contemplates that the only records of the resolution process will, in effect, be the closing documents. Further, r 4.20 assigns a privilege to the "statements made or documents generated for" the resolution process. Further still, rr 4.21(2) and (3) provide that the judge will treat the process as confidential and will keep only "(a) the agreement of the parties and any document necessary to implement the agreement, and (b) a consent order or consent judgment resulting from the process." We are not persuaded that the limited record resulted in an unfair Resolution Process.

[20] While this means the 'record' for a motion for permission to appeal will be limited, that does not, of itself, render the resolution process unfair by reason of it being unreviewable. While

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permission to appeal is required, that fact does not mean an appellant cannot challenge the consent order, as in the Final Order in this case.

[21] Finally, the relevance of the Final Order being a Consent Order is not merely a matter of academic interest in this matter. That is because it directly pertains to the jurisdiction of this Court under s 3(b) of the *Judicature Act*, RSA 2000 c J-2: see eg ***Keeder v AlGendy***, 2020 ABCA 420, [2020] AJ No 1266 (QL).

[22] The *Alberta Rules of Court*, AR 124/2010 and AR 194/2020 are validated by s 63(2) of the *Judicature Act*. Rule 14.5(1)(d) provides that ". . . no appeal is allowed to the Court of Appeal from . . . (d) a decision made on the consent of the parties . . .".

[23] Accordingly, the *Judicature Act* and the Rules allow for an appeal from a Consent Order, whether or not it is the product of a Judicial Dispute Resolution. But such an appeal requires a legal foundation based on a prior permission to appeal being granted. Because of the importance of screening provisions as contained in Rule 14.5, this Court is cautious about granting permission *nunc pro tunc*: compare ***Sedgwick v Edmonton Real Estate Board Co-Operative Listing Bureau Limited (Realtors Association of Edmonton)***, 2022 ABCA 264 at paras 62-85, 47 Alta LR (7th) 29.

[24] The lack of prior permission to appeal is ultimately not problematic as we are not persuaded that the Final Order was unfair or prejudicial to the appellant. Nor are we persuaded that Kachur J was disqualified or that the appellant's counsel's ineffectiveness has been proven. We turn to the grounds of appeal, commencing with a discussion of Ground 2.

III. Discussion of Ground 2

[25] One crucial question in Ground 2 is whether the Final Order can be properly described as a Consent Order as between the parties because:

(a) Both parties had prior experience with arbitration, and with Kachur J.

(b) Both parties were both intelligent and articulate people with a keen grasp of the disputes and of even minutiae of the facts (as well demonstrated before this Court).

(c) Both parties were represented by experienced counsel also with familiarity with Kachur J.

(d) Both parties had, indisputably, capacity to consent in advance to the Resolution Process, and were not misled but, rather, understood what the Resolution Process would involve.

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(e) Notwithstanding the proposed fresh evidence and other material offered by the appellant there is no basis for this Court to find that the appellant lost *the capacity* to consider consent on any of the issues on an ongoing basis, whether or not she would have preferred to think about each point more and whether or not she felt under stress.

(f) Both parties would have understood what they would be consenting to in the Final Order.

(g) Both parties would have understood and acknowledged that the matters in the specific 27 paragraphs of the Final Order were within the margin of appreciation and authority of the decision-making power of Kachur J as given by the parties' Resolution Agreement to decide for them and impliedly through the Resolution Process, and

(h) Actual consent would have been expressed in one way or another by counsel at the last stages of conclusion of the Resolution Process and in the drafting of the Final Order.

[26] The appellant's effective position on appeal is that she was entitled to expressly consent *or not* to every element of the proposed Final Order and that, due to her panic attack, she became unable to make a proper decision on each element of the Final Order. Her position is that whatever decisions that she might have communicated as apparent personal consent were invalid and that any elements of the Final Order that she did not expressly consent to were *ipso jure* invalid.

[27] We do not have before us objective evidence that demonstrates the appellant *communicated* to either Kachur J and to the respondent that she sought to withdraw either her consent to the Resolution Process or her implied consent to the resulting terms of the Final Order.

[28] As against the appellant's submissions, we draw from the record that there must be some practice in the bar and in the Court of King's Bench that by (a) consenting to the Resolution Agreement at the outset as a 'binding' form of resolution, and (b) expressly or impliedly consenting to events during the Resolution Process as it unfolded, the Final Order still has the quality of a Consent Order even if some items are not directly and expressly signed off and even if (as this Resolution Agreement specified) Kachur J was empowered by the parties to impose a final outcome without specific consent to every element.

[29] The clause of the Resolution Agreement allowing Kachur J to impose resolution was worded thus: "In the event that the parties do not reach an agreement to resolve the matter, the Justice will make a determination which will be final and binding upon all parties." A Divorce Judgment was to be done separately and did follow.

[30] The respondent suggests the appellant's panic attack had no effect on her capacity to 'give and take' and that the panic attack was not raised during the Resolution Process. He would suggest that there was *de facto* consent by both parties.

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[31] Assuming for present purposes, that many of the relevant consents ascribed to the parties were largely expressed via their counsel to Kachur J, that is not troubling here. That is because counsel for each of the parties had both ostensible and actual authority to represent them and to make decisions as to the process on their behalf. Moreover, provided Kachur J was supplied with an adequate description of the matters in dispute and the positions of the parties, absolute precision about those things was not mandated in the Resolution Agreement. We have no proper evidential basis to infer, let alone conclude, that Kachur J did not know what the case was about. Although disputing numbers, the appellant did not point to any of the 27 paras of the Final Order as demonstrably wrong in their *subject matter*.

[32] The topic of consent here is linked to the topic of agency by solicitors.

[33] The solicitor-client relationship has long been held to often give rise to an inference of agency although sometimes the solicitors may themselves be liable also: see ***Wakefield v Duckworth***, [1915] 1 KB 218; ***British Airways Plc v Prosser*** [2019] EWCA Civ 547 at paras 27-29, [2019] All ER 1104.

[34] Solicitors have been held to be agents whose actions are binding on their known principals in such cases as ***Felty v Ernst and Young LLP***, 2015 BCCA 445 at paras 24-31, 392 DLR (4th) 280; ***Maritime Travel Inc v Boyle***, 2014 NSCA 44 at paras 18-26, 344 NSR(2d) 242. Speaking generally, a primary purpose of agency is to facilitate and further contractual relationships between parties without the parties having to repeatedly verify that what the agent does or says had the authority of the principal or even that the principal knew about the point in issue: compare ***Intergulf Investment Corporation v 0954704 BC Ltd***., 2018 BCCA 337 at paras 57-62, 96 RPR (5th) 50; ***Toronto Dominion Bank v Kevin I Peddie Professional Corp***, 2017 ABCA 45 at paras 6-9, 407 DLR (4th) 640.

[35] The position of Harvey and MacPherson in *Agency and Partnership Law Primer*, 5th Ed, [Toronto: Thomson Reuters, 2016) at p 84 is expressed thus:

> Once litigation has been commenced, settlements made pursuant to express actual authority are, of course, binding on client principals; as well, in the absence of an express authorization or prohibition, lawyers have both actual authority, either implied incidental authority to the lawyer's express actual authority to act for the client or implied customary authority to settle a matter of litigation, and apparent authority to settle. [cites various cases including ***Lofthaug v Canadian Immigration Specialists Ltd***, 2011 ABQB 609, at paras 26-46, 525 AR 46].

[36] ***Lofthaug*** refers to limited exceptions to the general ostensible authority of solicitors to settle in a way that binds the client, but none of them apply here. The onus is on the third party to point to evidence that the agent is acting for the principal: ***Mraz v. Herman***, 2016 ABCA 313 at paras 29-40, particularly para 32, 42 Alta LR (6th) 1. But that onus is not hard to meet with respect

to a solicitor, litigation and the client. In ***Hrycoy Estate v Hrycoy Estate***, 2004 ABCA 320 at paras 10-13, 357 AR 329 we find this:

> 10 There are two applicable principles concerning the issue of a solicitor's authority to enter into a binding settlement agreement on a client's behalf. *According to the first principle, it is within a solicitor's apparent authority to compromise claims. If the solicitor acts within the scope of this apparent authority and the opposing party has no notice of any limitations imposed by the client, then the client will be bound by a settlement agreement the solicitor has agreed to: Strauss v. Francis (1866), L.R. 1 Q.B. 379; Matthews v. Munster (1887), L.R. 20 Q.B.D. 141; Welsh v. Roe (1918), 87 L.J. K.B. 520. The second principle states that where the court is asked to lend its authority to enforce a settlement and it is discovered that the solicitor agreed to a settlement on behalf of the client based on a misapprehension or mistake, the court will not enforce the agreement: Holt v. Jesse (1876), 3 Ch. D. 177; Neale v. Gordon-Lennox, [1902] A.C. 465 (H.L.). Both principles have been considered by this Court in Poon v. Dickson (1982), 134 D.L.R. (3d) 559, 19 Alta. L.R. (2d) 219 (C.A.) and Correria v. Danyluk (2000), 286 A.R. 117, 2001 ABCA 148.*
>
> 11 The appellant submits that the trial judge erred in finding that a settlement had been reached. The trial judge found that the appellant expressly authorized the settlement. The appellant submits that the trial judge should have concluded that the appellant had not accepted. Lippe testified that the appellant expressly authorized the settlement. Peterson and Shortreed both testified that the appellant spoke to them following the settlement indicating that the "deal was off". The trial judge made a finding of fact. As there was evidence to support that finding, this Court cannot interfere with it. Further, Mr. Lippe was the appellant's lawyer. There is no suggestion that the appellant placed any limit on Mr. Lippe's authority or that the other lawyers knew of any limitation.
>
> 12 The appellant seeks to rely on the second principle in an attempt to have the settlement agreement set aside. The major difficulty in this assertion is that the trial judge made a finding of fact that the appellant actually authorized his lawyer to accept the offer of $10,000. This leaves little room for an argument that the appellant's lawyer accepted the settlement offer based on some misapprehension or mistake. We agree with the comment of the trial judge that it is unfortunate that the appellant was not given more time to make his decision. Trial judges are generally willing to permit parties additional time when settlement is being discussed. However, there is no basis on which we can now intercede to assist the appellant who, on the finding of the trial judge, agreed to the settlement. Neither the respondents nor their solicitors were guilty of any misconduct toward the appellant. Although the appellant had second thoughts about the settlement, he advised his

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> concerns only after his lawyer communicated the acceptance of the settlement to counsel for the respondents.
>
> 13 In conclusion, as the trial judge found that the appellant authorized his solicitor to accept the offer, and that the solicitor communicated that acceptance to the respondents, the appellant cannot rely on the principle regarding misapprehension or mistake. *All that is left is the principle that a lawyer has the apparent authority to enter into a settlement contract which binds their client as long as the client has not limited the solicitor's authority and the opposing party knows of such limitation. There is no evidence that the appellant limited the authority of the lawyer in such a way that would prevent the settlement agreement from being binding. Therefore, the appellant is bound by the actions of his solicitor*. [Emphasis added

[37] The view of Prof. Fridman in *Canadian Agency Law*, 3rd Ed, [Toronto: Lexis-Nexis Canada Inc, 2017] at para 1.34, talking about how a lawyer may "involve the client in legal responsibility" wrote:

> One instance of this arises when a lawyer, in the course of litigation involving a client, enters into the compromise of an action for the purpose of bringing the litigation to an end. *As long as the lawyer has express, implied or ostensible or apparent authority to do this, the client will be bound by the compromise, even if the lawyer did not refer to the client for instructions, as long as the compromise did not include matters that were collateral to the intended action, and as long as the lawyers authority was not limited and such limitation was known to the other party to the compromise*. [cites cases, emphasis added]

[38] Accordingly, in the circumstances of this case, although subject to what is said below about the appellant's complaints about her counsel, the Resolution Process and the underlying Resolution Agreement, the appellant can be taken to have consented to the Resolution Agreement and to the Resolution Process and thereby to the Final Order. Indeed, it is worth noting that, even after the JDR, the parties requested that Kachur J seize herself with the matter. That does not communicate a loss of confidence in, or a problem with Kachur J or the Final Order.

[39] The appellant's proposed fresh evidence on the topic of her stress level and possible confusion about what was happening does not show incapacity, let alone an obvious state of incapacity which would have caused Kachur J, counsel and the respondent to perceive that the matter could not continue. During the appellant's oral submissions to this Court, we were left to conclude that the appellant's counsel must have been aware of the appellant's position on the points in dispute and that counsel presented them to Kachur J. Consequently, neither caucusing nor any other element of the Resolution Process has been shown to have been unfair by reason of the appellant's state of mind.

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[40] While the appellant alleged to us that there were shortcomings in performance by her counsel, the appellant did not waive privilege such that the counsel could reply to her allegations. That is a moot point, however, in light of the law of agency because, absent flagrant disloyalty or incompetence, any concerns or reservations that the appellant may have developed about her counsel's efforts during the course of the Resolution Process would not automatically diminish counsel's authority to act as her agent. Likewise, when not disclosed to Kachur J or to the respondent during the Resolution Process, her concerns would not rescind her pre-existing consent nor eliminate the binding effect of the Resolution Agreement.

[41] As pointed out in ***J W Abernethy Management & Consulting Ltd v 705589 Alberta Ltd and Trillium Homes Ltd***, 2005 ABCA 103 at para 30, 367 AR 38 (cited in ***AlGendy*** at paras 15-17):

> . . . The parties signed a contract agreeing to implement the judge's opinion as their settlement should they be unable to resolve the dispute. The appellants were represented by competent legal counsel and understood that the judge's decision, whether they agreed with it or not, would be binding on them and non-appealable. Having freely and willingly entered into a court-sanctioned process that would end the dispute, the appellants cannot turn their backs on their contractual commitment. They received precisely what they bargained for and are bound by their agreement.

[42] The Final Order was effective on the record, the evidence and even the additional material provided by the appellant. Against this, there is no exception to the authority of counsel as agent made out.

[43] For completeness, it is worth noting that the existence of a power to appeal under s 14.5 to this Court, subject to grant of permission, allows for the type of exceptions mentioned in the agency case authorities to challenge the foundation of the Consent Order.

[44] More broadly, permission to appeal might well be granted to allow an applicant to show the applicant was misled, cheated or improperly pressured into a Resolution Agreement. Perhaps permission might be considered to allow an applicant to show that the applicant did not understand the proposed Resolution Process to the essential degree from the beginning due to ineffectiveness of counsel and that the other party knew or was put on notice of the prospect of such misunderstanding. It might also be open to give permission to an applicant to argue that the Resolution Agreement was unconscionable, illegal, or contrary to a compelling public policy. None of those situations applies here.

[45] For example, as to compelling public policy, the Final Order addresses in several clauses the question of child support and leaves that topic open for further consideration in the future by the court. That is consistent with the law's purpose of protecting a child's best interests. The parties told us during the hearing that a future hearing had been scheduled for that purpose. The appellant did not challenge those provisions of the Final Order.

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[46] In the end, we are not persuaded that the Final Order reflects unfairness to the appellant.

[47] As for the appellant's Prayer for Relief that this Court should fine-tune or otherwise modernize or align the Final Order to past realities or events since it was made, this Court is not a Court of first instance. It is not this Court's function to micromanage proceedings in the Court of King's Bench. The appellant advised during the hearing that she and the respondent had run into some difficulties in the effort to carry out some of the property transfers directed by the Final Order. The appellant did have a counsel present with her in Court and the panel invited that counsel to assist in carrying out the terms of the Final Order.

[48] Ground 2 of the appellant's submissions has several sub-elements, but in light of the foregoing analysis it is unnecessary to address those features beyond what is done above. We find no basis on this record to find the conduct of the appellant's counsel ineffective. Ground 2 of the appeal is dismissed.

IV. Discussion of Ground 1

[49] This Ground is particular in its nature in that it is suggested that merely because Kachur QC as arbitrator and Kachur J as judge were the same person, there would necessarily be a reasonable apprehension of bias. With respect, that is a syllogism that we reject in this case. While there is a prophylactic aspect to the Judicial Dispute Resolution rules that a judge who conducts such a resolution process should not sit on a trial without consent of the parties – see r 4.21 – that is not the same context as the argument here. And, in either event, the appellant impliedly waived any concern about the bias arising from Kachur J's involvement as arbitrator years earlier.

[50] There is a high burden to establish that a superior court judge would not disabuse her mind of anything learned on a prior occasion which is raised as something to ignore. We assume that judges understand the law. By comparison, reasons are to be read applying a presumption that trial judges know the law: ***Barendregt v Grebliunas***, 2022 SCC 22 at para 104, 469 DLR (4th) 1 citing ***R v F(G)***, 2021 SCC 20 at para 79, 404 CCC (3d) 1. Even absent reasons, as here, the situation involves the preparation of the Final Order under the supervision of Kachur J. We see no reason to assume that the interpretive presumption above should not apply.

[51] There is also the strong presumption is that a judge will act judicially***: La Commission scolaire francophone du Yukon no. 23 v Yukon (Procureure générale),*** 2015 SCC 25 at paras 25-38, [2015] 2 SCR 282. It is hardly likely that Kachur J would not understand the difference between an arbitration and a Judicial Dispute Resolution let alone the difference between a trial and a Judicial Dispute Resolution. What is required in all situations is that the judge "approach each case with an open mind, free from inappropriate and undue assumptions": ***Yukon*** at para 36.

[52] The test for whose "reasonable apprehension" is involved, is a test whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable

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apprehension of bias. The test is not related to the "very sensitive or scrupulous conscience": see ***Ruffo v Conseil de la magistrature***, [1995] 4 SCR 267 at pp. 394-95.

[53] The appellant contends, at para 17 of her factum, that since Kachur J "issued three Consent Arbitration Awards and a detailed 25-page Arbitration Award in which she made numerous findings of fact and made orders, set out in 18 separate paragraphs, dealing with matrimonial property division, child support and spousal support", it was necessarily the case that she "formed impressions and opinions about the parties and their claims in the course of acting as their arbitrator". As such, the appellant argues that it is "unreasonable to believe that, in her role as Binding JDR Justice, [Kachur J] could have approached this case with an open mind." The appellant places most of the burden of this submission on reliance on the majority decision in ***N(L) v M(S),*** 2007 ABCA 258 at paras 20-23, 412 AR 232.

[54] There is no merit in this argument.

[55] To begin, the argument crosscuts through the presumption of judicial integrity.

[56] Second, the decision in ***N(L)*** was a case where a Judicial Dispute Resolution judge became a trial judge. As McFadyen JA dissenting observed:

> 42 Judicial dispute resolution, or JDR, has become a valuable and popular tool in Alberta to facilitate settlement of litigation. The Court of Queen's Bench of Alberta has established Guidelines for Judicial Dispute Resolution that include a provision permitting parties to consent to a JDR judge hearing the trial of a matter. The central issue on this appeal is whether parties, represented by counsel, can consent to a JDR judge also acting as trial judge, or whether the JDR judge is precluded from sitting as a trial judge because his or her involvement in the JDR raises a reasonable apprehension of bias, notwithstanding the consent of the parties and the Guidelines for Judicial Dispute Resolution.

[57] The appellant argues that she should not be taken to have waived objection to the participation of Kachur J because the Resolution Agreement did not say so expressly. This is an unpersuasive submission on this record. We have no reason to think that if Kachur J was asked to stand aside from the case she would have refused. Kachur J could not be clairvoyant about unexpressed reservations of the appellant even assuming they existed at the time of the Resolution Agreement or at any other time prior to the Final Order.

[58] Moreover, it does not appear likely that either party had any unexpressed reservations at all about Kachur J's involvement at any point prior to the Final Order. Indeed, the record is clear that the parties specifically requested Kachur J's involvement. The parties obviously consented to Kachur QC as a practicing lawyer to be involved multiple times. That they requested Kachur J's subsequent involvement as JDR judge precisely because of their familiarity with, and confidence in, her is understandable. The time for objection to Kachur J participating in the Resolution Process

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was before entering into the Resolution Agreement, not after the Final Order. It is difficult to conceive of the exceptional situation wherein an appellate court would entertain an appeal alleging bias against the judge in such a situation.

[59] While it is wise for counsel to arrange for the client to receive independent legal advice, as evidently occurred in ***AlGendy***, that is not a condition precedent for agreeing to a Judicial Dispute Resolution set out in the *Alberta Rules of Court*. 'Best practices' are not the only proper practices. Ground 1 is rejected.

V. Conclusion

[60] The appeal is dismissed. Since this Court is sitting on appeal of the Final Order, even if it was not the product of a trial, our primary function is to determine if the Final Order is improper, unfair, or invalid: compare ***Barendregt v Grebliunas*** 2022 SCC 22 at paras 100-104 *supra*. As the Supreme Court has instructed, intermediate appellate intervention is not a reconsideration of the matter under appeal. Nor is it the role of an appeal court to 'update' the order under appeal.

[61] Consequently, we leave the Final Order as is and leave the parties to carry it out. In the Final Order, the Court of King's Bench retained jurisdiction to make future adjustments to aspects of the Final Order so the matter remains with that Court.

Appeal heard on February 10, 2023

Memorandum filed at Calgary, Alberta
this 6th day of March, 2023

Authorized to sign for: Martin J.A.

Watson J.A.

Authorized to sign for: Ho J.A.

2023 ABCA 79 (CanLII)

Appearances:

Appellant R.C. Shannon
A. Singer (McKenzie Friend) for the Appellant

Respondent K.L. Shannon

2023 ABCA 79 (CanLII)

PLANNING LAW AND PRACTICE IN ALBERTA

FOURTH EDITION

FREDERICK A. LAUX, Q.C.
GWENDOLYN STEWART-PALMER

Juriliber

its discretion, could refuse an application for a use it considers inappropriate notwithstanding that the use falls within the generically described class.

§6.2(1)(c)(ii) Similar Uses

Some municipalities that employ specific, as opposed to generic, use lists attempt to avoid the problem of under-inclusion by utilizing some version of the "similar use" principle. Prior to 1977, planning legislation contained an express provision enabling a development authority to determine that a specific use that was not listed as either a permitted or discretionary use for the subject zone, was similar in character and purpose to a listed use. Upon making that determination, the agency could approve a permit for the use, if all other requisites had been met.[45] Although no such provision was included in the 1977 Act nor in the 1995 legislation, some land use bylaws purport to confer similar authority on administrators,[46] which authority may take various forms.[47]

It is not clear whether the current Act contemplates the taking of such license. Section 640(2)(b) expressly obligates a council to "prescribe with respect to each district...the one or more" permitted or discretionary uses. Moreover, in those instances in which the Act confers a power on decision-makers to deviate from the provisions of the land use bylaw in respect of a proposed development, it is clear that the development must nevertheless "conform with the uses prescribed" for the subject lands in the bylaw.[48] Arguably a council has not "prescribed" a use when it clothes a development authority with power to find a use to be similar to one that is expressly prescribed but, rather, it has improperly subdelegated the power to prescribe the uses to the authority. The general rule is that a delegate of the legislature may not subdelegate a power unless the right to subdelegate is expressly or by necessary implication

45 *Planning Act*, R.S.A. 1970, c. 276, s. 124(3).

46 The former I.D. No. 18 Land Use Order afforded an example of a bylaw that contained a general provision regarding similar uses coupled with an appendage to each list of uses:

> 3.11(7) In the case where a proposed specific use of land or a building is not provided for in any district in the order, the M.P.C. may determine that use is similar in character to a permitted or a discretionary use prescribed for that list in Schedule "B". [Schedule "B" contains the use districts.]

47 The City of Edmonton Zoning Bylaw No. 12800, s. 7.3(b) similar use provision is also of interest:

> where specific purposes or activities do not conform to any Use definition or generally conform to the wording of two or more Use definitions, the Development Officer may, at their discretion, deem that the purposes or activities conform to and are included in that Use which they consider to be the most appropriate. In such a case, the Use shall be considered a Discretionary Use, whether or not the Use is listed as a Permitted Use or Discretionary Use within the applicable Zone;

Quaere, whether in Edmonton an unlisted use can ever be similar in character and purpose to more than one listed use.

48 *Municipal Government Act*, subss. 640(6)(b) and 687(3)(d)(ii).

IN THE MATTER OF	Application to Appeal a Stop Order dated February 19, 2026
APPELLANT	Nelson Commercial Real Estate Inc.
SUBJECT LANDS	5109 41 Street, Lloydminster Alberta
LAND USE DISTRICT	General Commercial (GC) District
DOCUMENT	**WRITTEN REPLY SUBMISSIONS OF THE DEVELOPMENT AUTHORITY FOR THE CITY OF LLOYDMINSTER**
DATE OF SUBMISSIONS	Friday, May 15, 2026
DATE OF HEARING	Tuesday, May 26, 2026 at 9:00 AM
NAME AND ADDRESS FOR FILING FOR PERSON FILING THE DOCUMENT	Reynolds Mirth Richards & Farmer LLP Barristers & Solicitors Suite 1800 Stantec Tower 10220 103 Avenue Edmonton, AB T5J 3W8 Email: dyoung@rmrf.com Phone: (780) 425-9510 Fax: (780) 429-3044 File No. 78750-088-DJY

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(A) INTRODUCTION

[1] These are the reply submissions of the City of Lloydminster (the "City") with respect to the Written Submissions of the Appellant, Nelson Commercial Real Estate.

[2] The City submits that the Unauthorized Use of the Lands does not comply with any development permit that has been issued for the Lands or the applicable Land Use Bylaw, and is not a lawful non-conforming use, for reasons set out in the Written Submissions of the City of Lloydminster and these reply submissions. The City further submits that the doctrine of estoppel does not apply to this case.

[3] The City reiterates its request that the Board dismiss this appeal and confirm the issuance of the Stop Order.

(B) FACTS

[4] The City identifies as a preliminary matter that a number of the facts set out in the Appellant's Written Submissions are not relevant to these proceedings.

[5] The City's alleged refusal to issue a business license to the Appellant for the Unauthorized Use is not within the purview of this Board and is not relevant to these proceedings. It should be noted, however, that what has actually occurred is the City is not in a position to issue a business license in relation to the Appellant's operations on the Lands until the required land use and development permits are in place. This issue was identified after a resident brought it to the City's attention that the Appellant was advertising for tenants for the Unauthorized Use of the Lands in or around October 2025.

Advertisements for Heated Indoor Storage and Fenced Outdoor Storage, TAB 1.

[6] The following are not proper planning considerations or relevant considerations for this Board:

a. The Appellant's opinion that the business activities which have occurred on the Lands over time "have provided benefit and been an integral part of the community in the City" (Appellant's Written Submissions at para. 11).

b. At para. 13 of the Appellant's Written Submissions:

> The principal behind the corporate Appellant, Scott Nelson ("Scott") was born and raised in the City, and Scott's father, Ray Nelson , ("Ray") was the principal behind Nelson Lumber, whom previously owned the Lands and various parcels surrounding the Lands. The Appellant's connection to the City, and specifically the area surrounding the Lands, is deeprooted… the Lands have supported and represent Ray and Scott's entrepreneurial endeavors, successes, and contributions in Lloydminster. The occupiers of

the Lands, including the Appellant's Current Use, have and continue to provide notable benefit to the City and accords with the City's goals of business development and retention.

c. The Appellant's opinion that an amendment to the 2025 Land Use Bylaw, to bring the Lands and Unauthorized Use into compliance, will require "unnecessary time and costs".

[7] It is a legal error for a Subdivision and Development Appeal Board to be influenced by irrelevant or improper considerations.

***R & S Resource Services Ltd. v. Red Deer (County of),* 2004 ABCA 354 at para 19 citing *Dallinga v. Calgary (City),* 1975 ALTASCAD 13, TAB 2.**

[8] The relevant facts in relation to this appeal are largely undisputed. The Appellant does not dispute that the Lands are, and are intended to be, used for the Unauthorized Use.

(C) REPLY SUBMISSIONS

(i) The Unauthorized Use is Contrary to the 2025 Land Use Bylaw

[9] The Appellant concedes that the Unauthorized "likely does not fall within the 2025 Bylaw's list of permitted or discretionary uses for a Commercial General District", which is the land use district assigned to the Lands under the 2025 Land Use Bylaw.

[10] It is also not disputed that no development permit has been issued for the use of the Lands under the 2025 Land Use Bylaw. The only development permits that have been issued for the Lands are:

a. The 1990 Development Permit, and;

b. The Development Permit issued September 9, 2019, for a Communications Tower,

which can be found at TABS 3 and 11 of the City's Initial Written Submissions respectively.

[11] It is clear from the evidence before the Board not only that the Unauthorized Use does not comply with the 2025 Land Use Bylaw, but also that no development permit could be issued for the Unauthorized Use under the 2025 Land Use Bylaw without an amendment to the bylaw.

(ii) The Unauthorized Use is not a Lawful Non-Conforming Use

[12] Lawful non-conforming uses are governed by Section 643 of the *Municipal Government Act* (the "MGA").

***Municipal Government Act*, RSA 2000 c M-26, TAB 18 to City's Written Submissions, pp. 670-671.**

[13] The 2025 Land Use Bylaw contains provisions with respect to non-conforming uses. The 2025 Land Use Bylaw does not expand the scope of the protections afforded to non-conforming uses under Section 643 except to the extent that it provides for a longer discontinuance period.

[14] The 2025 Land Use Bylaw reiterates and confirms the application of Section 643 of the MGA.

Land Use Bylaw 05-2025, TAB 14 to the City's Written Submissions, Section 5.2.1, p. 457 and Definitions, p.600.

[15] Two aspects of the MGA are of particular relevance to the determination of this appeal:

a. Section 616(r) of the MGA defines a non-conforming use as a "lawful specific use" being made of land at the date a land use bylaw affecting the land become effective and which does not comply with the land use bylaw.

b. Section 643(1) of the MGA provides that a development permit issued prior to the adoption of a land use bylaw or land use bylaw amendment which would render the development that is the subject of the permit a non-conforming use "continues in effect in spite of the coming into force of the bylaw".

[16] The non-conforming use provisions of the MGA do not permit the continuation of any use for which a development permit could have been issued under a prior land use bylaw. A lawful use is one for which a development permit was actually issued or for which a development permit was not required.

[17] The question for determination in this appeal is what use of the Lands was authorized by the 1990 Development Permit, and specifically whether the 1990 Development Permit authorizes the Unauthorized Use of the Lands. The City's position is that it does not, for the reasons set out below.

[18] The 1990 Development Permit does not, contrary to the Appellant's submissions, authorize the general industrial use of the Lands. The 1990 Development Permit was issued for the specified and stated use of "Truss Manufacturing Plant", and for no other purpose or use.

[19] The issuance of a development permit for a specific proposed development does not authorize the use of the lands for any development which could potentially come within the same use class definition under which the development permit was issued.

[20] This "categorical approach" was expressly rejected by the Supreme Court of Canada in the Supreme Court of Canada's decision in *Saint-Romuald (Ville) v. Olivier,* referenced in the Appellant's Written Submissions:

> I fully agree with his rejection of the "categorical" approach. This is the theory under which an owner, whose use of land does not conform to a new by-law, nevertheless has an "acquired right" to expand, alter or modify an existing use to include anything and everything permitted on that land under the "use category" defined in the prior law (if indeed there was a prior law).
>
> ***Saint-Romuald (Ville) v. Olivier,* 2001 SCC 57, at para. 4, Appellant's Written Submissions at para. 4, TAB L, p. 75.**

[21] A Truss Manufacturing Plant was a discretionary use under the 1989 Zoning Bylaw. Discretionary uses are "of such a nature that they may or may not be reasonably compatible with neigbouring uses, depending upon the circumstances".

Planning Law and Practice in Alberta, p. 6-8, TAB 3.

[22] In considering the scope of what is unauthorized under a development permit for a discretionary use, courts will consider the plans submitted in support of the development permit application.

***Build-A-Vest* Structures *Inc. v. Red Deer (City of),* 2006 ABQB 869 at para. 94, TAB 4, p. 45.**
***R & S Resource Services Ltd. v. Red Deer (County of),* 2004 ABCA 354, TAB 2.**

[23] What is shown in the plans submitted to the City with respect to the 1990 Development Permit is what was approved by Council. The plans submitted to the City with respect to the 1990 Development Permit are found at TAB 4 of the City's Initial Written Submissions. The plans:

a. Describe the building shown on the plans as "Proposed Truss Shop".

b. Do not show or identify any outdoor storage areas on the Lands.

c. Do not show or identify any hard surfacing on the Lands other than a narrow concrete apron around the perimeter of the Building.

d. Show the fencing around the perimeter of the Lands as "Chain Link Fence".

[24] When Council approved the 1990 Development Permit the applicable land use bylaw, the 1989 Zoning Bylaw, contained the following requirements:

> All driveways, parking areas and storage areas shall be paved with asphalt or concrete for a minimum distance of 15 metres (49.2 feet) from the front property line, plus 1.5 metres (4.9 feet) of concrete apron in from the existing curb and gutter.
>
> **1989 Zoning Bylaw, City's Written Submissions, TAB 6, p. 356 (emphasis added).**

> Visual screening a minimum of 2 metres (6.6 feet) high shall be provided by a solid fence or a combination of fence and soft landscaping where the site abuts a residential district and all storage, freight or trucking yards shall be enclosed or completed screened by buildings, trees, landscaped features or fences, or a combination thereof to provide effective screening from the ground to a height of two (2) metres (6.6 feet).
>
> **1989 Zoning Bylaw, City's Written Submissions, TAB 6, p. 190 (emphasis added).**

[25] It is possible that some outdoor storage that was accessory and ancillary to the Truss Manufacturing Shop would have been permitted under the 1990 Development Permit if the storage area was hard surfaced and effectively screened by buildings, trees, landscaping features or fences.

[26] However:

a. The plans submitted to the City with respect to the 1990 Development Permit show only limited hard surfacing and do not show any effective screening of the Lands.

b. The Appellant's Written Submissions confirm that the majority of the Lands are graveled (not hard surfaced) and the Lands are surrounded only by a chain link fence.

c. Recent photographs of the Lands included as TAB 16 to the City's Initial Written Submissions confirm that the majority of the Lands are not hard surfaced and the area being used for outdoor storage is not effectively screened.

[27] Council made the determination that a Truss Manufacturing Plant as shown on the plans submitted to the City in relation to the 1990 Development Permit was an appropriate use of the Lands. Council did not determine that all possible General Industrial Uses of the Lands were an appropriate use of the Lands.

[28] The Unauthorized Use is clearly and significantly distinct from what was authorized by the 1990 Development Permit. The intended and actual outdoor storage on the Lands is not shown on the plans forming a part of the 1990 Development Permit, is not accessory to a Truss Manufacturing Shop, and does not comply with the surfacing and screening requirements of the 1989 Zoning Bylaw. It includes what would be considered Industrial Storage under the 1989 Zoning Bylaw, for which no development permit was ever applied for or obtained.

[29] The Supreme Court of Canada's decision in *Saint-Romuald (Ville) v. Olivier* is of limited, if any, application to this appeal.

[30] The applicable provincial legislation in the *Olivier* decision was Section 113 of the *Act Respecting Land Use Planning and Development,* which included the following provisions:

> **113.** The council of a municipality may adopt a zoning by-law for its whole territory or any part thereof.
>
> A zoning by-law may include provisions regarding one or more of the following objects:
> . . .
>
> (18) to regulate non-conforming structures and uses protected by acquired rights,
>
> (*a*) by requiring that a non-conforming use protected by acquired rights cease if such use has been abandoned, has ceased or has been interrupted for such period of time as it may define, which must be a reasonable period, taking into account the nature of the use, but must not in any case be shorter than six months;
>
> (*b*) by stipulating that a non-conforming use or structure protected by acquired rights shall not be replaced by another non-conforming use or structure;
>
> (*c*) by prohibiting the extension or alteration of a non-conforming use or structure protected by acquired rights, or by establishing conditions under which a non-conforming use or structure protected by acquired rights may be extended or altered

[31] The zoning by-law before the Court in did not contain provisions with respect to non-conforming uses. *Olivier* was therefore decided based on the common law doctrine of acquired rights.

[32] In contrast, the MGA contains express provisions with respect to non-conforming uses.

a. Section 616(r) of the MGA defines a non-conforming use as a "lawful specific use" (emphasis added) being made of land at the date a land use bylaw or amendment affecting the land become effective which does not comply with the land use bylaw or amendment.

b. Section 643(1) of the MGA provides that if a development permit is issued prior to the adoption of a land use bylaw or land use bylaw amendment which would render the development that is the subject of the permit a non-conforming use "the development permit continues in effect in spite of the coming into force of the bylaw".

c. Section 643(4) of the MGA prohibits the extension or transference of a non-conforming use of lands to any other part of the lands.

[33] The doctrine of acquired rights discussed by the Supreme Court of Canada in *Olivier* contemplates a degree of flexibility. In contrast, Section 643 of the MGA and the definition of a non-conforming use as a lawful specific use of lands demonstrates a clear and

unequivocal legislative intent for the continuation of lawful non-conforming uses to be strictly limited and not extended or expanded.

[34] In any event, the application of the principles set out in *Olivier* does not support a conclusion that the Unauthorized Use is a non-conforming use. The doctrine of acquired rights is applied with regarding to "the real and reasonable expectations" of affected landowners and the "normal evolution" of a use (*Olivier* at para. 19).

[35] There is no indication that the Appellant made any inquiries with the City prior to or at the time of its acquisition of the Lands which resulted in actual expectations regarding the allowable use of the Lands. The City submits it would not be objectively reasonable for a person to conclude that the 1990 Development Permit for a Truss Manufacturing Shop would permit the operation of an indoor and outdoor storage facility on the Lands.

[36] The operation of an indoor and outdoor facility on the Lands is both a change from the type of use authorized by the 1990 Development Permit (Truss Manufacturing Shop) and an intensification of use, as any outdoor storage allowed under the 1990 Development Permit would have been restricted to that accessory to the principal use of the building on the Lands and which complied with the requirements of the 1989 Zoning Bylaw (hard surfacing and effective screening of storage areas) and therefore very limited in scope. In contrast, the existing outdoor storage on the Lands is unrestricted, not limited to hard-surfaced areas, and not effectively screened.

[37] The decision in *Forbes v Caledon (Town of)* referenced in the Appellant's Written Submissions can be distinguished from the facts before the Board in this appeal. Unlike in *Forbes,* the use of the Lands for the operation of an outdoor storage facility was not at any point in time a lawful use of the Lands for the reasons set out herein.

[38] The City's position is that the 1990 Development Permit authorizes the specific use of a Truss Manufacturing Shop, the 1990 Development Permit does not authorize the Unauthorized Use of the Lands, and there is no lawful non-conforming use of the Lands.

[39] If, however, the Board determines that there is a lawful non-conforming use of the Lands in the nature of a general industrial use, the City submits that the decision in *Beresford (Ville) v Brunswick Rent A Car Ltd.* is illustrative of how the Board should determine the question of the extent to which the non-conforming use includes outdoor storage.

Beresford (Ville) v. Brunswick Rent A Car Ltd*., 178 NBR (2d) 233 (Queen's Bench), TAB 5 ("*Beresford").

[40] The defendant in *Beresford* had a long history of using the subject lands for vehicle sales and rentals. In or around 1975 the defendant began to keep inoperable vehicles on the subject lands for of using parts from the inoperative vehicles to repair other vehicles for sale or rent.

[41] The issue before the Court in *Beresford* was the expansion of the defendant's business to include an "automobile graveyard" (the storage of a large number of vehicles for salvage purposes). The Court drew a distinction between the possible accessory use of the subject lands for storage and the use which was occurring:

> I therefore conclude, on the evidence before me, that since 1990, the defendant has been operating an automobile graveyard on its property, in violation of the Town of Beresford's zoning bylaw. Although the storing of about 30 scrapped vehicles for the purpose of salvaging their reusable parts may constitute an accessory use, such is not the case here. This is clearly the operation of an automobile graveyard. ... I accept the evidence showing that the defendant has always sold used parts, but I believe that the purpose of this activity was more in the sense of doing favours to people than operating a business. That is also true of the car bodies which were sold to scrap dealers. Prior to 1990, only about 30 to 40 such bodies were sold each year, but these now number between 200 to 300. It is therefore obvious that this is not simply a matter of scrapping the bodies of cars in the defendant's fleet, but this involves buying scrapped car bodies for the purpose of reselling them at a profit.

***Beresford,* para. 9, TAB 5, p 57.**

[42] The 1990 Development Permit at most permits the outdoor storage of goods which are accessory to the use of the building on the Lands and which complies with the requirements of the 1989 Zoning Bylaw in relation to the hard surfacing and screening of storage areas. That is clearly not the use to which the Appellant is putting, or intends to put, the Lands.

(iii) The Doctrine of Estoppel Does Not Apply

[43] The starting point is that the City's authority to issue a Stop Order under Section 645 of the MGA cannot be estopped:

> As a general rule, municipal rights, duties and powers, including the duty to carry out the provisions of a statute, are of such public nature that they cannot be waived, lost or vitiated by mere acquiescence, laches or estoppel: *Langley (Township) v. Wood,* 1999 BCCA 260 at para. 12. Although this type of argument generally arises (and fails) in situations where a municipality has not taken prior enforcement action though entitled to do so, the principle must apply with even greater force where the argument is, in essence, that the City cannot enforce a *new* licensing bylaw because it imposes different requirements than the former bylaw. To accede to the Dispensaries' argument in the present case would be to interfere with the City's delegated legislative authority to make bylaws.
>
> ***West Kelowna (City) v Black Crow Herbals Association*, 2019 BCSC 1082, TAB 6, para. 81.**

[44] The narrow circumstances where a public authority may be estoppel from exercising its discretionary powers have been summarized by the Court of Appeal as follows:

> *Obiter dicta* at the Supreme Court of Canada has held that public authorities may be estopped from exercising discretionary powers in narrow circumstances: *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 40, [2001] 2 SCR 281 [*Mount Sinai*]. Those circumstances include the normal conditions of private law promissory estoppel, with the additional requirement that the representee show that it is consistent with legislative intent, and the broader statutory scheme, that the public body may be bound to exercise its power in accordance with its prior representations: *Mount Sinai* at paras 47-48.
>
> ***Carleo Investments Ltd v Strathcona (County)*, 2014 ABCA 302, Appellant's Written Submissions at para. 18, TAB N, p. 98.**

[45] The "normal conditions" of private law promissory estoppel have been stated as follows:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, [1] by words or conduct, made a promise or assurance [2] which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, [3] in reliance on the representation, [4] he acted on it or in some way changed his position.
>
> …
>
> [T]he promise must be unambiguous but could be inferred from circumstances.
>
> ***Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 SCR 50, TAB, cited in *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 [*Mount Sinai*] at para 45, TAB 7, p. 116.**

[46] The present case is clearly distinguishable from the facts before the Court in *Mount Sinai,* where the elements of private law promissory estoppel were met.

[47] The Appellant states that the City's issuance of business licenses for the Lands is a representation that "the developments on the land were properly permitted via the Development Permit and could continue on the basis of a legal non-conforming use" (the "Alleged Representation").

[48] The Alleged Misrepresentation does not appear in any of the business licenses issued by the City for the Lands. Nor can the Alleged Representation reasonably be inferred from the circumstances.

[49] Municipalities fulfill many different functions. Municipalities may have multiple departments operating independently from one another and may administer multiple regulatory regimes. Business licensing is one specific regulatory function of the City, which

is administered by a specific department or employees in accordance with the applicable business license bylaw.

[50] The City's Planning and Development Department, which is responsible for administering and enforcing Part 17 of the MGA and the 2025 Land Use Bylaw, does not administer business licensing. The City's business licensing documents specifically instructs business license applicants to contact the Planning and Development Department for information on development permits. See, for example, TAB 10, p. 386 of the City's Written Submissions.

[51] The inference of the Alleged Representation from the circumstance is not reasonable and would be wholly inconsistent with the reality of municipal governance which may involve decisions being made by different municipal departments and employees across multiple disciplines.

[52] The decision in *Ritchot, Rural Municipality of v. Mandziuk et al.* is illustrative. The defendant in municipal enforcement proceedings claimed (amongst other things) that the municipality made a misrepresentation to him regarding the use of the lands by imposing and accepting business taxes in relation to the disputed use of the lands. The Court of Queen's Bench concluded that "the acceptance of such business revenue is in no way related to the use of the property by the defendant".

> ***Ritchot, Rural Municipality of v. Mandziuk et al* , 42 Man R (2d) 188 (Queen's Bench) at para. 27, TAB 8, p. 155**

[53] Similarly, the issuance of business licenses for the Lands is in no way related to the actual or allowable use of the property under Part 17 of the MGA.

[54] There is no evidence or information which shows or would support an inference that the City's issuance of business licenses was intended to affect its legal relationship with the Appellant or be acted upon by the Appellant as a representation, promise or assurance regarding compliance of the Lands with the 1990 Development Permit, the applicable land use bylaw, or Part 17 of the MGA. The sole function of the issuances of the business licenses was administration of the City's business licensing bylaws. Compliance with one bylaw is not a representation of compliance with another. The City did not "encourage" the Appellant in any way. Nor has the Appellant established any reliance on the Alleged Representation, or that it changed its position in any way as a result of the Alleged Representation.

[55] Furthermore:

> Public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text. As stated

in *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, 1950 CanLII 28 (SCC), [1950] S.C.R. 211, *per* Rand J., at p. 220: "there can be no estoppel in the face of an express provision of a statute" (emphasis added). See also *The King v. Dominion of Canada Postage Stamp Vending Co.*, 1930 CanLII 87 (SCC), [1930] S.C.R. 500.

***Mount Sinai* at para. 48, TAB 7, p. 117.**

[56] The authority set out in Section 645 of the MGA is express and unambiguous. The City submits that the legislative intent of the applicable MGA provisions would negate a finding of estoppel in the present case even were the Applicant to establish the elements of private law estoppel.

(D) CONCLUSION AND RELIEF SOUGHT

[57] For the reasons set out in the City's Written Submissions and these Reply Submissions, the City respectfully requests that the Board uphold the Stop Order as issued.

[58] The City's position is that the time for compliance set out in the Stop Order (which allowed the Appellant 5 months to comply with the applicable requirements) was reasonable and sufficient in the circumstances.

[59] The MGA does not authorize the Board to grant a stay of the Stop Order. If the Board determines that the time for compliance set out in the Stop Order should be extended, the Board has the authority under Section 687(3)(c) of the MGA to vary the Stop Order to extend the time for compliance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF MAY, 2026.

REYNOLDS MIRTH RICHARDS & FARMER LLP

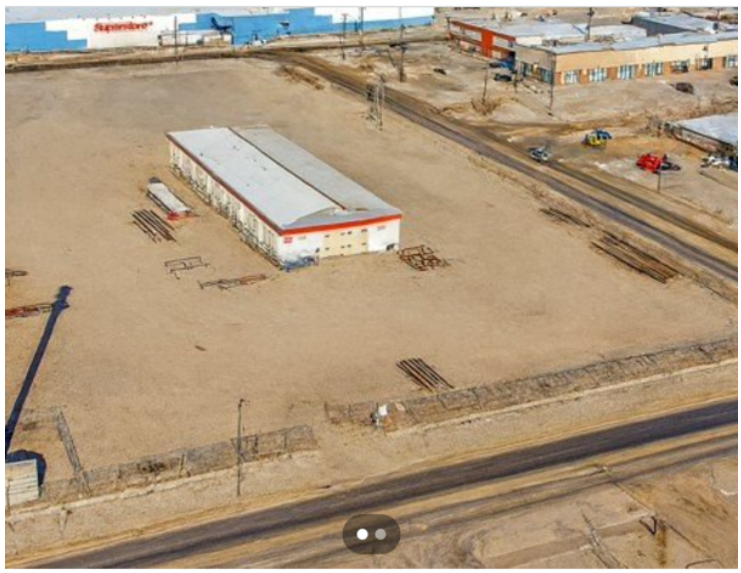
[redacted]

Daina Young, RMRF LLP
Solicitors for the City of Lloydminster

LIST OF DOCUMENTS AND AUTHORITIES

1. Advertisements for Heated Indoor Storage and Fenced Outdoor Storage
2. *R & S Resource Services Ltd. v. Red Deer (County of),* 2004 ABCA 354
3. Planning Law and Practice in Alberta, p. 6-8
4. *Build-A-Vest* Structures *Inc. v. Red Deer (City of),* 2006 ABQB 869
5. *Beresford (Ville) v. Brunswick Rent A Car Ltd*., 178 NBR (2d) 233 (Queen's Bench)
6. *West Kelowna (City) v Black Crow Herbals Association*, 2019 BCSC 1082
7. *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*,2001 SCC 41
8. *Ritchot, Rural Municipality of v. Mandziuk et al* , 42 Man R (2d) 188 (Queen's Bench)

Storage Rental
5109 41 Street - Block 13, Plan 762-2291



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Seller information

Seller details

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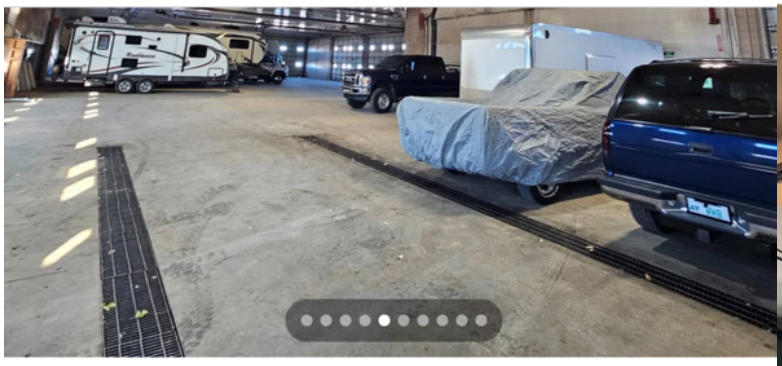

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Monitored Alarm System, Cameras, and nightly security patrol.

Pricing
- 28′ + Boat or RV - $400.00/Month
- 21′-27′ Boat or RV - $250.00/Month
- 16′-20′ Boat or RV – $215.00/Month
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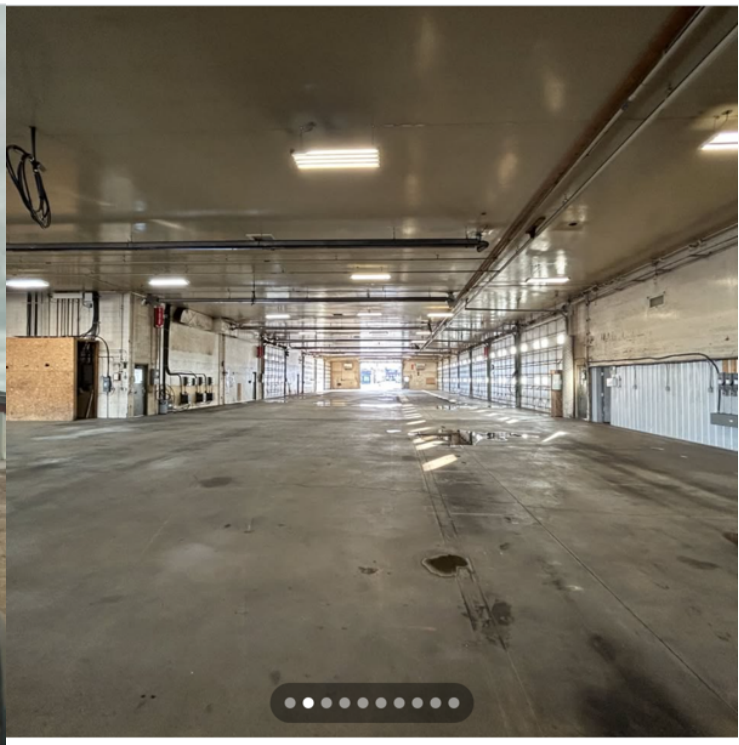

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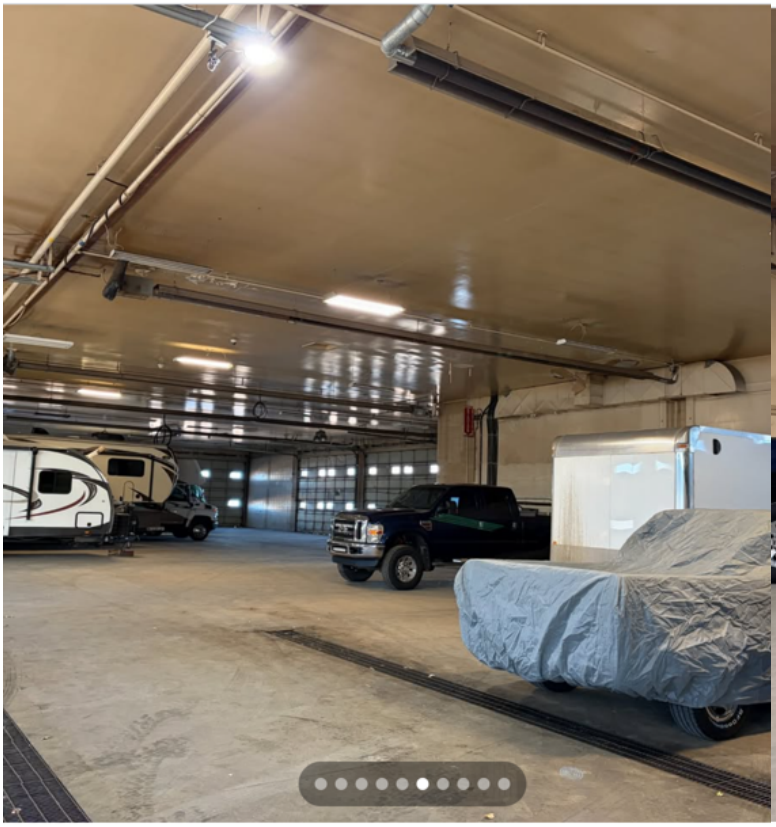

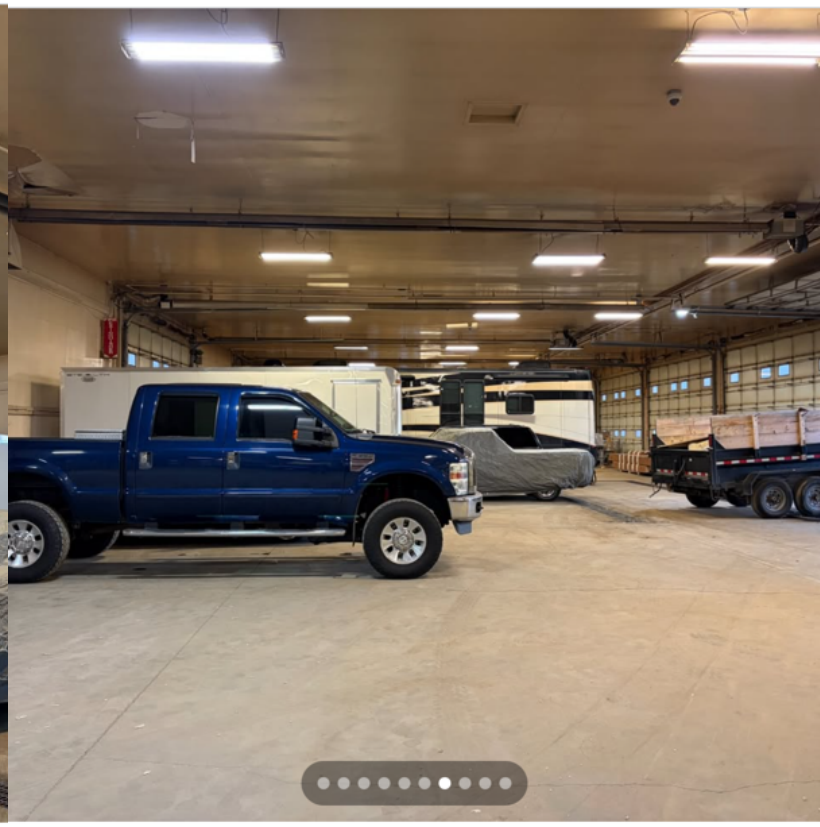

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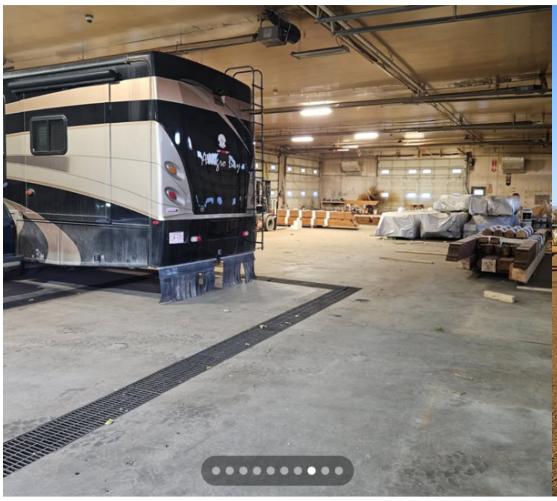

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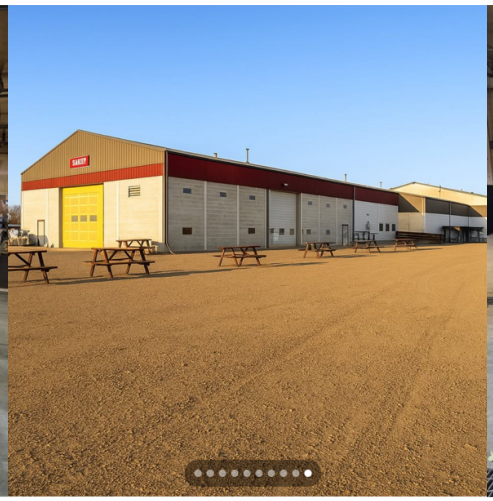

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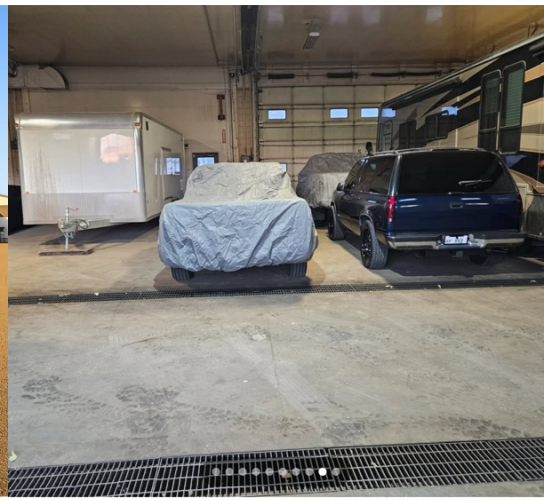

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In the Court of Appeal of Alberta

Citation: R & S Resource Services Ltd. v. Red Deer (County of), 2004 ABCA 354

Date: 20041118
Docket: 0401-0204-AC
Registry: Calgary

2004 ABCA 354 (CanLII)

Between:

R & S Resource Services Ltd.

Applicant
(Appellant)

- and -

The County of Red Deer and the Subdivision and Development Appeal Board for the County of Red Deer No. 23

Respondents
(Respondents)

Reasons for Decision of
The Honourable Madam Justice Carole Conrad

Application for Leave to Appeal the Decision of
the Subdivision and Development Appeal Board
Dated the 24th day of June, 2004

Reasons for Decision of
The Honourable Madam Justice Conrad

I. Introduction

[1] R & S Resources ("R & S") applies for leave to appeal a decision of the Subdivision and Development Appeal Board (the "SDAB"). The SDAB decision upheld a stop order issued by the County of Red Deer (the "County"), which stated that R & S did not have a development permit for certain development activities currently being carried on by R & S on its land.

[2] I have concluded that leave must be denied. There is no question of law or jurisdiction of sufficient importance. Nor, in my view, is there any reasonable chance of success. No argument is raised that could affect the end result or ultimate decision of the SDAB that the 1997 development permit did not cover the work enjoined.

II. Facts

[3] In 1997, a development permit application for "shop building/material storage" was submitted in respect of land owned by R & S. Details of the proposed development were provided in an "attached site drawing" and a completion date of about two months was indicated. Site drawing 1853-02, a detail drawing showing only the proposed development to the portion of the land where the shop building was to be built accompanied the application. The Red Deer file did not contain any other site drawing. A development permit for the proposed development of a shop building was issued in October 1997. R & S then proceeded with construction of the shop.

[4] Since 1998, R & S admittedly has been grading and gravelling the southern portion of the land, and the land has been used for the storage of oilfield related materials and vehicles. Between December 4, 2003 and March 8, 2004, R & S received three letters from the County advising that a development permit was needed for this site preparation and storage on the land. The final letter warned that unless a permit was obtained a stop order would soon be issued.

[5] R & S took the position that the 1997 development permit covered this development. It said that at the time of application for the 1997 permit a second site drawing 1853-01, which showed the entire land including grading lines, was included with the application and therefore the permit covered all development.

[6] R & S did not answer the letters warning of a stop order, but as a precautionary measure it applied for the requested development permit on April 2, 2004. At the hearing it maintained its position that the second site drawing was part of the permit.

[7] On May 28, 2004, the County issued a stop order with respect to the "site excavation, grading, outdoor storage of field equipment and vehicles" on R & S's land. R & S appealed the stop order to the SDAB, arguing that the activities in question were covered by the 1997 development

2004 ABCA 354 (CanLII)

2004 ABCA 354 (CanLII)

permit, largely due to the existence of a second site drawing, drawing 1853-01, which showed the entire land area including grading lines.

[8] At the hearing, evidence was led as to the second site drawing. The County could not find any second site drawing in the material. Nor could R & S positively swear that it had been included in the application. Thus, this became the key issue in the hearing.

III. Decision Below

[9] Following a hearing on June 24, 2004, the SDAB denied the appeal and, with one minor amendment, upheld the stop order. The date by which R & S had to comply with the stop order was extended. The decision was stated to be based on a review of all the evidence presented and the relevant legislation and policy provisions.

[10] The reasons for the decision were brief and given in two paragraphs. First, the SDAB found as a fact that the development permit issued in 1997 only authorized the development shown in the site drawing 1853-02. It further found that no development other than that depicted in drawing 1853-02 had been approved on the site, including the development that was currently under review.

IV. Test for Leave to Appeal

[11] Leave to appeal a decision of the SDAB may be granted on questions of law or jurisdiction if they are of sufficient importance to merit further appeal and if the appeal has a reasonable chance of success: section 688 of the *Municipal Government Act*, R.S.A. 2000, c. M-26, as amended. This means the applicant must show "there is a reasonably arguable point of law which could affect the result": ***Lillo's School of Modern Music Ltd. v. Edmonton (City)***, [2004] A.J. No. 66 (C.A.), 2004 ABCA 37 (at para. 5).

V. Standard of Review

[12] In considering whether there is an arguable point of law, that could affect the result, it is necessary to consider the standard of review that the court would apply if leave was granted. Ordinarily, this would involve the application of the four factors set out in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 to determine the extent of deference, if any, to be given to the SDAB. I do not need to make this assessment, however, because, given my view of the issues raised, even the application of the least onerous standard would not assist the applicant.

2004 ABCA 354 (CanLII)

VI. Decision

[13] The main complaint of the applicant is that the reasons of the SDAB are not adequate because there is no statement of the approach taken in interpreting the 1997 development permit, no discussion of what the SDAB considered relevant or irrelevant, no indication of how it assessed the law, and no explanation of how it reached its conclusions from contradictory facts.

[14] The SDAB has a responsibility to come to a conclusion on the central issue of the appeal: ***Lor-al Springs*** (2000), 271 A.R. 149 (C.A.), 2000 ABCA 299 (at para. 17). General guidelines for determining the adequacy of reasons were set out at paras. 12-15:

> (1) The rationale of the SDAB must be reasonable but does not have to be perfect.
>
> (2) One should not examine the reasons in isolation, but in the context that the SDAB made the decision.
>
> (3) The reasons should disclose what findings of fact the board has made where evidence is contradictory on a key point or where facts need to be established to determine whether a proposed development conforms to a plan.
>
> (4) The test for determining whether reasons given are adequate in law is whether they show why or how or on what evidence the delegate reached the conclusion.

[15] These general guidelines were expressly adopted by Wittmann J.A. in ***Keephills Aggregate Co. Ltd. v. Parkland (County of) Subdivision and Appeal Board***, [2003] A.J. No. 1017 (C.A.), 2003 ABCA 242, to which he added that, "the SDAB is not obliged to indicate for every submission made to it, whether it considered the matter relevant or irrelevant" (at para. 29). In ***Keephills***, the SDAB's reasons were held to be adequate as measured by the ***Lor-al*** criteria and, further, there was "no doubt as to the reasons for the decision". Wittmann J.A. also agreed with the statement quoted from ***Burnco Rock Products Ltd. v. Rockyview (Municipal District No. 44)*** (2000), 261 A.R. 148, 2000 ABCA 129 at para. 7 "the Board's reasons, although brief, are sufficient to enable an assessment to be made of grounds of appeal to this Court" (at para. 31).

[16] The cases can be summarized as confirming that the SDAB must give reasons for its decisions, but the reasons should be viewed in the context of the hearing. The reasons may be brief, but in the end they must make clear what the decision was and the basis on which it was made.

[17] Applying theses guidelines to the present case and keeping in mind the context in which the decision and reasons were given as well as the fact that the main issue was simple and straightforward, I am satisfied there is no reasonable chance of success on this appeal. The best

2004 ABCA 354 (CanLII)

argument relates to the paucity of reasons. While I agree that the reasons were brief and greater care should be taken with reasons, when looked at in context, they are sufficient to indicate what the Board had done. The primary issue in dispute was whether a second site drawing 1853-01, showing the entire land including grading lines, had been submitted to the County at the time of the 1997 permit application and, therefore, the further work was covered by the 1997 permit. Not even the appellant called evidence that stated positively that the drawing had been submitted. That was the central issue. The SDAB reasons, viewed in the context of the entire hearing, make it clear that it rejected this position. It found that the development authorized by the 1997 permit was that depicted in drawing 1853-02, inferentially rejecting that the second drawing was part of the permit. That finding was supported by the face of the permit and the evidence. It was the issue, and the short reasons for decision indicate that it rejected any further drawing. Without that further drawing, there is no reasonable argument that supports the appellant's position that the 1997 permit was sufficient to cover the work being done.

[18] I am also satisfied that there is no merit to the balance of the arguments. The appellant was aware of the central issue involved here, and it was not taken by surprise on that issue. Nor did it request an adjournment as a result of any surprise. It needed to find authority for its work in the 1997 permit.

[19] With respect to its submission that the SDAB considered irrelevant evidence, the test is whether the Board allowed itself to be influenced by such evidence: ***Re Dallinga and City of Calgary*** (1975), 62 D.L.R. (3d) 433 (Alta. C.A.). Here any connection between any irrelevant or prejudicial evidence has not been demonstrated as going to the main issue, or that the Board was influenced by it. The decision of the SDAB focussed solely on whether the 1997 permit covered the work involved. The Board was obviously clear on what the main issue was and what its duty and responsibility was. There is no evidence that the County's advocating a position somehow compromised the Board so as to amount to an error of law or jurisdiction.

[20] Finally, I do not accept that the stop order that "the existing property be converted to its former state" is vague and uncertain. The test for determining whether a condition set down by the SDAB is void for uncertainty provides that "the uncertainty would have to contain a vital ambiguity on its face incapable of being resolved by reference to the circumstances": ***Hutterian Brethren Church of Starland v. Starland No. 47 (Municipal District)*** (1994), 149 A.R. 288, [1994] A.J. No. 276 (Alta. C.A.) (at para. 28). It was further pointed out in that case that difficulty in interpretation is not the same as ambiguity.

[21] As was found in ***Hutterian Brethren***, there is evidence in this case to assist in the interpretation of the above noted words, most notably the remainder of the stop order itself. Thus, the interpretation of the above passage is not impossible to resolve. The respondent is correct in stating that the stop order, when viewed as a whole and read in context, is clear. In any event, the respondent does not take the position which concerns the applicant.

[22] Finally, the statement of the SDAB in its reasons that the 1997 development permit authorized only the development depicted in the site drawing numbered 1853-02 had been approved, was its finding of fact on which its decision was based. It was not a retroactive condition as alleged by the appellant.

VII. Conclusion

[23] I am satisfied, there is no reasonable chance of success on this appeal. Though the reasons given by the SDAB were brief, when looked at in context, they are sufficient to make its reasons clear. The primary issue in dispute was whether there was a second site drawing 1853-01, which showed the entire land including grading lines, submitted to the County at the time of the initial permit and thereby was covered by the permit. Not even the appellant called evidence that stated positively that the drawing had been submitted. That was the central issue. The SDAB's reasons, viewed in context of the entire hearing, make it clear that it rejected this position. It found that the development authorized by the 1997 permit was that depicted in drawing 1853-02, inferentially rejecting that the second drawing was part of the permit. That finding was supported by the evidence and was pivotal.

[24] Nor am I satisfied there is merit to the balance of the argument. The appellant was aware of the central issue involved here. Having regard to the narrow issue, there is no suggestion any irrelevant matter would have affected the decision. Nor is there any evidence to suggest bias on the part of the SDAB. Leave to appeal is denied.

Application heard on September 30, 2004

Reasons filed at Calgary, Alberta
this 18th day of November, 2004

Conrad J.A.

2004 ABCA 354 (CanLII)

Appearances:

R.B. Brander and K. Stewart
for the Applicant/Appellant

S.C. McNaughtan
for the Respondent

2004 ABCA 354 (CanLII)

PLANNING LAW AND PRACTICE IN ALBERTA

FOURTH EDITION

FREDERICK A. LAUX, Q.C.
GWENDOLYN STEWART-PALMER

Juriliber

land within the municipality". The Court of Appeal cited the provisions of the *Planning Act* to the effect that a land use bylaw may prescribe the conditions that may be imposed in development permits[30] and stated that the bylaw at issue failed to prescribe conditions. Instead, it improperly delegated the task to the development officer, leaving him with an unacceptably broad discretion. In particular, the court emphasized that an applicant is entitled to know from the bylaw what obstacles he may encounter in the form of conditions when applying for a permitted use permit. In short, the court was sympathetic to the proposition that if permitted uses were to be authorized in a land use bylaw, the entitlement should not be diminished by conferring excessive discretion on planning administrators in connection with conditions. Indeed, the court stated that conditions on permitted uses ought to be kept to a minimum.[31]

§6.2(1)(b) Discretionary Uses

As the name implies, these are the uses for which the issuance of a development permit is dependent on the exercise of discretion by the development authority.[32] Unlike permitted uses, which were adjudged by council at the time of adopting the bylaw as being unquestionably appropriate for the district, the listed discretionary uses, while generally appropriate for the district, are those that are of such a nature that they may or may not be reasonably compatible with neighbouring uses, depending upon the circumstances. To illustrate, the use of part of one's home for the purpose of earning income from a trade or calling (usually called a "home occupation" use) in a district in which single family homes are the sole permitted use, is generally acknowledged to be appropriate, provided the use will not unreasonably detract from the amenities of the neighbourhood or otherwise unnecessarily interfere with the use, enjoyment and value of neighbouring properties.

Whether a particular home occupation use on a particular site meets the test will depend upon a variety of factors: the type of home occupation proposed, the amount of vehicular or pedestrian traffic the use will generate, the business hours, and the physical layout of streets and alleys in the neighbourhood, to name a few. A given home occupation may be appropriate on one site in the district but not on another. Accordingly, it is appropriate that the development authority be in a position, in its discretion, to permit or refuse

30 The provisions then in effect were essentially the same as the current subss. 640(2)(b) and (c)(iv) and 642.

31 Other cases considering the ability of development authorities to impose conditions on permitted uses include: *Civeo Canada Inc. v Wood Buffalo (Regional Municipality) Subdivision and Development Appeal Board*, 2016 ABCA 63, 2016 ABCA 63; *Grand Central Properties Inc. v. Cochrane (Town)*, 2013 ABCA 69, [2013] AJ No 636; and *Van Bezooyen v. Cardston County (Subdivision and Development Appeal Board)*, [2011] A.J. No. 1021, 2011 ABCA 263, 7 C.L.R. (4th) 1, 2011 CarswellAlta 1638, 207 A.C.W.S. (3d) 149. See §9.7(3) for more a detailed examination of conditions respecting permitted uses.

32 *Municipal Government Act*, s. 642(2).

Court of Queen's Bench of Alberta

Citation: Build-A-Vest Structures Inc. v. Red Deer (City of), 2006 ABQB 869

Date: 20061205
Docket: 0003 00278
Registry: Edmonton

2006 ABQB 869 (CanLII)

Between:

Build-A-Vest Structures Inc. and Parkland Funeral Home and Crematorium Ltd.

Plaintiffs

- and -

The City of Red Deer and Lorna Watkinson-Zimmer

Defendants

Corrected judgment: A corrigendum was issued on April 3, 2007; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice T.D. Clackson

I. Nature of the Action

[1] This action arises from the use of the term "retort" on a development application which was not recognized or understood by those issuing the resulting development permit as meaning "cremator."

[2] The Plaintiffs seek a declaration that a retort unit incorporated in a funeral home which they have developed on lands municipally described as 6370 - 68 Street in Red Deer is a permitted or discretionary use in the C-4 District under the Red Deer City Land Use Bylaw and that a valid development permit was issued to Build-A-Vest Structures Inc. in relation to that development. They also seek an order directing that the City allow them to connect their retort unit to a source of natural gas and to operate it in conjunction with their funeral home. They ask for damages from the City as a result of its refusal to permit the connection and operation of the

retort unit on the lands in question. In the alternative, they ask for damages against the City for negligent misrepresentation in issuing them a development and building permit.

2006 ABQB 869 (CanLII)

II. Evidence and Facts

[3] Mr. Joe Cramer, who represents the operating mind and will of Build-A-Vest Structures Inc., one of the Plaintiffs in this litigation, testified that he was approached by SCI Canada Ltd. to assist it in developing a funeral home and cremation facility in the City of Red Deer. The idea was that Build-A-Vest would purchase the lands and build the facility to SCI Canada's specifications and then lease the premises to SCI. After the development permit was issued, SCI Canada backed out of the arrangement and was replaced as operator of the facility by Parkland Funeral Home and Crematorium Ltd. The sale of the property to Parkland closed on the date that Build-A-Vest's builder applied for the temporary gas permit.

[4] In pursuit of the arrangement with SCI Canada, Mr. Cramer contacted Mr. Murray Mehling, a real estate agent, to act as Build-A-Vest's agent in locating suitable properties in Red Deer for the undertaking. Mr. Cramer testified that he asked Mr. Mehling to find a location where a funeral home could be built with a retort or cremation facility. Mr. Mehling's evidence was that he was instructed to locate potential sites for a funeral home, to possibly include cremations.

[5] Mr. Mehling met with Mr. Ryan Strader, manager of the City's Inspections and Licencing Department, and Mr. Paul Meyette, principal planner with the Red Deer Regional Planning Commission. He testified that he advised Messrs. Strader and Meyette of his instructions from Mr. Cramer when they met to review possible sites in the City for the development. He said that most of their discussion dealt with the funeral home, which was his primary focus, and about 25 percent with the cremation facility, which he viewed as a possible additional use of the property. He confirmed that the term "crematorium" rather than "cremation facility" was used during his discussions with Mr. Strader and Mr. Meyette.

[6] Ultimately, they agreed that the site selected by the Plaintiffs would be re-zoned from a direct control district to a C-4 District (Commercial (Major Arterial) District), which would mean that a funeral home would be a permitted use. Mr. Mehling advised that he was told that a crematorium would require special permission from counsel. In his mind, the term "crematorium" referred to the cremation function which was to be associated with the funeral home. He said that he was under the impression at the time that the term meant the same to Mr. Strader and Mr. Meyette as well. Mr. Mehling understood from his discussion with Mr. Strader and Mr. Mayette that if Build-A-Vest wanted a cremation facility, it would have to apply to the City for it.

[7] Mr. Strader testified that it was his impression that Mr. Mehling's client was looking for a site for a crematorium. He said that he told Mr. Mehling that a crematorium was not allowed in the City. He admitted in cross-examination that when he use the word "crematorium" he used it

to mean a stand-alone cremation facility, as that term was defined in the Land Use Bylaw. He testified that he told Mr. Mehling that a crematorium was not allowed in a C-4 District but that a C-4 District did permit a funeral home.

[8] Mr. Meyette said that he understood that Mr. Mehling's client wanted a funeral home with a crematorium inside. He testified that Mr. Mehling was told that a funeral home could be built in a C-4 District but that a crematorium would require an amendment to the Land Use Bylaw. Mr. Meyette testified that he assumed the only reason he was called to the meeting was because of the crematorium issue, since both Mr. Strader and Mr. Mehling would or should have known that a funeral home *per se* was a permitted use in a C-4 District and would not require planning authority approval.

[9] Mr. Meyette's assumption was not necessarily warranted. The land in question was not zoned C-4, but rather was zoned for direct control and therefore an amendment to the Land Use Bylaw would have been required in order to designate it as a C-4 District. That inevitably would have required input from the planning authority, which Mr. Meyette represented. Therefore, there was good reason for Mr. Meyette to be included in the meeting.

[10] Mr. Mehling testified that he told Mr. Cramer that Build-A-Vest would have to apply to the City for permission to develop a cremation facility. Mr. Cramer testified that Mr. Mehling told him that building a crematorium would require City Council's approval. Mr. Cramer's evidence was that he understood that to mean that a stand-alone cremation facility would need Council approval, but that the funeral home with retort that Build-A-Vest was planning to develop would not. Mr. Cramer said he understood from Mr. Mehling that the property under consideration could readily be re-zoned to accommodate a funeral home, but that building a crematorium would require an amendment to the Land Use Bylaw. Mr. Cramer's recollection was that Mr. Mehling said "crematorium" and not "cremation facility."

[11] It would appear that Mr. Mehling, Mr. Strader and Mr. Meyette were not *ad item*. Nor were Mr. Mehling and Mr. Cramer. I have no doubt that Mr. Mehling used the term "crematorium" to mean cremation facility while Mr. Strader took it to mean a free-standing cremation facility. Nevertheless, Mr. Mehling understood that the retort would require Council approval. He advised Mr. Cramer that a "crematorium" required approval. Although Mr. Cramer intended to name the facility the "Parkland Funeral Home and Crematorium," despite the fact that it would not include a stand-alone crematorium, I accept that Mr. Cramer did not realize that Mr. Mehling meant that any cremation facility required City approval, including the retort which was planned as part of the funeral home. Mr. Cramer viewed the retort as simply an accessory use, which he understood would require approval by the Planning Commission but not City Council. In any event, Mr. Cramer pursued the Parkland Funeral Home development with that mind-set, although he left the actual application process to Build-A-Vest's agent, Bearden Engineering Ltd. ("Bearden")

[12] The land in question was re-zoned to C-4 before application was made for the development permit.

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[13] The development permit application submitted by Bearden on behalf of Build-A-Vest did not indicate that approval was sought for a discretionary or accessory use. Nor did it reveal the proposed name of the facility. It identified the proposed development as “new development construction - funeral home.” The architectural plans which accompanied the application referred to the development as “proposed Red Deer Funeral Home SCI Canada Ltd.” The cremation area on drawing A-2 was described as “Retort Room.” The retort itself was not labelled as such.

[14] The application was submitted to the City’s Inspections and Licencing Department, which is responsible for reviewing all development, building and gas connection permit applications.
The application was then forwarded to Ms. Joyce Boon, who was a plan reviewer of considerable experience at the time. She testified that she reviewed the plans for compliance with the Land Use Bylaw and forwarded duplicate sets of the plans to other City departments for comment. She indicated that she saw the application was for a funeral home and she checked the plans for parking, elevations and the like. She admitted that she missed the reference to “retort room” and did not realize the application was for a funeral home and cremator. In any event, she indicated that she did not know what a retort meant in that context. Her evidence was that she usually relied on the information in the application and the title on the plans as to the development and developer and did not look at the floor plans (A-2 drawings) for details as to use.

[15] Ms. Boon testified that experienced applicants often disclosed in their applications that a discretionary or accessory use was sought. I find that Ms. Boon relied on the fact that no discretionary or accessory use was mentioned in the Build-A-Vest application and assumed that neither was sought. At the time, the Red Deer Land Use Bylaw defined “accessory use” as a discretionary use which was incidental and subordinate to the principal use of the site. Discretionary uses were defined as uses permitted by the Municipal Planning Commission. Therefore, all accessory uses had to be approved by the Municipal Planning Commission.

[16] None of the other departments to which Ms. Boon forwarded the plans made any comment about the “retort room,” although they had comments on other aspects of the development application. After she received feedback from the other City departments, she referred the matter to the Municipal Planning Commission. She testified that she was the person responsible for preparing the Commission’s agenda and she would have prepared the information package relating to this application.

[17] As a funeral home was a permitted use or a use as of right in a C-4 District, there was no statutory reason to seek the approval of the Municipal Planning Commission for that use alone. However, the practice apparently had developed in Red Deer of referring all new commercial and industrial development applications to the Municipal Planning Commission for its approval. Ms. Boon and Mr. Strader were uncertain as to which of them actually presented the Build-A-Vest application to the Municipal Planning Commission, but it is clear that both were present and one of them made the presentation. Mr. Meyette also was present on behalf of the Planning

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Authority. As well, a representative of Bearden was at the meeting to answer any questions which Commission members might have of him in relation to the development application.

[18] The Commission could have accessed all of the architectural drawings for the development, which likely were in the room when it met, but only drawings A-1 (the site plan) and A-3 (the elevations) were posted in the room. In their review of the development application, the City and Commission focussed on the subdivision of the affected lots, sanitary services, the driveway connection and other related matters.

[19] The normal process for issuance of a development permit was followed in this case. The Municipal Planning Commission approved the application. The City then published the decision of the Commission in the "Red Deer Advocate" newspaper. As no objections were received within 14 days, a development permit automatically was issued to Build-A-Vest. There was no appeal taken from that decision.

[20] The Plaintiffs point out that the "Red Deer Advocate" also published a report on the Parkland Funeral Home development. The report described the applicant as the Parkland Funeral Home and Crematorium. The article indicated that the funeral home would include a crematorium and that it was scheduled to be built in January 1999. Apparently, no one from the City saw the article or, if anyone did, it did not register with them or cause them to take action to review the development permit which had been issued.

[21] In February 1999, Build-A-Vest applied for the necessary building permit. Again, the application was presented to the Inspections and Licencing Department of the City. As a result of changes that were made to the plans for the building, the permit was not fully processed until June 1999.

[22] Normally, an applicant for a building permit would submit architectural, structural, electrical and mechanical plans with the application. Those plans would be reviewed by the plan checker and duplicate sets of the plans would be forwarded to the relevant City departments for their review and comments. There is conflicting evidence as to whether the City actually received a set of mechanical and electrical drawings for the funeral home and retort facility. The Agreed Statement of Facts says the working drawings submitted to the City for the building permit are attached as Appendix H, but the plans in that appendix do not include mechanical or electrical plans. However, Mr. Bearden was adamant that a full set of drawings was submitted to the City. Whereas, Mr. Robert Fisher, the person responsible for checking plans to ensure compliance with the *Alberta Building Code*, testified that he received only the architectural and structural plans. He said that although the subject development was not exempt under the *Alberta Building Code* from the requirement that mechanical and electrical drawings be provided, he chose not to ask for these plans in the exercise of his personal discretion.

[23] I suspect that Mr. Bearden's evidence that a full set of plans was submitted with the building permit application is probably accurate. His evidence was that it is the practice in his office to run off a full set of plans and that they are attached to each other. Given that mechanical

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and electrical drawings ordinarily would have to be submitted, in my view it is likely that the normal practice was followed in this case. In any event, Mr. Fisher did admit that he had the engineering letters of the engineers certifying compliance with the provisions of the *Alberta Building Code*, or at least had access to them. He also admitted that he could have called any of the certifying engineers if he had any questions or concerns with respect to any of the plans.

[24] The A-2 drawing shows a "retort room." Within the room a rectangular object is shown, which is labelled "retort unit (power pack supplied by others)." Mr. Fisher testified that he reviewed the A-2 drawing and noted the words "retort room." He said that he also saw the references to a "retort room power pack" and "viewing area," and presumed that the rectangular object in the room referred to a power table for whatever processes occur in a funeral home. He did not seek anyone's advice as to whether his understanding of retort room was correct. Mr. Fisher admitted that at the time of his review he missed the "retort vent" shown in the A-3 elevations drawing and the reference to the "retort flew" on the S-3 structural drawing.

[25] The plans submitted by Build-A-Vest with its application for a building permit were reviewed by various City departments. It appears that none noticed or at least had any comment on the proposed "retort room" or the structural, mechanical or electrical features associated with the installation and operation of a retort.

[26] Mr. Fisher received comments from other City departments on the plans and passed along those comments as well as his own to Ms. Boon. He recommended that the building permit be issued. A building permit was issued for the Parkland Funeral Home on June 8, 1999, and construction of the facility began in accordance with the plans submitted with the development permit and building permit applications.

[27] The lands owned by Build-A-Vest were subdivided in compliance with the development permit condition requiring subdivision. The plan of subdivision created two lots. The lot on which the funeral home facility was being built was sold to Parkland Funeral Home and Crematorium Ltd. by way of transfer registered on July 14, 1999.

[28] On that same day, the mechanical contractor working on the project applied for a gas permit to hook up the gas line to the retort unit in the building. The receiving clerk, Ms. Shawna Tangerman, noted that the permit was for a cremator. She was under the impression that a cremator was not permitted in a C-4 District and therefore brought the matter to the attention of the gas inspector, who referred her to Mr. Fisher. She testified that Mr. Fisher told her that the development had not been approved for a cremator. He advised her not to issue a gas permit that would allow for hook up of the cremator but rather, on a temporary basis, to issue a permit for gas hook up that specifically excluded the cremator. Mr. Fisher confirmed this evidence.

[29] A temporary gas permit issued accordingly. Mr. Fisher testified that he discussed the matter of the cremator with Ms. Boon. He looked up the definition of "retort" in a construction dictionary and Ms. Boon examined a Webster's dictionary for the same purpose. As a result, they learned that a retort was associated with burning. Both he and Ms. Boon understood as a

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result of general lore in the office that cremation, to use their word, was not allowed in the City. They both testified that they knew this even at the time the development application was submitted.

[30] Construction of the funeral home continued, but the retort unit was not hooked up to gas. When Build-A-Vest applied for a permanent gas permit, excluding the retort, the City refused and issued a stop work order under the *Safety Codes Act* as it was concerned that the Plaintiffs were attempting to get the retort up and operating without the City's approval. This impasse was resolved days later and a permanent gas permit, which excluded the retort, was issued and a meter installed.

[31] The resolution was achieved by way of a "without prejudice" agreement which orphaned the retort from the gas supply until City Council approved an application to re-zone the site to allow for a funeral home with a retort or until the determination by a court that a retort was a permitted or discretionary use in a C-4 District. The idea was that if City Council could be persuaded to amend the Land Use Bylaw to specifically authorize use of a retort in a C-4 District, it would be a moot issue whether the City or the Plaintiffs were right in the position they took as to whether the development and building permits as issued covered the retort.

[32] The Plaintiffs pursued City Council approval. Mr. Strader and Mr. Lindout of the Parkland Community Planning Services recommended against the application, primarily because of their concern with respect to smoke, odour, noise and the proximity of the property to a residential area. City Council refused the application to re-zone the property. The retort, therefore, remains unattached and inoperable.

[33] In these circumstances, the Plaintiff Parkland Funeral Home and Crematorium Ltd., the successor in title to Build-A-Vest, seeks a declaration that funeral homes containing cremators were a permitted or discretionary use under Red Deer's Land Use Bylaw No. 3156/96. Alternatively, Parkland claims that issuance of the development and building permits constituted negligent misrepresentations on which it relied to its detriment and seeks damages as a result of that reliance.

III. Analysis

A. Whether the Funeral Home with Cremator was Approved in the Development Permit

1. Was a funeral home with a cremator a permitted use under Red Deer's Land Use Bylaw 3156/96?

[34] The parties agree that a "permitted use" is a use as of right which does not require approval by the Municipal Planning Commission, whereas a "discretionary use" does.

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[35] Land Use Bylaw 3156/96 defined "permitted use" as "the use of land or a building which in a land use district table appears under the heading 'Permitted Uses.'"

[36] The land use district table for the C-4 District included a "commercial service facility" as a permitted use. "Commercial service facility" was defined in the Bylaw as meaning "a facility in which services are provided commercially to individuals." Funeral homes were among the listed commercial service facilities. However, the term "funeral home" was not defined in the Bylaw.

[37] As indicated in ***Love v. Flagstaff (County) Subdivision and Development Appeal Board*** (2002), 317 A.R. 261, 2002 ABCA 292 at para. 19:

> In interpreting the Bylaw, the purposive and contextual approach repeatedly endorsed by the Supreme Court of Canada and set out in E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87 applies:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[As cited with approval in ***Re Rizzo & Rizzo Shoes*** [1998] 1 S.C.R. 27; ***Bell ExpressVu Limited Partnership v. Rex*** (2002) 212 D.L.R. (4th) 1 (S.C.C.).]

[38] This approach to statutory interpretation requires that the Court assess the legislation in light of its purpose. Interpretations that are consistent with or promote its legislative purpose should be preferred: R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 35.

[39] The term "crematorium" was defined in the Bylaw as "an establishment with one or more cremation chambers used only for the reduction of the human body to ashes by heat and where funeral services will not be permitted to be conducted." Aside from in the definitions section, the term did not appear elsewhere in the Bylaw. Clearly, a funeral home with a retort would not fall within that definition. The question, however, is whether such a facility would be considered a funeral home and, therefore, a permitted use for purposes of the Land Use Bylaw.

[40] Given that the term "crematorium" was defined as involving cremation alone, it is apparent that cremation was considered to be a distinct use of land under the Bylaw. None of the districts permitted a crematorium; that is, a cremation facility without accessory funeral services. It is unlikely, therefore, that cremation services provided as part of another facility would simply be considered to fall within that other use. A mixed use facility would require consideration as to which use of the land was the principal use. If cremation was the principal use, presumably the facility would not fall within the list of permitted uses for the District. If cremation was normally incidental and subordinate to the principal use of the site, it would be an accessory use for which approval would have to be sought.

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[41] In my view, the term “funeral home” as used in the Bylaw did not include use of the land for cremation. While I do not believe that the term is ambiguous, to the extent that it is, parole, contextual and expert evidence support my interpretation of the term as excluding a funeral service facility with built-in retort.

[42] In the course of his evidence, Mr. Strader admitted that where a term was used in the Land Use Bylaw which was not defined, such as the term “funeral home,” his practice was to use the expected or usual meaning of the term. He also testified that he might consult dictionaries, ask someone at Parkland Planning Services, check in the land use bylaws of other municipalities or possibly consult Mr. Laux’s book in an attempt to ascribe meaning to a word. He agreed that none of those things were done in this case.

[43] Mr. Strader testified that earlier incarnations of the Land Use Bylaw listed all or substantially all of the permitted and discretionary uses in each zone. However, the modern practice of being more general in the description of permitted and discretionary uses was adopted by Red Deer in Land Use Bylaw 3156/96.

[44] It is clear that in Mr. Strader’s mind at the time he reviewed Build-A-Vest’s development application, a funeral home did not include a cremator. His view was that the ordinary and usual meaning of the term “funeral home” was a facility that did not include cremation on site.

[45] Section 617 in Part 17 of the *Municipal Government Act*, R.S.A. 2000, c. M-26 provides that:

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

[46] Sections 640 to 646 set out the requirements for land use bylaws and authorize municipalities to regulate the use and development of land through issuance of development permits. Land use bylaw are intended to provide information to developers and others on land uses which are permitted in the various land use zones or districts.

[47] As noted by the Defendant’s expert, Mr. VanBelle, the Act and land use bylaws are meant to balance the rights of property owners to use their land as they see fit with the rights of

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the wider community to control its use for the greater public interest. The parties agree that a land use bylaw, restricting as it does the right of a land owner to use his land, must be interpreted strictly.

[48] Red Deer's Land Use Bylaw 3156/96 provided at para. 123 with respect to District C-4 that:

> The general purpose of this District is to facilitate the development of the primary location for trade and service related to automotive transportation and the automobile traveller, and other commercial land uses which are built at low densities, in planned centres, generally, to serve the City and the region, as a whole.

[49] In my view, consideration of the scheme and object of the Bylaw in relation to this District is not of particular assistance in determining whether the term "funeral home" was meant to include a funeral facility with built-in retort. However, consideration of how this Bylaw came about is of assistance.

[50] The evidence establishes that in 1987, Alberta Memorial Chapels applied to the City of Red Deer for amendment of its Land Use Bylaw to permit it to build a cremation facility in the City. The proposed location was within one of the City's C-4 Districts. A crematorium was neither a permitted nor a discretionary use in any zone in the City at the time. The City's Inspections and Licencing Department, managed by Mr. Strader, was responsible for receiving applications for development and building permits. The Department made a recommendation to Red Deer City Council to approve the application for a Land Use Bylaw amendment adding a crematorium as a discretionary use in the C-4 District to allow the proposed development to proceed. In the alternative, it was suggested that the specific parcel on which Alberta Memorial Chapels wished to build the facility could simply be re-zoned for a crematorium. The Red Deer Regional Planning Commission recommended approval of the application and inclusion of a crematorium as a discretionary use in C-4 Districts. The Commission noted that the existing Bylaw did not specifically address crematoria.

[51] At the ensuing City Council meeting, which was attended by Mr. Strader, Mr. H. Mohabir advised Council on behalf of Alberta Memorial Chapels that the application was restricted to a crematorium and did not encompass the operation of a funeral home. The application proceeded on the basis that the C-4 zoning would be changed to allow a crematorium as a discretionary use. Council resolved that:

> Council of The City of Red Deer having considered application from Kam Peyrow, Canada Trust Realtor, on behalf of Hilbert E. Mohabir, to amend the Land Use Bylaw to allow for the operation of a crematorium at 7891 - 50 Ave. hereby approve said application in principle subject to Council approval of a Land Use Bylaw Amendment.

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[52] The City Clerk advised Alberta Memorial Chapels of Council's resolution and that Council also had passed first reading of proposed Bylaw 2672/DD-87, the amendment which was designed to achieve the necessary change. The City Clerk's letter to Alberta Memorial Chapels indicated that a public hearing on the amendment would be held and that the applicant was to bring plans of the development to that meeting to allow Council to satisfy itself that the development was a crematorium and not a funeral home. A copy of this letter was sent to the Building Inspections Department.

[53] The public hearing was held on November 30, 1987. At the hearing, Mr. Joe Cramer presented a petition signed by numerous residents who were opposed to the amendment because they did not want a crematorium in the proposed location. Mr. Cramer was then and remains the operating mind and will of Build-A-Vest. He testified before me that he canvassed for signatures to the petition at the time because he was concerned that his business, located near the proposed crematorium, would be impacted by the traffic generated by use of the site as a crematorium. What motivated approximately 120 other persons to sign the petition is unknown. However, among the signatories, there were persons who owned or worked at some of the established funeral homes in Red Deer.

[54] It is common ground that there were no cremation facilities within the city limits at the time Alberta Memorial Chapels applied for the Bylaw amendment. It is also common ground that the year before, the City of Red Deer had obtained approval from the County of Red Deer to turn a building known as Alto-Rest, located in the County, into a crematorium. This was done at the urging of funeral home operators in Red Deer and area and was undertaken on the basis that the resulting facility would be leased by the City to the funeral home operators who had urged the renovation. It is reasonable to infer that at least some of the funeral home operators involved in the Alto-Rest project signed Mr. Cramer's petition because they did not want the competition from Alberta Memorial Chapels. Indeed Ms. Margaret Schroeder, then employed at Eventide Funeral Chapels Ltd. as a funeral director, testified before me that that is what she thought when she signed the petition. Mr. Schroeder subsequently became a director of Parkland.

[55] The Council minutes from the November 30, 1987 meeting at which Ms. Surhan, Mr. Strader, Mr. Cramer and Ms. Schroeder were present indicate that the proposed Bylaw amendment was given second reading, but the motion for third reading was tabled by the following resolution:

> RESOLVED that consideration of Third Reading of Bylaw 2672/DD-87 be tabled for two weeks to allow the administration to provide for Council's consideration the necessary amendments to Bylaw 2672/DD-87 that will incorporate definitions for crematorium and funeral home and a site specific rezoning.

[56] As a result of that resolution, a new amendment was presented to City Council and the City's Clerk recommended that Council defeat third reading of the originally proposed amendment and give first reading to the new draft. The new draft added definitions of the terms "crematorium" and "funeral services." It designated the specific site as a site where a

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crematorium was a discretionary use as opposed to making it a discretionary use in all C-4 Districts. The new draft also required Alberta Memorial Chapels to enter into a restrictive covenant which prohibited it from conducting funeral services at the proposed crematorium. Presumably, that is why the terms “crematorium” and “funeral services” had to be defined in the new amendment.

[57] At the ensuing Council meeting, Council abandoned the originally proposed amendment, Bylaw 2672/DD-87, and gave first reading to the newly proposed amendment, Bylaw 2672/EE-87.

[58] The definitions appearing in Bylaw 2672/EE-87 were as follows:

> **“Crematorium”** means an establishment with one or more cremation chambers used only for the reduction of the human body to ashes by heat, and where funeral services will not be permitted to be conducted.
>
> **“funeral services** means the holding of religious or memorial services or meetings for the dead by a group of 10 or more persons.

[59] Bylaw 2672/ EE-87 subsequently received second and third reading, and became law.

[60] Alberta Memorial Chapels never actually proceeded with development of the crematorium. As a result, there was still no cremation facility in the City of Red Deer in 1998 when Build-A-Vest and Mr. Cramer pursued the Parkland Funeral Home and Crematorium development.

[61] In my view, the appropriate inference from this historical excursion is that the City did not object to a cremation facility within its environs, but that at the time it did not want it to be part of a business which also provided funeral services due to the traffic concerns expressed by the petitioners. In any event, Alberta Memorial Chapels had stated it would only engage in cremations and did not plan to run a funeral home business. It is clear that the City regarded cremation and funeral services as two separate land uses.

[62] The City’s Land Use Bylaw underwent further change. Bylaw 2672/D-93 rescinded the previous content of the Land Use Bylaw in relation to its C-4 Districts and substituted the current language, although it also retained the definition of “funeral services.”

[63] In 1996, the City’s Land Use Bylaw again was amended. The only change germane to this case was the deletion of the definition of “funeral services.” Presumably, the definition of “crematorium” had to remain in the Land Use Bylaw because it had been amended to zone a particular parcel of land for that use.

[64] The Plaintiffs called Mr. F. Laux as an expert on the function of land use bylaws, the application process for development permits and building permits, and the significance of

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permitted, accessory and similar use designations in land use bylaws. Mr. Laux's expertise is well known and was admitted by the Defendants.

[65] The Plaintiff also tendered Mr. Laux's expert report and the report of Mr. W. Candler, who is an expert on (a) the duties, powers and standard of care of a development officer; (b) the processing of development permit applications; (c) the examination and interpretation of plans forming part of a development permit application; and (d) the meaning and application of permitted, discretionary and accessory uses.

[66] The Defendants countered with the reports of Mr. P. VanBelle and Mr. D. Monsen. Mr. Vanbelle is an expert on the function of land use bylaws, land use bylaw components, the application process for development permits and building permits, and the substance of permitted use and accessory or similar use designations. Mr. Monsen is an expert on the application of the *Safety Codes Act*; the duties, powers and standard of care of a Safety Codes Officer; and the examination and interpretation of architectural plans.

[67] Mr. Laux's research revealed that there are 35 cremation facilities in the province and that 25 of those are found in funeral homes as distinct from stand alone crematoria. Two others are located on funeral home sites, but in separate buildings. After reviewing the land use bylaws of the jurisdictions containing combined funeral service and cremation facilities, it was his opinion that such facilities are treated in the planning and funeral industries as falling under the term "funeral home" or as an accessory use to a "funeral home."

[68] The online dictionary *Wikipedia* (http://en.wikipedia.org/wiki/Funeral_home), in an article on funeral homes, states that:

> Due to the increasing popularity of cremation, more and more funeral homes have crematoria to cremate bodies. Funeral homes without facilities on-site will often contract the work out to other facilities.

[69] While it may be more and more common for funeral homes to include cremators, the survey undertaken by Mr. Laux does not establish that that phenomena is so predominate that cremators can be considered a necessary incident of funeral homes.

[70] The Society for the Prevention of Cruelty to Animals in the City of Red Deer apparently has operated a cremator in its City premises for some time. That fact was known to Mr. Strader when Build-A-Vest applied for its development permit. He indicated that he is not aware of any permit having been sought or obtained by the SPCA for such use. In any event, no steps have been taken by the City to enjoin that activity.

[71] The Plaintiffs argue that the SPCA situation can be used as an aid in interpreting the term "funeral home" in Land Use Bylaw 3156/96. They contend that since there is a cremator in the SPCA premises, it must be assumed that it was considered an ordinary incident of the SPCA use of the land or was implicitly approved as a discretionary or accessory use when the development

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and building permit was issued. I do not agree that these assumptions can be made. It is patent from the evidence I heard that the planning authority may not have known about or given consideration to the SPCA cremator. The fact that no steps have been taken to stop its use does not speak to whether the development permit for that facility was properly issued. The cliche, two wrongs do not make a right, provides a full answer to this argument by the Plaintiffs.

[72] In the end result, it seems to me that Red Deer's Land Use Bylaw 3156/96 did not allow a funeral home with a cremator as a permitted use in C-4 Districts. Indeed, it was Mr. Cramer's evidence that he understood that a retort was, to use his words, "an accessory to the building." At trial, he adopted the following answer from his examination for discovery evidence:

> The gist of the conversation [referring to the conversation between he and Mr. Mehling after Mr. Mehling's meeting with Mr. Strader and Mr. Meyette] was that we would proceed with the funeral home and have to apply for retort as an accessory to the funeral home in our development permit application . . .

2. Does Land Use Bylaw 3156/96 allow cremation as an accessory use to the permitted use "funeral home"?

[73] Mr. VanBelle expressed the opinion that the City, by defining the term "crematorium" but not including it as a permitted use in the C-4 District, intended to preclude association of this service with funeral homes in that zone. He indicated that once a use has been defined in a land use bylaw, it must be listed as a permitted or discretionary use rather than as an accessory use.

[74] I do not agree that it necessarily follows that because a use was defined, it could not be an accessory use. Given that this was legislation which restricted the right of landowners to deal with their property as they saw fit, the Bylaw must be strictly construed. It did not state that an accessory use could not include a defined use and I am not prepared to read that prohibition into the Bylaw.

[75] The term "accessory use" was defined in the Bylaw as "a discretionary use of a building or site which the Commission decides is normally incidental and subordinate to the principal use of the building or site." I believe that normal, in this context, means regularly occurring. A "discretionary use" was defined as "a use of land, building or other structure that may be permitted by the Commission after due consideration is given of the impact of that use upon neighbouring land and other lands in the City, and includes accessory and similar uses approved by the Commission."

[76] The evidence before me was that the main purpose of the Build-A-Vest development was for use as a funeral home. I have found that cremation by itself was considered a separate land use under the Bylaw. The research undertaken by Mr. Laux satisfies me that there is a sufficient percentage of funeral homes in this province with cremation facilities to properly characterize those two uses as regularly occurring together. The evidence before me establishes that in those

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developments where funeral services are combined with cremation facilities, the latter are usually subordinate to the former.

[77] I conclude that cremation as part of a funeral home was an accessory and therefore a discretionary use in the C-4 District.

[78] Accordingly, to obtain approval to use the retort in this case, Build-A-Vest did not need to seek an amendment to the Land Use Bylaw, but rather required the approval of the Municipal Planning Commission, which was the appropriate approving authority at the time the application for a development permit was submitted.

3. Did the Plaintiff obtain the Commission's approval for the discretionary use?

[79] It is clear that the development permit did issue for the project as proposed by Build-A-Vest. That permit was regularly issued in all respects even though it is patent that neither the City nor the Municipal Planning Commission addressed their minds to the accessory use which was disclosed on the plans submitted in support of the application. In my view, the plans did sufficiently disclose the proposed accessory use, although the application form itself merely indicated that the proposed development was a funeral home. The application form did not require that the applicant specify on the form whether an accessory use was involved in the development.

[80] Mr. Laux stated that in his experience development permit applications often are perfunctory in terms of describing the intended use of the site, with the specifics of the intended use being disclosed in the accompanying plans.

[81] I am satisfied that neither Build-A-Vest nor its agent attempted to hide the fact that the facility was to contain a retort. The City points out that Mr. Cramer knew that a crematorium development would require an amendment to the Land Use Bylaw, as a result of his earlier opposition to the Alberta Memorial Chapels application in 1987. Therefore, it maintains that an inference should be drawn that Build-A-Vest or its agent intentionally failed to indicate in the development application that a cremator was proposed as an accessory use and intentionally labelled the devise as a retort on the plans rather than use the more familiar term "cremator."

[82] I do not agree. Mr. Cramer testified that he is uncertain what he knew or thought in 1987. I accept that evidence. As well, he testified that he did not consider the 1987 events in 1998. Again, I accept that evidence.

[83] Build-A-Vest and Mr. Cramer had developed a number of funeral homes in Alberta and other Canadian provinces. Through Build-A-Vest and a closely held corporation, Mr. Cramer had built or renovated approximately 22 funeral homes and crematoria to the end of 1999.

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[84] Three of the 15 funeral homes built or renovated included a cremator or retort. All of those were built before submission of the development permit application by Build-A-Vest in this case. Bearden was involved in all three as the engineering firm responsible for preparing the plans necessary to obtain the development and building permit approvals. As well, at some time prior to October 6, 1998, Build-A-Vest was asked to develop a funeral home in Calgary. The plans for that development described the facility as "Glen Morgan Funeral Home." Bearden also worked on that project. A retort was planned for the development.

[85] The A-2 (architectural drawing) for the Hainstock project, built in 1999, labelled the room in which the retort was housed "crematory" and the device itself "retort." The developer was described on the plans as "Hainstock Funeral Home." The development permit application for the project, submitted in 1993 under the City of Edmonton's Land Use Bylaw, stated that the application was: "To construct a cremation and interment service building and funeral services building."

[86] The A-2 drawings for the Calgary project described the room housing the retort as the "retort room." The device itself was unlabelled. The developer was described as "Glen Morgan Funeral Home."

[87] On the Dogwood project, built around 1998, the A-2 drawing described the area housing the retorts as a "crematory" and labelled the two retort units within as "retort." The developer was described as S.C.I. Canada Limited First Memorial Dogwood Columbarium."

[88] The Mountainview Crematorium, a stand alone cremation facility located on the same site as a funeral home, was renovated in 1999, but the plans were created in approximately 1997. The plan tendered in evidence described the cremation area as "retort area" and the devices as "retort" and "future retort."

[89] Mr. Cramer testified that the renovation to Alto-Rest for the City of Red Deer also was carried out by Build-A-Vest. When shown a rough drawing of the renovation, which apparently had been in the City's files, Mr. Cramer identified the letters "R.R." on the drawing as meaning "Retort Room."

[90] Clearly, Mr. Cramer had reason to believe that the term "retort" was used in the industry to mean a cremation unit and that the term "funeral home" could be used in reference to facilities where funeral services were held and bodies prepared for burial or cremation, whether including a retort or not. Mr. Cramer testified that he was under the impression that a cremator or retort was an accessory use to the funeral home and would require approval by the Municipal Planning Commission. Build-A-Vest relied on Bearden's expertise in these matters. It is patent that Bearden did not attempt by subterfuge, feint or misdirection to mislead the development authority. In fact, the evidence makes it plain that Bearden believed the cremator was an ordinary part of a funeral home. It submitted a development permit application which stated: "We hereby make application for a Development Permit under the provisions of the Land Use Bylaw in accordance with the plans and supporting information submitted herewith and which

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form part of this application." The main floor plan which was submitted showed the "Retort Room."

[91] Mr. VanBelle opined that if Build-A-Vest did not specify in the permit application that it proposed to include a cremator in the funeral service facility, the City was entitled to assume that approval for that use was not being sought. In my view, however, in the absence of evidence of misrepresentation by the developer or subterfuge, it was the City which bore the responsibility of ensuring that the proposed development was in compliance with the Land Use Bylaw. Indeed, in his expert report (at p. 8), Mr. VanBelle conceded that:

> ... The purpose and role of the Development Authority is to ensure that the Land Use Bylaw provisions are applied to "achieve the orderly, economical and beneficial development of land and patterns of human settlement."
>
> The Development Authority must first establish that the use proposed for the land is permitted in the Land Use Bylaw District."

[92] The evidence does not establish an intention to conceal or mislead either on Mr. Cramer's part or on the part of Build-A-Vest's agent, Bearden. Therefore, the obligation remained on the issuing authority. It was the Development Officer's responsibility to identify improper uses or accessory uses which the Municipal Planning Commission had a discretion to allow. It was the Commission which had an obligation to consider whether the discretionary use would unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment or value of neighbouring sites. The Commission also was charged with confirming that the proposed development conformed with the use prescribed for the site in the Bylaw. The applicant and its successor in title were entitled to assume that these authorities performed their responsibility.

[93] I conclude that the development permit issued for this development was valid. It authorized the development proposed by Build-A-Vest as detailed in the plans, which included a retort unit. Although the Bylaw authorized the Development Officer to revoke a development permit if the permit was issued in error, the permit in the present case was not revoked.

[94] The *Alberta Building Code* is a Regulation under the *Safety Codes Act*. The City does not dispute that the funeral home was built in accordance with the building permit and in compliance with the *Alberta Building Code*. The only reason that a gas permit was not issued to cover the retort was that City personnel did not believe that a cremator was allowed in a C-4 district or, for that matter, within the City at all. In my view, having issued valid development and building permits, the City was bound to allow the gas hook-up for the retort if there was otherwise compliance with the *Safety Codes Act*.

[95] The City contends that the *Safety Codes Act* provides an appeal mechanism for actions taken by the City which an applicant finds objectionable. It takes the position that the Plaintiffs

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should have appealed the refusal of the gas permit and, if unsuccessful at that level, sought review by the Court of Queen's Bench as provided for in the Act.

[96] Build-A-Vest attempted to deal with the City's refusal to issue a gas permit by obtaining a "without prejudice" agreement from the City to issue a gas permit which orphaned the retort from the gas supply until City Council approved an application to re-zone the site to allow for a funeral home with a retort or until determination by a court that a retort was a permitted or discretionary use in a C-4 District. The parties in this case have embarked on an agreed process and the City is estopped from reneging on its agreement with the Plaintiffs and insisting that the Plaintiffs should have appealed this gas permit refusal.

[97] The Plaintiffs ask for "an order in the nature of Judicial Review directing the City of Red Deer to permit the Plaintiffs to connect their retort unit to a source of natural gas and to operate the retort unit as an integral part of the funeral home." The difficulty is that they did not seek judicial review of the decision refusing a permit that would allow hook up of the retort. Instead, they chose to rely on their agreement with the City. Implicit in that agreement was the City's acknowledgement that if a funeral home with retort was determined by the Court to be a permitted or discretionary use in the District, it would proceed to determine whether the requirements for a permit allowing gas hookup to the retort have been met and, if so, it would issue the permit. There is no reason to believe that the City will not do so.

[98] Accordingly, I declare that the operation of a cremator within this funeral home was a discretionary use which was approved in the development permit. The development and building permits were validly issued.

4. Damages

[99] The parties agreed that, in the event I concluded the Plaintiff had a valid permit for the proposed use and therefore was entitled to be provided with gas in order to run its cremator, the Plaintiff has suffered a loss of profit of $278,695.00 to date of trial. It was agreed that that sum includes an amount for pre-judgment interest. As well, in argument, I was asked to leave it to the parties to determine what loss the Plaintiff will have suffered post-trial until such time as it is provided with the gas permit which will allow it to operate the retort. I accede to that request with the caveat that the parties are free to approach me to resolve the matter in the event they are unable to reach agreement.

[100] One week before trial, the City successfully applied to amend its Statement of Defence for a third time to include those provisions of the *Safety Codes Act* which ostensibly protect it against liability. Section 12(1) provides:

> 12(1) No action lies against the Crown, the Council, members of the Council, safety codes officers, accredited municipalities or their employees or officers, accredited regional services commissions or their employees or officers, accredited agencies or their employees or officers or Administrators for anything

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done or not done by any of them in good faith while exercising their powers and performing their duties under this Act.

[101] In my view, this provision has no application in these circumstances. In building the funeral home with retort, the Plaintiff relied on the City's representation in the development permit that the use applied for was approved. The actions of the City in refusing to issue a permit allowing gas hook up to the retort and in issuing the stop work order, while purportedly made under the *Safety Codes Act*, were not grounded in that legislation but rather were premised on the City's erroneous conclusion that the land could not be used for the purpose which had been approved. The development permit was never revoked. The City wrongly impeded the ability of the Plaintiff Parkland, Build-A-Vest's successor in title, to use the land in the manner applied for and approved. The Plaintiff suffered a loss of profits as a result and is entitled to the agreed amount of damages (***Toronto (City) v. Elias Rogers Co.*** (1914), 31 O.L.R. 167 at para. 31 (Ont. S.C.A.D.).

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B. Whether the City was Negligent in Issuing the Development Permit?

[102] In the event that I am found to be wrong in my conclusion that a cremator is an accessory use to the funeral home and that Build-A-Vest was entitled to build the funeral home and retort, I must consider whether the City was negligent in issuing the development permit.

1. Duty of Care/Standard of Care

[103] It is patent that the City owed a duty to development permit applicants to take care in the assessment of development applications.

[104] The applicable standard of care was a matter of considerable evidence. As I have said, the City, as gatekeeper, was responsible for ensuring that proposed developments for which it issued development permits conformed to the Land Use Bylaw. The City, therefore, was obliged to employ such scrutiny as to ensure that any developments which it approved were in compliance with the Bylaw.

[105] The City argues that it was entitled to rely on what was stated in the application and the sophistication of the applicant in assessing whether to issue a permit. I disagree, particularly as there was evidence that some development permit application forms were filled out by City personnel for the applicants. To absolve the City of responsibility for ensuring compliance with the Bylaw and to foist that burden onto the applicant could result in invalidly issued permits which, running with the land, would have serious consequences for the applicant and *bona fide* purchasers of the lands without notice of the error. In my view, the City was responsible for reviewing each development permit application thoroughly, including the submitted architectural drawings, to determine whether a permit could or should issue.

2. Breach

[106] The Development Officer, members of the Municipal Planning Commission and other City personnel reviewed the development application and plans in this case but did not notice the reference to a “Retort Room” on the main floor plan or did not question what that term meant. I have found that there was no deception on the part of the applicant or its agent. In my view, the City breached the standard of care in this case.

3. Causation and Damage

[107] The City was negligent in issuing the development permit. I find that Build-A-Vest built the funeral home and retort in the City on the lands in question because it obtained the development permit. Accordingly, the Plaintiffs are entitled to damages.

[108] Mr. Cramer’s evidence was that had he known a funeral home with retort was not allowed in the City of Red Deer, Build-A-Vest would have built in the County of Red Deer, where such a facility was allowed. He was motivated by a request from SCI Canada Ltd., which wanted both a funeral home and a cremator. Therefore, if one could not have been built in Red Deer, I accept that Mr. Cramer would have located the facility in the County.

[109] Having accepted that but for the City’s misrepresentation, the facility would have been built in the County, the Plaintiffs’ loss is, firstly, the total cost to obtain the property and approvals and the cost to design and construct the facility in the Court, less the net market value of the existing facility in the City of Red Deer, and, secondly, the profit lost from the operation of the replacement facility.

[110] In this case, I simply do not have evidence which would allow me to fix the former loss. However, it seems to me that the parties’ agreement respecting lost profit applies equally to this scenario. As a result, I would award Parkland, as successor to Build-A-Vest, the sum of $278,695.00 to date of trial, inclusive of prejudgment interest.

IV. Conclusion

[111] The City of Red Deer issued a valid development permit to the Plaintiffs which allowed for development of a funeral home with retort. The gas permit to allow the retort to be hooked up to gas was withheld for reasons which did not relate to the *Safety Codes Act.* As a result of the City’s failure to allow the land in question to be used in the manner applied for and approved in the development permit, Parkland has suffered a loss of profits.

[112] Parkland is entitled to damages for its loss of profits in the sum of $278,695.00 plus costs. It is also entitled to the loss of profits post trial in such amount as the parties may agree or this Court determines on application.

[113] The parties may apply for a determination as to costs.

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Heard on the 28th day of September, 2006.
Dated at the City of Edmonton, Alberta this 5th day of December, 2006.

T.D. Clackson
J.C.Q.B.A.

Appearances:

K.D. Wakefield, Q.C.
Fraser Milner Casgrain
for the Plaintiffs

Jamie McGinnis and Colin Neal
Parlee McLaws LLP
for the Defendants

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Corrigendum of the Reasons for Judgment
of
The Honourable Mr. Justice T.D. Clackson

Please note under appearances that “Colin Neal” has been added as co-counsel for the Defendants.

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The Town of Beresford (plaintiff) v.
Brunswick Rent A Car Ltd. (defendant)
(B/C/589/92)

Indexed As: Beresford (Ville) v. Brunswick Rent A Car Ltd.

New Brunswick Court of Queen's Bench
Trial Division
Judicial District of Bathurst
McIntyre, J.
April 24, 1996.

La Ville de Beresford (demanderesse)
c. Brunswick Rent A Car Ltd.
(défenderesse)
(B/C/589/92)

Répertorié: Beresford (Ville) c. Brunswick Rent A Car Ltd.

Cour du Banc de la Reine
du Nouveau-Brunswick
Division de première instance
Circonscription judiciaire de Bathurst
Le juge McIntyre
Le 24 avril 1996

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Counsel:

Luc Desjardins, for the plaintiff;
Terrence P. Lenihan, for the defendant.

This application was heard on April 17 and 18, 1996, before McIntyre, J., of the New Brunswick Court of Queen's Bench, Trial Division, Judicial District of Bathurst.

The following decision was delivered by McIntyre, J., on April 24, 1996.

Avocats:

Luc Desjardins, pour la demanderesse;
Terrence P. Lenihan, pour la défenderesse.

Cette demande fut entendue les 17 et 18 avril 1996, par le juge McIntyre, de la Cour du Banc de la Reine du Nouveau-Brunswick, Division de première instance, circonscription judiciaire de Bathurst.

Le juge McIntyre rendit la décision qui suit le 24 avril 1996.

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[1] McIntyre, J. [Translation]: The plaintiff alleges that the defendant is operating an automobile graveyard (scrap yard) within the limits of the Town of Beresford, in violation of the Town's Zoning Bylaw. The plaintiff therefore seeks the following relief:

[1] Le juge McIntyre: La demanderesse allègue dans la présente cause que la défenderesse opère, à l'intérieur des limites de la ville de Beresford, un cimetière d'autos (scrap yard) contrairement à l'arrêté de zonage de la ville. La demanderesse demande donc le redressement suivant:

"(a) That the defendant be ordered:

(i) to cease to operate an automobile graveyard on its property at 1193, Principale Street, in the Town of Beresford, New Brunswick;

(ii) to clear the property of any vehicle bodies or other similar objects and to restore the land to its condition immediately prior to the commencement of this activity.

"(b) In case the defendant should not comply, that the plaintiff be authorized to take the necessary steps to enforce the order sought, at the plaintiff's expense.

"(c) Costs of this action.

"(d) Any other relief which the court may deem just and equitable."

[2] The plaintiff is a body corporate duly incorporated under the **Municipalities Act**, R.S.N.B. 1973, c. M-22 and amendments thereto. In 1982, the plaintiff adopted a development plan and a zoning bylaw establishing the uses permitted within the municipality. Although the development plan and the zoning bylaw were later amended in 1986 in order to rezone the subject area to "highway commercial", the fact remains that the operation of an automobile graveyard is not permitted. The defendant acknowledges these facts, the Town's development plan and the amended zoning bylaw, but contends that it has acquired the right to a nonconforming use because it operated this business at the same place long before the **Act** came into force.

"a) Que la défenderesse:

i) cesse d'opérer un cimetière d'autos sur sa propriété sise au 1193, rue Principale, dans la Ville de Beresford, au Nouveau-Brunswick; et

ii) nettoye le terrain de toute carcasse de véhicule ou autre objet similaire et effectue tous les travaux requis pour rétablir le terrain dans l'état où il se trouvait juste avant que soit entreprise cette activité.

b) Dans le cas où la défenderesse n'obtempérerait pas, que la demanderesse soit autorisée de mettre en oeuvre les mesures nécessaires au respect de l'ordonnance susdemandée, aux frais de la demanderesse.

c) Les frais et dépens de la présente action.

d) Tout autre recours que la cour pourra considérer juste et équitable."

[2] La demanderesse est une corporation municipale dûment constituée en vertu de la **Loi sur les municipalités**, L.R.N.-B. 1973, c. M-22 et ses modifications. En 1982, la demanderesse a adopté un plan d'aménagement et un arrêté de zonage établissant les usages permis à l'intérieur de la municipalité. Quoiqu'il y eut modification du plan d'aménagement et de l'arrêté de zonage en 1986 pour rendre la zone qui nous préoccupe en l'espèce une zone d'aménagement dite de "commerce routier", en reste-t-il que l'opération d'un cimetière d'autos n'est pas permise. La défenderesse reconnaît ces faits et reconnaît le plan d'aménagement de la ville ainsi que l'arrêté de zonage modifié mais elle prétend avoir acquis un droit d'usage non conforme à l'arrêté de zonage en vertu du fait qu'elle opérait ce genre de commerce au même endroit longtemps avant l'entrée en vigueur de la **Loi**.

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[3] The defendant has been in the business of selling and renting motor vehicles since 1963. In the early seventies, it started business at Peters River, a small community near the village of Beresford at the time and which is now part of the town of Beresford. As Robert Verret, president of the defendant company explained in his testimony, the business expanded over the years. For the purpose of reducing the cost of repairing its vehicles, the defendant decided, in 1975, to keep those which were too old to rent and those involved in accidents and which were not repairable in order to use their reusable parts to repair other vehicles in its fleet. Thus, according to Mr. Verret, there are always between 30 to 40 scrapped vehicles behind its property for the purpose of obtaining spare parts. When the vehicle has been stripped of all reusable parts, it is sent to the scrap yard. Martin Morrison, a scrap dealer, testified that he has been buying car bodies from the defendant for about 20 years. Furthermore, Mr. Verret testified that the defendant was selling used car parts to the public. "I never left anybody in a jam", he said. Mr. Maurice LeBlanc, a car dealer, testified that he has been buying used car parts from the defendant for more than 25 years. Mr. Rodrigue Roy, who operated a body shop in the defendant's building from 1980 to 1989, corroborated Mr. Verret's testimony relating to the use and sale of spare parts taken from scrapped cars. Mr. Morrison testified having bought used car parts from the defendant since 1979.

[3] La défenderesse opère un commerce de vente et de location de véhicules à moteur depuis 1963. Au début des années 1970, elle s'installe à Peters River, une petite localité avoisinante du village de Beresford à l'époque et qui maintenant fait partie de la ville de Beresford. Tel que l'expliquera dans son témoignage le président de la défenderesse, Robert Verret, le commerce a grossi au cours des années. À partir de 1975, afin de réduire les coûts de réparation de ses voitures, la défenderesse décide de conserver les voitures trop vieilles pour location ainsi que les voitures accidentées et non réparables et d'utiliser les pièces pour effectuer la réparation de d'autres véhicules dans son parc d'automobiles. C'est ainsi, comme l'explique M. Verret, qu'il y aura toujours de 30 à 40 véhicules pour des pièces mis au rancart à l'arrière du commerce. Lorsque la voiture a été dépouillée de toutes pièces utilisables, elle est envoyée à la ferraille. Le témoin Martin Morrison, un ferrailleur, nous dira qu'il achète des carcasses de voitures de la défenderesse depuis une vingtaine d'années. M. Verret témoignera, de plus, que la défenderesse vendait des pièces d'autos usagées au public. "Je n'ai jamais laissé quelqu'un mal pris" de dire M. Verret. C'est ainsi que M. Maurice LeBlanc, un concessionnaire de voitures, témoignera avoir acheté des pièces de voitures usagées de la défenderesse depuis au-delà de 25 ans. M. Rodrigue Roy, qui a opéré un atelier de carrosserie dans l'édifice de la défenderesse de 1980 à 1989, viendra corroborer le témoignage de M. Verret relativement à l'utilisation et la vente de pièces provenant de voitures mises au rancart. M. Morrison témoignera avoir acheté des pièces de voitures usagées de la défenderesse depuis 1979.

[4] In the course of his oral pleadings, Mr. Desjardins, the plaintiff's counsel, seemed to acknowledge that the storage of a certain number of old or wrecked vehicles on the defendant's premises for the purpose of salvaging reusable parts is an accessory use

[4] Au cours de sa plaidoirie orale, Me Desjardins, procureur de la demanderesse, a semblé reconnaître que l'entreposage d'un certain nombre de vieilles voitures ou de voitures endommagées sur le lotissement de la défenderesse dans le but de récupérer les

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to the business of selling and renting of vehicles. Furthermore, since 1975, the defendant has adopted a policy of keeping a certain number of vehicles on its property for the purpose of salvage. Thus, in my view, the defendant would have acquired the right to a nonconforming use under the zoning bylaw even if it were not an accessory use.

[5] However, the plaintiff contends that in 1990, the defendant wanted to expand its business by opening an automobile graveyard. The Town of Beresford's zoning bylaw does not permit this kind of activity.

[6] In support of its submission, the plaintiff called the Town's former Planning Director. He stated that in July, 1990, he had observed some work being carried out on the defendant's premises which showed that the defendant was getting ready to operate an automobile graveyard. On July 16, 1990, Marc Bouffard, the Director, delivered a letter to Mr. Verret advising him that the development in question was being carried out without permission and that it did not conform to the zoning bylaw. The letter ended as follows:

"For this reason, this letter constitutes an order under s. 93 of the **Community Planning Act** directing you:

1 - to immediately cease that type of commercial operation;

2 - to immediately put a stop to any new arrival of wrecked vehicles or spare parts;

3 - that within 14 days of the service of this order, you must have removed all wrecked vehicles and spare parts from this property and transferred them to a place that is authorized by law.

pièces utilisables est un usage accessoire au commerce de vente et de location de voitures. Qui plus est, la défenderesse, depuis 1975, a adopté la politique de conserver un certain nombre de tels véhicules pour les pièces. La demanderesse aurait donc, à mon avis, acquis un droit d'usage non conforme à l'arrêté de zonage même s'il ne s'agissait pas d'usage accessoire.

[5] La demanderesse soutient, toutefois, qu'en 1990 la défenderesse a voulu développer son commerce en faisant l'aménagement d'un cimetière de voitures. L'arrêté de zonage pour la ville de Beresford ne permet pas ce genre de commerce.

[6] Au soutien de ses prétentions, la demanderesse fera témoigner l'ancien directeur des services d'urbanisme de la ville qui nous dira avoir observé certains travaux sur le terrain de la défenderesse, au mois de juillet 1990, qui démontraient que la défenderesse s'apprêtait à aménager un cimetière de voitures. Le 16 juillet 1990, le directeur, Marc Bouffard, livrera une lettre à M. Verret l'avisant que l'aménagement en question se faisait sans permis et qu'il était non conforme à l'arrêté de zonage. La lettre concluait en ces termes:

"Pour cette raison, la présente lettre constitue un arrêté pris en vertu de l'art. 93 de la **Loi sur l'urbanisme** et vous ordonne:

1 - de cesser immédiatement ce type d'activité commerciale;

2 - de cesser immédiatement tout nouvel arrivage de voitures accidentées ou de pièces d'auto;

3 - dans un délai de 14 jours à partir de la notification de cet arrêté, vous devrez avoir enlevé toutes les voitures accidentées et les pièces d'auto de sur cette propriété et les déménager à un endroit permis par la loi.

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"If, within the prescribed time, the above-mentioned violation has not been rectified in accordance with the provisions of the municipal zoning bylaw, the Town of Beresford will immediately undertake appropriate proceedings to ensure the enforcement of its bylaws.

"You will find enclosed an excerpt from the **Community Planning Act** and I would suggest that you review it carefully.

"Should you require more information, please do not hesitate to contact me."

"Si dépassé ces délais, la contravention mentionnée ci-haut n'est pas corrigée en conformité avec les dispositions de l'arrêté de zonage municipal, la Ville de Beresford va entreprendre aussitôt les procédures judiciaires qui s'imposent pour assurer le respect de ses arrêtés.

"J'inclus sous pli un extrait de la **Loi sur l'urbanisme** et je vous invite à en prendre connaissance.

"Si vous avez besoin de plus d'information, n'hésitez pas à me contacter."

[7] On July 30, 1990, the defendant submitted a re-zoning application to the Planning Commission; it was rejected on August 1, 1990.

[7] Le 30 juillet 1990, la défenderesse fera une demande de rezonage auprès de la Commission d'urbanisme qui sera refusée le 1er août 1990.

[8] The whole of the evidence shows clearly, in my view, that in 1990, the defendant attempted to add a new dimension to its business of selling and renting vehicles, namely, the development of an automobile graveyard. The relevant facts which lead me to reach this conclusion are as follows:

[8] L'ensemble de la preuve démontre clairement, à mon avis, qu'en 1990 la défenderesse a voulu ajouter une nouvelle dimension à son commerce de vente et location de véhicules, soit celle d'un cimetière de voitures. Les faits pertinents qui me portent à conclure ainsi sont les suivants:

Before 1990, there were between 20 and 30 old or wrecked cars on the defendant's lot. Aerial photos taken in 1985 and in 1989 show only a few vehicles behind the building.

Avant 1990 on retrouvait sur le terrain de la défenderesse de 20 à 30 voitures, vieilles ou accidentées. Les photos aériennes prises en 1985 et en 1989 ne démontrent que quelques voitures à l'arrière de l'édifice.

Mr. Léonard Léger, who lives next door to the defendant, does not remember seeing any scrapped vehicles on the defendant's property before 1989-1990, from which I can infer that there were very few; however, Mr. Léger has noticed a significant number of such vehicles on the defendant's property since 1989-1990.

M. Léonard Léger qui demeure voisin de la défenderesse ne se souvient pas avoir vu de voitures pour la ferraille sur le terrain de la défenderesse avant 1989-1990, ce qui me porte à croire qu'il y en avait très peu. Depuis 1989-1990, toutefois, M. Léger a noté un nombre considérable de telles voitures sur le terrain de la défenderesse.

Mr. Verret himself acknowledges in his testimony that the number of scrapped

M. Verret lui-même avoue dans son témoignage que le nombre de voitures pour

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vehicles has increased from around 30 to 200 and even up to 300 today. The evidence shows that this increase has occurred during the last few years.

Before 1990, the defendant used to occasionally buy wrecked vehicles in order to use their reusable parts to repair its own vehicles. At the present time, most of these vehicles are bought for the purpose of selling their reusable parts and selling the bodies to scrap dealers.

Since 1991, the defendant has been placing ads in newspapers informing the public that it operates an automobile graveyard and sells used parts.

[9] I therefore conclude, on the evidence before me, that since 1990, the defendant has been operating an automobile graveyard on its property, in violation of the Town of Beresford's zoning bylaw. Although the storing of about 30 scrapped vehicles for the purpose of salvaging their reusable parts may constitute an accessory use, such is not the case here. This is clearly the operation of an automobile graveyard. It is also obvious that the defendant has only been operating this business since 1990. I accept the evidence showing that the defendant has always sold used parts, but I believe that the purpose of this activity was more in the sense of doing favours to people than operating a business. That is also true of the car bodies which were sold to scrap dealers. Prior to 1990, only about 30 to 40 such bodies were sold each year, but these now number between 200 to 300. It is therefore obvious that this is not simply a matter of scrapping the bodies of cars in the defendant's fleet, but this involves buying scrapped car bodies for the purpose of reselling them at a profit. The Town of Beresford's zoning bylaw does not permit this particular use.

la ferraille a augmenté d'une trentaine de voitures à 200 et même jusqu'à 300 aujourd'hui. La preuve démontre que cette augmentation a eu lieu dans les dernières années.

Avant 1990, la défenderesse achetait de temps à autre des voitures accidentées dans le but d'employer les pièces pour effectuer la réparation de ses propres voitures. Présentement, la plupart des voitures sont achetées dans le but de revendre les pièces et de vendre la carcasse aux ferrailleurs.

Depuis 1991, la défenderesse place des annonces dans les journaux avisant le public qu'elle opère un cimetière d'autos et qu'elle fait la vente de pièces usagées.

[9] Je conclus donc, d'après la preuve, que depuis 1990 la défenderesse opère, sur son terrain, un cimetière de voitures contrairement à l'arrêté de zonage de la ville de Beresford. Quoique la mise au rancart d'une trentaine de voitures dans le but de prendre les pièces encore utilisables peut constituer un usage accessoire, tel n'est pas le cas en l'espèce. Il s'agit clairement d'un commerce de cimetière d'autos. Il est aussi évident que la défenderesse n'exploite ce commerce que depuis 1990. J'accepte la preuve qui démontre que la défenderesse a toujours vendu des pièces usagées mais je suis d'avis qu'il s'agissait là de services rendus plutôt que d'un commerce. Il en va de même pour les carcasses qui étaient vendues aux ferrailleurs. Avant 1990, il ne s'agissait que de 30 ou 40 carcasses par année. Présentement, il s'agit de 200 à 300 carcasses. Il est donc évident qu'il ne s'agit plus uniquement d'envoyer à la ferraille les carcasses de voitures qui faisaient partie du parc de véhicules de la défenderesse mais de carcasses achetées dans le but des revendre pour un profit. Cet usage n'est pas permis à l'arrêté de zonage de la ville de Beresford.

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[10] The application is allowed.

[11] IT IS ORDERED

That the defendant cease immediately to operate an automobile graveyard at 1193 Principale Street or elsewhere in the Town of Beresford, in New Brunswick, without the Town's permission.

That, within 60 days from the issuing of this order, the property be cleared of all car bodies remaining in the said automobile graveyard. If the defendant refuses to comply, the plaintiff is authorized to take steps necessary to clean up the land, at the defendant's expense, following 10 days written notice.

[12] As the court has acknowledged during trial, the defendant has always kept on its property a certain number of vehicles which had become too old for renting or too damaged for repairing. The evidence shows that the defendant kept some 30 such vehicles on its premises and that the reusable parts were used for the repair or the maintenance of the other vehicles in its fleet. This is, in my view, a use that is incidental to the business of selling and renting used trucks and cars. The defendant may continue to keep on its premises between 20 and 30 vehicles for the purpose of salvaging reusable parts, but it will have to comply with the regulations and bylaws of the Town as well as the **Unsightly Premises Act**, S.N.B., c. U-2, with respect to the maintenance of its premises.

[13] The plaintiff is entitled to costs of $2,500, including disbursements.

Order accordingly.

[10] La demande est accordée.

[11] Il est ordonné

Que la défenderesse cesse immédiatement d'opérer un cimetière d'autos au 1193, rue Principale ou ailleurs dans la ville de Beresford, Nouveau-Brunswick sans la permission de la ville.

Que le terrain soit nettoyé dans les 60 jours de cette ordonnance de toutes carcasses de voitures situées dans ledit cimetière d'autos. Si la défenderesse refuse d'optempérer, la demanderesse sera autorisée de prendre les mesures nécessaires pour nettoyer le terrain aux frais de la défenderesse, après un avis écrit de 10 jours.

[12] Tel que le tribunal l'a reconnu au cours du procès, la défenderesse a toujours eu sur son terrain un certain nombre de voitures devenues trop vieilles pour location ou trop endommagées pour être réparées. La preuve démontre que la défenderesse conservait une trentaine de voitures de ce genre sur les lieux et que les parties utilisables servaient à la réparation ou l'entretien des autres voitures dans son parc d'automobiles. Il s'agit là, à mon sens, d'un usage accessoire au commerce de vente et de location de camions et de voitures d'occasion. La défenderesse pourra continuer de conserver sur son terrain entre 20 et 30 voitures pour des pièces mais elle devra toutefois respecter les règlements et les arrêtés de la ville ainsi que la **Loi sur les lieux inesthétiques**, L.N.-B., c. U-2 relativement à l'entretien du lieu.

[13] La demanderesse aura droit à des dépens de 2 500 $ incluant les débours.

Ordonnance en conséquence.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *West Kelowna (City) v. Black Crow Herbals Association,* 2019 BCSC 1082

Date: 20190704
Docket: S117544
Registry: Kelowna

Between:

The City of West Kelowna

Petitioner

And

Black Crow Herbals Association, Okanagan Cannabis Solutions Society, Selina Lau, Ralph Krenbiel, and Matthew Nicholas

Respondents

- and -

Docket: S118404
Registry: Kelowna

Between:

Black Crow Herbals Association and Okanagan Cannabis Solutions Society

Petitioners

And

The City of West Kelowna and Her Majesty the Queen in Right of Canada

Respondents

Corrected Judgment: The cover page of the judgment was corrected on April 16, 2020.

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

2019 BCSC 1082 (CanLII)

Counsel for The City of West Kelowna:	B. Williamson E. Anderson
Counsel for Black Crow Herbals Association and Okanagan Cannabis Solutions Society:	S. Tessmer
Counsel for the Attorney General of Canada:	B. Sokhansanj (appearing August 21, 2018 only)
Place and Dates of Hearing:	Kelowna, B.C. August 21-23, 2018
Place and Date of Judgment:	Kelowna, B.C. July 4, 2019

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I. Introduction

[1] On October 17, 2018, the federal government legalized the regulated production, distribution, sale and possession of cannabis in Canada. Prior to that, cannabis dispensaries had opened in many communities, the operators taking advantage of either the medical exception created through federal regulations or, perhaps, merely the absence of criminal law enforcement.

[2] Criminal law (and its enforcement) may be one thing, but municipal law is another. The City of West Kelowna (the "City") alleges that the two dispensaries in this case (the "Dispensaries") are operating in violation of City bylaws governing business licensing and land use (zoning). Through its petition, the City seeks a declaration to that effect along with a permanent injunction restraining the activities of the Dispensaries, an enforcement order and special costs.

[3] The Dispensaries have countered with a petition of their own. They seek relief under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*] and specifically: (a) an order setting aside the City's decision to cancel Black Crow's business licence; (b) declarations that both Dispensaries are entitled to continue operating; (c) orders setting aside two bylaw amendments; and (d) a declaration that one section of the City's business licensing bylaw is *ultra vires* the City's municipal jurisdiction and is therefore of no force and effect.

[4] The petitions were heard before the *Cannabis Act*, S.C. 2018, c. 16 came into force on October 17, 2018. From the time these petitions were filed to the time the petitions were heard, cannabis was only legally available through the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 [*ACMPR*]. The *ACMPR* did not authorize the sale of marihuana products through storefront dispensaries. The *ACMPR* was repealed upon the coming into force of the *Cannabis Act*.

[5] During the hearing of these petitions I was told that the operators of the Dispensaries did not intend to continue operations after October 17, 2018 (the date the regulated sale of marihuana was legalized), regardless of the outcome of these

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proceedings. I gather that the operators wished to qualify under the new cannabis regime and that continued operations would be a barrier to that process. On the face of things, one might have thought this would provide a basis for resolving this matter, and although I encouraged the parties to do just that, no resolution was achieved. In fairness, I also understand there are other issues between the parties – outstanding bylaw fines being at least one of those issues – and so the case was perhaps not as straightforward as it might have seemed at first glance.

[6] It may well be that by the date of these reasons for judgment the Dispensaries are no longer operating. I am satisfied, however, that as of the date of the hearing of these petitions the Dispensaries continued to operate and so the issues are not moot.

II. Abandoned Constitutional Challenge

[7] As part of their petition, the Dispensaries sought a declaration that both the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*] and the *ACMPR* are contrary to s. 7 of the *Charter of Rights and Freedoms* insofar as cannabis is concerned. They also sought relief pursuant to s. 24(1) of the *Charter*. In light of these constitutional challenges they named “Her Majesty the Queen in Right of Canada” as a respondent.

[8] On the first day of the hearing, the Dispensaries abandoned that part of their petition and filed, by consent, a notice of discontinuance, without costs, with the discontinuance naming “the Attorney General of Canada, named in the style of cause as Her Majesty the Queen in Right of Canada”.

[9] Counsel for the Attorney General of Canada appeared at the outset of the hearing to address that discontinuance (and to point out that the federal government respondent had been improperly named), but otherwise played no part in the hearing of the petitions.

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III. Background

[10] Black Crow Herbals Association ("Black Crow") and Okanagan Cannabis Solutions Society ("Okanagan Cannabis") are societies registered under the provincial *Societies Act*, S.B.C. 2015, c. 18. As at the date of the hearing of these petitions, they each operated a storefront or retail cannabis outlet located within the boundaries of the City. I will use the terms "Dispensaries" or "respondents" to describe these establishments and their operators.

[11] Black Crow obtained a business licence from the City in October 2014 and began operating a retail outlet on Westgate Road that same month. In July 2016, the operators of Black Crow opened a second retail cannabis outlet on Main Street under the name Okanagan Cannabis Solutions Society. Unlike Black Crow, Okanagan Cannabis never held a business licence. Its operators were told by City bylaw personnel that Okanagan Cannabis' business licence application was unlikely to be successful, so they decided to open as a non-profit society because, prior to 2017, non-profit societies were not required by the City to hold business licences.

[12] Both Dispensaries made applications for business licences in December 2017, but those applications were rejected. The Dispensaries continued to operate anyway, despite the City's enforcement efforts, which included warnings and bylaw infraction tickets.

IV. Additional Facts

A. Robert Jaenicke

[13] Robert Jaenicke, who described himself as a "cannabis advocate and businessman", deposed that he was the "directing mind" of both respondents until late 2017. He said that in October 2014 he spoke to Mike Cain, "head bylaw officer" of the City, and informed him of his wish to open a cannabis dispensary in West Kelowna. Mr. Jaenicke said Mr. Cain told him he (Mr. Cain) had no objection to the opening of a cannabis dispensary and he would issue a business licence for the operation, but that this would be no guarantee against police enforcement.

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[14] Mr. Jaenicke deposed that he then went to the RCMP, where he spoke to Constable Ash Puri of the West Kelowna drug squad. Constable Puri told Mr. Jaenicke that although he could not consent to the operation of an illegal enterprise, if the dispensary focused on selling to medical patients then they would be left alone.

[15] Mr. Jaenicke subsequently obtained from the City a business licence for Black Crow. Business licences were issued to Black Crow in 2015, 2016 and 2017.

[16] In 2016, Mr. Jaenicke again approached Mr. Cain, this time to inform Mr. Cain of his intention to open a second dispensary on Main Street. Mr. Cain told him that he could not issue a business licence in respect of that operation because of a new bylaw prohibiting licences for cannabis dispensaries, but that under the then-current bylaw he did not need a business licence to operate a non-profit society at that location.

B. Selina Lau

[17] Selina Lau, the manager of the Dispensaries, deposed that a large proportion of their clientele was dissatisfied with the limited range of products available through Health Canada licensed producers. She said the Dispensaries were meeting this customer need.

C. Mike Cain

[18] Mr. Cain is the senior bylaw officer for the City. He maintained that throughout his discussions with Mr. Jaenicke he was consistent in stating that the City was not condoning the illegal sale of marihuana.

[19] Mr. Cain noted that Black Crow's October 2014 business licence application did not refer to the sale of marihuana. Instead, Black Crow's application described its operation as follows:

> We are a private compassion club dedicated to providing safe access to medical marijuana to qualified patients. We also provide information, literature and doctor referrals.

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[20] In December 2014 the City completed a building inspection for the tenant's improvements made on the Black Crow premises. The inspection report noted:

> The distribution of cannabis related materials may be subject to legal issues. Contact the local RCMP for further information.

[21] Mr. Cain said he did not recall having a conversation with Mr. Jaenicke in 2016 about opening another dispensary, and he believed no such conversation took place.

[22] Mr. Cain said both the Black Crow and Okanagan Cannabis operations are located in commercial buildings in areas zoned as C4 Service Commercial. He said the sale or dispensing of illegal products, including marihuana, are not allowed in those areas.

[23] In September 2017, Mr. Cain visited the Black Crow dispensary. He noted various glass-fronted display cases filled with product for sale, and price lists showing a variety of products and prices, including "medical marijuana", "edibles", "tinctures", "shatter", and so on. Mr. Cain also accessed a website associated with Black Crow which listed various marihuana-related products for sale.

[24] On October 10, 2017, City council passed a resolution rescinding Black Crow's business licence on the basis that it was operating contrary to the *Criminal Code*, the *CDSA* and section 2.5 of the City's Business Licence Bylaw No 0087, 2010. Black Crow was served with notice of that resolution on October 16, 2017. The City's letter also warned Black Crow that enforcement action would ensue if Black Crown continued its operations.

[25] On that same day, Mr. Cain also served a letter to Okanagan Cannabis notifying it that, as a society, Okanagan Cannabis required a licence to operate by virtue of the Business Licence Bylaw (due to a revision to the bylaw made in June 2017) and that enforcement proceedings would be taken if it did not cease its unlicensed operations.

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[26] Mr. Cain re-attended at the two locations on several occasions in early November 2017 and observed that the retail sale of marihuana products was continuing in the same fashion as before.

[27] On December 18, 2017, each of the Dispensaries applied for 2018 business licences for a "medical marijuana dispensary". Mr. Cain denied both applications on the basis that they did not meet the requirements of s. 2.5 of the Business Licence Bylaw, which prohibits the issuance of a licence to a business operating in contravention of the *Criminal Code* or *CDSA*. The Dispensaries appealed those denials to council. At a public hearing held January 23, 2018, City council upheld the licence denials.

D. Nancy Henderson

[28] Ms. Henderson is the general manager of development services for the City.

[29] Ms. Henderson provided some of the general context for the City's zoning bylaws, noting that they provide for the orderly development of the community and the avoidance of conflicts between incompatible uses. The City's current zoning bylaw is Zoning Bylaw No 0154. It has been in effect since February 2014.

[30] In 2013 and 2014, when the Zoning Bylaw was being developed, storefront cannabis dispensaries were illegal by virtue of the *CDSA*. In June 2013 the federal government enacted the *Marihuana for Medical Purposes Regulations* [*MMPR*] to permit the production and mail order purchase of medical cannabis. Storefront operations were not authorized by the *MMPR*.

[31] In April 2016 the federal government announced that it planned to introduce legislation legalizing non-medical marihuana. The *Cannabis Act* was subsequently introduced in the House of Commons on April 13, 2017. The announced intention was to legalize cannabis in July 2018.

[32] As a result of these developments, the City adopted Zoning Amendment Bylaw 154.46 on June 13, 2017 in order to "provide clarity for the current status of

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commercial marihuana facilities". The bylaw amendment provided that there could be no retail use of marihuana (including production, storage or distribution) unless the operation was licenced as a full-service pharmacy.

[33] Ms. Henderson also said a revised Business Licence Bylaw was adopted, allowing a licence inspector to grant a business licence when satisfied that the application has complied with other City bylaws and provided that the proposed business operation would not contravene the *Criminal Code* or *CDSA*. Ms. Henderson explained that this clarification became desirable due to the "proliferation of illegal storefront dispensaries that began to apply for business licences".

[34] Ms. Henderson also said that on June 13, 2017 the Business Licence Bylaw was amended by adding s. 2.14, requiring every registered society to obtain and hold a valid business licence. She said this amendment arose from their observation that some societies were operating businesses that had the same types of impacts and required the same regulatory oversight as regular commercial operations carried on by corporations or individuals.

V. The Bylaws

A. General Powers

[35] The City is a municipality taking its authority to regulate land use from the *Local Government Act*, R.S.B.C. 2015, c. 1 [*LGA*] and its business licensing authority from the *Community Charter*, S.B.C. 2003, c. 26 [*Community Charter*].

B. Zoning Bylaw

[36] The City is empowered to regulate land use within its bounds by making zoning bylaws: *LGA*, Part 14. The City's zoning bylaws divide the municipality into areas and designate permitted and unpermitted uses in each area. The use of land, buildings or structures is prohibited except in conformity with the Zoning Bylaw: Zoning Bylaw, s. 1.2.1.

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[37] As noted earlier, amendments to the Zoning Bylaw in 2017 and 2018 addressed retail cannabis sales and dispensing. Specifically, on June 13, 2017, the Zoning Bylaw was amended to define and regulate "commercial marihuana facilities": Zoning Amendment Bylaw No. 154.46, 2017 [the "2017 Zoning Bylaw Amendment"]. "Commercial marihuana facilities" included compassion clubs for "provision of information or advice on medicinal use of marihuana in combination with the provision or supply of marihuana": 2017 Zoning Bylaw Amendment, s. 2.8.1.

[38] "Commercial marihuana facilities" were prohibited on every land parcel unless expressly permitted. "Commercial marihuana facilities" were not considered "general retail" and could not make use of parcels zoned for that purpose: 2017 Zoning Bylaw Amendment, s. 3.3.7.

[39] On June 12, 2018, the Zoning Bylaw was amended again to its current form, this time to define and regulate "cannabis sales facilities": Zoning Amendment Bylaw No. 154.64, 2018 (the "2018 Zoning Bylaw Amendment"). It provided that "cannabis sales facilit[ies]" are "premises used for the retail sale of cannabis, and includes premises used for the service of providing referrals or facilitating access to cannabis not physically sold on the premises", excluding pharmacies: 2018 Zoning Bylaw Amendment, s. 2.8.1. Section 3.3.9 (formerly s. 3.3.7.) provides that "[c]annabis sales facilities are prohibited on every parcel, and for certainty, where the distribution of cannabis is permitted, distribution must not be by retail sale to customers at the premises."

[40] The use of land or buildings for cannabis retail outlets was not dealt with, expressly at least, in the City's zoning bylaws until the 2017 amendment. After the 2017 Zoning Bylaw Amendment, use for retail cannabis sales was expressly prohibited while the City made plans in anticipation of federal legalization. After the 2018 Zoning Bylaw Amendment, use for retail cannabis sales and dispensing remained prohibited on parcels zoned as C4 Service Commercial.

[41] The respondents began operations at their locations in October 2014 and July 2016 before those types of operations were expressly addressed in the Zoning

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Bylaw. As a result, the respondents argue that they may continue their operations as a "non-conforming use".

C. The Business Licence Bylaw

[42] The City is empowered to regulate businesses in its jurisdiction by making business licensing bylaws: *Community Charter*, ss. 8(6), 15, 59-61. No one may carry on business in the City without a business licence: Business Licence Bylaw, s. 2.1.

[43] Prior to April 14, 2015, s. 2.5 of the Business Licence Bylaw allowed the Licence Inspector to grant a business licence when satisfied that the applicant was complying with the City's other bylaws. Black Crow received its business licence as "private compassion club" in January 2015.

[44] On April 14, 2015, the City amended s. 2.5 of the Business Licence Bylaw. The amendment provided that in addition to the applicant's compliance with other bylaws, the Licence Inspector must be satisfied that the proposed business operations would not contravene the *Criminal Code* or the *CDSA*.

[45] Effective that day, s. 2.5 of the Business Licence Bylaw provides:

> 2.5 A license Inspector may grant a business licence when satisfied that the applicant has complied with the requirements of the bylaws of the District and that the proposed business would not be carried out in contravention of the *Criminal Code of Canada* or the *Controlled Drugs and Substances Act*.

[46] On June 13, 2017, the Business Licence Bylaw was amended such that anyone carrying on business required a business licence (s. 2.14). Prior to that amendment, non-profit societies could carry on business without a business licence.

VI. The Issues

[47] Unquestionably, the Dispensaries operated and, as of the date of the hearing of the petitions, continued to operate contrary to the City's bylaws. The real issues centre on the validity and enforceability of the bylaws in question.

[48] The Dispensaries argue that:

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a) the amended version of s. 2.5 of the Business Licence Bylaw is beyond the powers of the City because it purports to exercise a criminal law power;

b) the amended version of s. 2.5 of the Business Licence Bylaw is beyond the powers of the City because it amounts to a broad prohibition of a class of business;

c) Business Licence Bylaws 2.14 (requiring every registered society carrying on business to obtain and hold a valid business licence) and 2.5 ought to be set aside because they were amended without proper notice to them;

d) because the Dispensaries were permitted to operate under the old bylaw they are entitled to continue to operate under the amended bylaw as a non-conforming use by virtue of s. 528 of the *LGA*.

VII. Analysis

A. Standard of Review

[49] I agree with the shared view of the parties that the standard of review on jurisdiction and questions of law is one of correctness: *Nanaimo (City) v. Rascal Trucking Ltd*., [2000] 1 S.C.R. 342, 2000 SCC 13 at para. 29.

B. Whether the Business Licence Bylaw is an Exercise of Criminal Law

The Issue

[50] The Dispensaries submit that s. 2.5 of the Business Licence Bylaw is the City's attempt to regulate the possession and sale of marihuana. They say this falls under federal jurisdiction over criminal law and so it is unconstitutional.

[51] The City says s. 2.5 of the Business Licence Bylaw was amended in order to clarify that the authority of the licence inspector included the authority to deny a business licence to an operation that, on its face, violates the *Criminal Code* or *CDSA*. The City argues that illegal operations inherently run counter to the general

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object of the Business Licence Bylaw, which is to regulate businesses in a manner that promotes and enhances community safety and economic prosperity.

[52] The authorities establish a two-step analysis. The Court must first determine the essential character of the impugned provision, and then the Court determines if the impugned law falls within the jurisdiction of the enacting government.

Essential Character of the Amended Bylaw

[53] The first step is to consider the "matter" of the provision at issue, identified through its "pith and substance" or essential character: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at paras. 16-18 [*Quebec v. Pilots Association*]. To determine pith and substance, the court looks to the purpose of the enacting body and the legal effect of the provision: *Chatterjee v. Ontario (A.G.)*, 2009 SCC 19 at para. 16 [*Chatterjee*]. To glean purpose, the court may examine "both intrinsic evidence, such as the preamble or the general purposes stated in the resolution authorizing the measure, and extrinsic evidence, such as that of the circumstances in which the measure was adopted": *Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23 at para. 36 [*Rogers Communications*]. Determining the effect of the provision involves "considering both the legal ramifications of the words used and the practical consequences of the application of the measure": *Rogers Communications* at para. 36.

[54] Municipal bylaws should be examined in light of the purpose broadly targeted by the enabling legislation and elected council, with a view to giving effect to the intention of the municipal council, as expressed in the bylaw, upon a reasonable basis that it will accomplish that purpose: *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271 at para. 18; see also *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494 at para. 13, and *Smith v. St. Albert (City)*, 2014 ABCA 76 at para. 24 [*St. Albert City*].

[55] The *Community Charter* sets out the following non-exhaustive list of municipal purposes (in other words, *intrinsic* evidence of purpose):

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> 7 The purposes of a municipality include
>
> (a) providing for good government of its community,
>
> (b) providing for services, laws and other matters for community benefit,
>
> (c) providing for stewardship of the public assets of its community, and
>
> (d) fostering the economic, social and environmental well-being of its community.

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[56] Extrinsic evidence of purpose is found in the evidence of Ms. Henderson, the general manager of development services with the City, who said the revised Business Licence Bylaw (which added that a licence inspector could issue a licence when satisfied the proposed business would not contravene the *Criminal Code* or *CDSA*) was adopted "due to the proliferation of illegal storefront dispensaries that began to apply for business licences". She added:

> Such illegal operations inherently run counter to the objects of the Business Licence Bylaw in regulating businesses in a manner to enhance and promote community safety and economic prosperity.

[57] I am satisfied the *purpose* of the bylaw amendment was to clarify that the City's licence inspector could deny a business licence to an applicant whose business operation would violate the *Criminal Code* or *CDSA*. Similarly, the *effect* of the bylaw amendment is to disentitle any applicants for a business licence who fail to satisfy the licence inspector that their operations do not violate those statutes.

[58] By ensuring that licences are only issued to businesses carrying out legal activities, the City is fostering the safety and thus the well-being of the community. Accordingly, I conclude that the essential character of the bylaw amendment is to foster community well-being, a purpose specifically noted in the *Community Charter*.

The Appropriate Head of Power

[59] Stage two of the analysis is to classify the essential character of the impugned provision under one of the heads of power in the *Constitution Act, 1867* [*Constitution Act*] in order to determine if the law falls within the jurisdiction that enacted it: *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 481.

[60] The Dispensaries argue that s. 2.5 of the Business Licence Bylaw is *ultra vires* the City because it is an exercise of federal criminal power.

[61] If the essential character of s. 2.5 of the Business Licence Bylaw falls under the provincial head of power and the intrusion into a federal head of power (here, criminal law) is merely incidental, the provision will be found to be a valid exercise of delegated provincial power: *Rogers Communications* at paras. 37-38; *Quebec v. Pilots Association* at para. 18, *Chatterjee* at paras. 29-32, 40.

[62] At the relevant time, access to cannabis, a controlled substance, was governed by the *CDSA*, a federal statute, as well as the *ACMPR*, pursuant to the federal criminal law power. Since, after a point at least, the Dispensaries did not have licences to carry on business within the City and there were no parcels within the City that were zoned for cannabis-related business activities at the time of the petitions, conducting that sort of business amounted to both a bylaw infraction at the municipal level and a criminal offence at the federal level. Consequently, there is overlap between measures enacted under s. 92 provincial jurisdiction and s. 91 federal jurisdiction.

[63] Business regulation is a matter of property and civil rights, falling under the provincial head of power under *Constitution Act*, s. 93(13): *Ward v. Canada (Attorney General)*, 2002 SCC 17 at para. 42. Section 92(9) of the *Constitution Act* also gives the provinces jurisdiction over shop, saloon, tavern, auctioneer, and other licences for the raising of revenue for provincial, local, or municipal purposes. Together, ss. 92(13) and (9) grant the power of regulation through licences: *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371 at paras. 67-68.

[64] The City's enforcement efforts and pursuit of injunctive relief concerns economic, social, and environmental well-being of its community, as mandated by the *Community Charter*, s. 7. Activities captured by federal criminal statutes can have civil consequences, and section 2.5 of the Business Licence Bylaw refers to the *Criminal Code* and the *CDSA* because the conduct targeted by those statutes has civil consequences. Certain activities, including antisocial or illegal activities,

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may for one reason fall under a federal head of power, and for another reason fall under a provincial head of power: *Chatterjee*, at paras. 29-32, 40. The *civil* consequences of antisocial behaviour are rightly addressed by provincial and municipal schemes.

[65] The Business Licence Bylaw, insofar at it merely references criminal law, does not push it outside of the realm of property and civil rights: see *R. v. Keshane*, 2012 ABCA 330. The mere existence of federal legislation on a given subject does not preclude a province or municipality from regulating the same. If the statutes co-exist in their operation, each may properly regulate aspects of the activity in keeping with its jurisdiction: *British Columbia Lottery Corp v. Vancouver (City)*, 1999 BCCA 18 at para. 19.

[66] In the present case, I conclude the City was not trying to prohibit the trafficking of controlled substances, nor create a new offence, which distinguishes this case from a case relied upon by the respondents, *R. v. Westendorp*, [1983] 1 SCR 43. The Business Licence Bylaw does not target the sale of substances in and of itself or set a criminal prohibition and penalty. Instead, it sets a standard which must be met for the issuance of a business licence and, by implication, for the carrying on of a business in the community.

[67] Accordingly, I conclude that the essential character of the Business Licence Bylaw is to set standards that must be met for the carrying on of a business and the issuance of a business licence. The dominant feature of the bylaw is the regulation of business in the community. Any intrusion into the criminal head of power is merely incidental to a dominant provincial purpose.

[68] I am reinforced in my conclusion on this point by *Vancouver (City) v. Karuna Health Foundation*, 2018 BCSC 2221 [*Karuna*], a decision released after this case was heard. The facts in *Karuna* are similar to those in the present case. There, the City of Vancouver sought injunctive relief to enforce its bylaws against cannabis dispensaries carrying on business without business licences. At the time, the *Cannabis Act* was not yet in force. Vancouver's business licence bylaw required

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that all businesses hold a valid licence and that licence-holders comply with federal legislation. The dispensaries argued that Vancouver's licensing bylaw was a colourable attempt to regulate the possession and sale of cannabis. The Court found the pith and substance of the business licence bylaw was to regulate business, and it fell under the "property and civil rights in the province" (s. 92(13)) and "matters of a merely local or private nature in the province" (s. 92(16)): *Karuna* at paras. 81, 83-84.

[69] In *Karuna*, Hinkson C.J.S.C. also referred (at para. 90) to the broad powers available to the province to legislate on matters that have incidental effects on federal criminal law power, such as the power to legislate in order to suppress crime, and he quoted with approval the following extract from *St. Albert City*:

> [48] As discussed above, the purpose of the *Bylaw* is to provide for safe and viable communities by regulating businesses in a manner that suppresses conditions that are likely to favour the commission of crime. Legislating to suppress conditions that are likely to favour the commission of crime is indeed within provincial legislative competence: *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19 at paras 26-29, [2009] 1 SCR 624; *Bedard v Dawson*, [1923] SCR 681 at 684, 40 C.C.C. 404; *Attorney General for Canada and Dupond v City of Montreal*, [1978] 2 SCR 770 at 792, 19 N.R. 478. In *Bedard*, Idington J held, at 684:
>
> > As to the argument addressed to us that the local legislatures cannot legislate to prevent crime, I cannot assent thereto for in a very wide sense it is the duty of the legislature to do the utmost it can within its power to anticipate and remove, so far as practicable, whatever is likely to tend to produce crime.

[70] For these reasons, I conclude the dominant feature of the Business Licence Bylaw is to regulate business so as to manage the impacts of business activities on the local community. Any intrusion into the criminal head of power is merely incidental to a dominant provincial purpose. Accordingly, I find s. 2.5 of the Business Licence Bylaw to be valid and I decline to grant the relief sought by the Dispensaries in their petition at Part 1, number 6.

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C. Whether Business Licence Bylaw 2.5 is Authorized by the *Community Charter*

The Issue

[71] The second argument of the Dispensaries is that the amendment to the Business Licence Bylaw is invalid because it does not fall within any of the powers granted to municipalities under the *Community Charter*. They say the requirement that a business applying for a licence not offend the *Criminal Code* or *CDSA* amounts to a broad prohibition of a class of business, something the *Community Charter* does not authorize. The *Community Charter*, they say, is very specific about what a city council may prohibit, and cannabis dispensaries do not fall within any of the matters listed. They cite *Prince George (City) v. Payne*, [1978] 1 S.C.R. 458 [*Payne*] as authority for their position.

[72] In *Payne*, the city of Prince George refused to issue a business licence for the operation of an adult boutique. The Supreme Court of Canada noted (at 461) that the "moral implications" of the business appeared to have been the determining consideration of the city's council. The Court said (at 463):

> Let me say, at the outset, that one might well be inclined to support Council's evident distaste with sex businesses. But it is no part of a Court's task to determine the wisdom of Council's decision, assuming a power to deny the licence inhered in the Council. The Court's sole concern is whether the Council acted within the four corners of its jurisdiction. The discretion contained in s. 455 [of the then *Municipal Act*], wide as it is, must be exercised judicially. It is not a judicial exercise of discretion to rest decision upon an extraneous ground. The common law right of the individual freely to carry on his business and use his property can be taken away only by statute in plain language or by necessary implication.

[73] The Court concluded (at 467-468):

> In the case at bar, the Council of the City of Prince George sought to prohibit land use through the mechanism of a licensing regulation. The action was not related to a particular person or to a particular location. In exercising its licensing function, Council passed a resolution the effect of which was to refuse a licence to a particular land use. In my opinion, that is not a judicial exercise of Council's function. It has long since been decided, in *Municipal Corporation of the City of Toronto v. Virgo*, that a statutory power conferred upon a municipal council to make by-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize

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> the making it unlawful to carry on a lawful trade in a lawful manner. Argument in this Court proceeded on the basis that the proposed trade was lawful and for the purposes of this appeal I assume it to be so.
>
> The Prince George Council, in my opinion, did not have statutory power to prohibit the trade which the applicant sought to conduct. Council was empowered by s. 455 to refuse a licence "in any particular case" but those words do not mean and cannot be so construed to extend to any particular type of business. They do not suggest a blanket right to prohibit generally so‑called "adult boutiques" which are not *ex hypothesi* illegal. The words "particular case" mean peculiar to the applicant and not to the type of business which he wishes to conduct.
>
> Interdiction of particular types of business is carried out by zoning or other by-laws in pursuance of clear authority in the *Municipal Act*. Perusal of the Act makes it clear that when the legislature intended to give power to restrict land use or to prevent or prohibit a particular type of business activity it did so in express words. Municipal officers are not given a discretion whether, as a matter of policy, one type of lawful business can be carried on within a municipality while another cannot.
>
> [Emphasis added.]

[74] Here, the City does not argue that the Business Licence Bylaw was amended pursuant to a power of prohibition. Instead, the City says the amendment is within the power of the City because it comes under the authority of the *Community Charter*, s. 8(6) (a municipal council may regulate in relation to business) and s. 15(1) (a council may provide for a system of licences, permits or approvals).

[75] The City says the Business Licence Bylaw does not prohibit cannabis dispensaries as a type of business. As the City noted in its written submissions:

> Section s. 2.5 of the Business Licence Bylaw does not prohibit a class of business; it establishes a criterion for the Inspector's use of their delegated power to confer or deny a benefit under the Bylaw. Although prohibitory in the sense that this criterion will result in preventing federally illegal businesses from operating, it does not discriminate between classes of business in a way restricted to the exercise of land use [i.e., zoning] powers.

[76] The City argues that business licensing bylaws impose criteria that may have the practical effect of preventing certain businesses from operating where all those businesses share a common, mutable characteristic, such as federal unlawfulness of operation, but this is not a prohibition of a type or class of business. The City

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notes that dispensaries may very well be issued licences once their activities no longer contravene the *Criminal Code* or *CDSA*.

Analysis

[77] I am satisfied that the bylaw, in its essential function, regulates an activity rather than prohibits it. As noted in *International Bio Research v. Richmond (City)*, 2011 BCSC 471:

> [37] … Regulation of business necessarily involves restrictions on businesses, including setting out rules of what cannot be done by a business. Municipal regulation of the conduct of business, including prohibiting certain types of transactions, is an established aspect of valid business regulation.

[78] The business of storefront or retail cannabis sales in the City is not prohibited, as such. Instead, that type of business is *regulated* in a way that ensures only legal cannabis businesses may be licensed.

[79] *Payne* is of no assistance to the Dispensaries in this case. As the excerpt quoted earlier shows, the court in *Payne* was concerned about irrelevant considerations being relied upon to deny the carrying on of a *lawful* business. The businesses that were being run here are not lawful. It was within the power of the City to regulate that activity so as to ensure this activity was only carried on in a lawful manner.

Estoppel

[80] The Dispensaries argued that the City cannot change its mind once the activity is allowed. While resisting the suggestion this was an estoppel argument, counsel also conceded that issuing a business licence did not "lock [the City] in forever". This inconsistent submission left me in a state of uncertainty as to whether the Dispensaries were, in effect at least, arguing that the City was estopped on the matter of business licences because it had issued licences in the past. Because of this uncertainty, I will deal with this issue briefly.

[81] As a general rule, municipal rights, duties and powers, including the duty to carry out the provisions of a statute, are of such public nature that they cannot be

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waived, lost or vitiated by mere acquiescence, laches or estoppel: *Langley (Township) v. Wood,* 1999 BCCA 260 at para. 12. Although this type of argument generally arises (and fails) in situations where a municipality has not taken prior enforcement action though entitled to do so, the principle must apply with even greater force where the argument is, in essence, that the City cannot enforce a *new* licensing bylaw because it imposes different requirements than the former bylaw. To accede to the Dispensaries' argument in the present case would be to interfere with the City's delegated legislative authority to make bylaws.

[82] The doctrine of estoppel does not apply here.

D. Whether Business Licence Bylaws 2.14 and 2.5 Ought to be Set Aside Due to Procedural Unfairness or Lack of Notice

The Issue

[83] The Dispensaries submit that they did not receive proper notice of proposed bylaw changes. They cite the City's statutory fairness obligations under the *Community Charter*, s. 59(2). By way of a brief reminder, the amendments in question were: (1) s. 2.14 of the Business Licence Bylaw, requiring every registered society carrying on business to obtain and hold a valid business licence; and (2) s. 2.5, requiring that the licence inspector be satisfied that a proposed business not contravene the *Criminal Code* or *CDSA*.

[84] The principals of the Dispensaries say they did not receive notice of the proposed amendments to the bylaws. The City says that there is no requirement that notice be given to individuals.

The Notice Given

[85] The City's evidence was that, prior to the enactment of each of the two amendments, the City provided the public with notice that the amendment was being considered, and it did so by postings on the City's official website and public notice boards and notices published in free local newspapers. Each notification process was carried out in accordance with process described in the related report to council

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that was submitted for council's consideration of the first, second and third reading of each amendment.

[86] Prior to the enactment of each amendment the City provided the public and persons who considered they might be affected by the amendments with an opportunity to make representations to City council at a public meeting.

Analysis

[87] Before adopting a bylaw in respect of business regulation, the City must give notice of its intention and provide an opportunity for persons who think the change will affect them to make representations to council: *Community Charter*, ss. 59(2), 59(3). Section 59(3) leaves the manner of notice to council:

> 59(3) Notice required under subsection (2) (a) may be provided in the form and manner, at the times and as often as the council considers reasonable.

[88] The Dispensaries submit there was no evidence the City considered the notice given to be reasonable, which they say is a requirement given the language the section.

[89] I do not accept that submission. For each amendment, the notification process implemented was the process that had been described in staff reports to City council. It was a process that accorded with the City's policy decisions. The inference that I draw from those facts is that the City considered the manner of notice set out in the policy to be reasonable.

[90] While that disposes of the main point argued by the Dispensaries, they also made submissions suggesting the method of notice was insufficient, although their argument was not developed beyond the assertion that the "absence of notice to the petitioners" amounted to procedural unfairness. I will deal with the issue in any event, out of an abundance of caution. First, however, I will deal with the standard to be applied in considering the issue.

[91] Although the Dispensaries conceded that the standard of review on matters of procedural fairness is "reasonableness", instead I conclude there is no specific

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standard of review, at least in the sense generally applied in administrative law. In *Moreau‑Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, the court said:

> [74] The third issue [*procedural fairness*] requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

[92] In *Bentley v. Braidwood*, 2009 BCCA 604 [*Bentley*], the court noted the difficulty in applying a typical standard of review analysis to questions of procedural fairness:

> [59] There is difficulty in applying the language of standard of review, 'correctness' and 'reasonableness', to issues of procedural fairness. Whether the tribunal has the alleged duty, in respect to procedural fairness, is a matter on which the courts have the final say. However, subject to any express statutory requirements, a tribunal typically enjoys broad discretion as to how it will fulfill the requirements of procedural fairness, and there will rarely be a single correct answer.

[93] The Court of Appeal later cited that passage with approval in *Seaspan Ferries Corp. v. British Columbia Ferry Services Inc.*, 2013 BCCA 55, and concluded as follows:

> [51] I am not convinced that this attempt to apply the standard of review analysis to issues of procedural fairness is particularly helpful. The approach taken in *Moreau-Bérubé* and *Bentley* appears to me to be more easily applied. …
>
> [52] I agree … that the standard of review applicable to issues of procedural fairness is best described as simply a standard of "fairness". A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures.

[94] As indicated earlier, little was said by either the City or the Dispensaries on this issue, and there was very little evidence. The Dispensaries argued, in effect at

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least, that personal notice was required. The City said it followed all procedural requirements of the *Community Charter*, the notice given was as set out in staff reports to council, and it followed its own policy decisions in that respect. It seems reasonable to infer that those reports and policy decisions did not require that personal notice be given.

[95] The *Community Charter* allows a municipal council to provide notice in the form and manner it considers reasonable, which suggests a wide latitude for manner of notice and, as the passage from *Bentley* quoted above confirms, a tribunal "typically enjoys broad discretion as to how it will fulfill the requirements of procedural fairness".

[96] Perhaps the strongest argument for the Dispensaries – and one which was, at best, only *implicitly* raised by the Dispensaries – is that these amendments likely affected only a very few businesses, perhaps just these two, and so individual notice would not have been onerous. That same argument, however, would perhaps apply in the case of many amendments to licensing bylaws and, as well, it may well be that individual notice is not the norm in any municipality. All of that conjecture simply highlights the dearth of evidence on the subject.

[97] Given that: (1) the City was entitled to give notice in the manner it considered reasonable; (2) the City enjoys a broad discretion as to how it will fulfill the requirements of procedural fairness; (3) notice was given in accordance with the process described in staff reports to City council, a process that accorded with the City's policy decisions; (4) notice was posted in various ways, including on the City's website, notice boards and community newspapers; and (5) there was an opportunity to make representations to City council at a public meeting, I conclude that the Dispensaries have not met the burden of showing that the notice given by the City was procedurally unfair.

[98] Accordingly, the Dispensaries have failed to show that the two bylaw amendments in question should be set aside due to procedural unfairness.

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E. Whether the Dispensaries Are Entitled to Operate as a Non-Conforming Use By Virtue of s. 528 of the *LGA*

The Issue

[99] As noted earlier, the Zoning Bylaw was amended in 2017 and 2018 to prohibit or largely prohibit "commercial marihuana facilities" (2017 amendment) and "cannabis sales facilities" (2018 amendment) on every land parcel. The City says the Dispensaries are operating in violation of the Zoning Bylaw and so this is an additional basis on which an injunction should issue.

[100] The Dispensaries respond by noting, first of all, that in taking its various enforcement measures the City never purported to rely on alleged breaches of the Zoning Bylaw until litigation began.

[101] More substantively, they argue that while the City is entitled to regulate in relation to land use, s. 528 of the *LGA* protects existing uses from the effect of later changes by permitting non-conforming uses.

[102] In response, the City submits that since the Dispensaries have never been in compliance with the Zoning Bylaw, their use has never been lawful. Accordingly, their continued use cannot be a lawful non-conforming use.

Analysis

[103] Section 528(1) of the *LGA* reads as follows:

> 528 (1) Subject to this section, if, at the time a land use regulation bylaw is adopted,
>
> (a) land, or a building or other structure, to which that bylaw applies is lawfully used, and
>
> (b) the use does not conform to the bylaw,
>
> the use may be continued as a non-conforming use.

[104] The wording of the section makes it clear that the land or building must be "lawfully used" under the then-existing bylaw in order to benefit from the immunity accorded to a non-conforming use.

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[105] The City says that retailing of cannabis products was not a lawful use of property (from a zoning point of view) prior to the enactment of the first Zoning Bylaw amendment because that use did not appear in the list of permitted uses in any City zone. In answer to the Dispensaries' argument that it fell within the "retail – general" category of uses, the City argues that, by the doctrine of paramountcy, a (delegated) provincial law cannot permit what a federal law (the *CDSA*) prohibits. Finally, the City says that in interpreting what activities ought to fall into the "retail – general" category, the court should not read it as including *unlawful* retail activities.

[106] I conclude that the Dispensaries cannot claim the benefit or immunity of lawful non-conforming use. The pre-amendment zoning bylaw never authorized land or buildings to be used for retailing or trafficking in a controlled substance, either expressly or by implication. Certainly, this type of use was not on the list of permitted uses. I am also satisfied it did not fall within "retail – general" category because retailing a controlled substance has materially different land use impacts than does the retailing of lawful goods, and so the former activity does not equate with the latter: see *Nanaimo (Regional District) v. Saccomani*, 2018 BCSC 752, where the use of a house for vacation rentals was found not to fall within "residential use" because vacation rentals involved very different land use impacts.

[107] While the lack of criminal law enforcement of the *CDSA* and the resulting proliferation of cannabis dispensaries may have tended to normalise the activity in the minds of some, simply put, the activity was illegal. An equivalent operation might be a hypothetical retail outlet that "fenced" knowingly stolen goods. Such an operation might be "retail" in a sense, but given its markedly different land use impacts no one could seriously argue that it should fall into the same category as a lawful retail business.

[108] I conclude the former zoning bylaw never permitted the type of use of land or buildings carried on by the Dispensaries and so they cannot be exempted from the later versions of the Zoning Bylaw on the basis of lawful non-conforming use.

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F. Conclusion

[109] I conclude that the relevant provisions of the City's Business Licence Bylaw, ss. 2.14 and 2.5, were and are valid. The City was therefore entitled to cancel Black Crow's 2017 business licence and to refuse to issue business licences to both Dispensaries after that. The continued operation of the Dispensaries after those events was a breach of the Business Licence Bylaw.

[110] I also conclude that the continued operation of the Dispensaries was in breach of the Zoning Bylaw as amended in both 2017 and 2018, and that those operations were not exempted from the Zoning Bylaw amendments by the non-conforming use provision (s. 528) of the *LGA*.

VIII. Remedy

[111] The City has a statutory right to an injunction to enforce, prevent or restrain a breach of a bylaw: *Community Charter*, s. 274. Despite the indication from Dispensaries that they would cease their operations by the time the *Cannabis Act* came into force, the persistence of the individuals associated with the Dispensaries in continuing operations despite the City's enforcement measures satisfies me that an injunction should issue in the terms sought.

[112] The City also sought an enforcement order, allowing for police assistance in ensuring the injunction is complied with. In light of the stated intention of the respondents to discontinue operations by October 17, 2018, I decline to make an enforcement order at this time, but I grant leave to the City to apply for an enforcement order if necessary.

IX. Costs

[113] The City seeks special costs. They argue that the respondents demonstrated "flagrant disregard" for the bylaws and so special costs are called for.

[114] I decline to order special costs. The ambit of special costs has been circumscribed by various cases, both recent and not-so-recent, to the point that they are essentially limited to cases involving misconduct in the litigation: *Smithies*

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Holdings Inc. v. RCV Holdings Ltd., 2017 BCCA 177. There is no suggestion here that there was misconduct in the litigation. As to the flouting of the bylaws, the City itself played at least some role, for a time, in leading the respondents to believe they could carry on business as they did, and the points raised by the respondents were not frivolous. There is no basis for special costs here.

[115] The City will have costs on the ordinary scale.

X. Summary

[116] In summary:

a) Sections 2.14 and 2.5 of the City's Business Licence Bylaw are and were valid at the material times;

b) the City was entitled to cancel Black Crow's 2017 business licence and to refuse to issue business licences to the Dispensaries after that;

c) the operations of the Dispensaries contravened, and continued to contravene, the City's Zoning Bylaw;

d) the operations of the Dispensaries contravened, and continued to contravene, the City's Business Licence Bylaw at the material times;

e) an injunction in favour of the City shall issue in the terms sought;

f) there shall be no enforcement order, but the City has leave to apply for an enforcement order if necessary;

g) the petition of Black Crow and Okanagan Cannabis is dismissed; and

h) the City shall have its costs of both proceedings at Scale B.

"Blok J."

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Minister of Health and Social Services *Appellant*

v.

Mount Sinai Hospital Center *Respondent*

and

Elliot L. Bier, Howard Blatt, Peter Erenyi, Ruth Kovac, Mary Likoudis, Avrum P. Orenstein, Charles Roth (in their capacity as directors of the Mount Sinai Hospital Center) *Respondents*

and

Maimonides Hospital Geriatric Centre *Respondent*

INDEXED AS: MOUNT SINAI HOSPITAL CENTER *v.* QUEBEC (MINISTER OF HEALTH AND SOCIAL SERVICES)

Neutral citation: 2001 SCC 41.

File No.: 27022.

2000: December 12; 2001: June 29.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Judicial review — Ministerial discretion — Minister promising to issue modified permit upon Hospital Center's relocation to Montreal — Minister subsequently refusing to issue modified permit — Whether ministerial discretion exercised — Whether exercise of ministerial discretion validly reversed — An Act respecting health services and social services, R.S.Q., c. S-5, ss. 138, 139.1.

Administrative law — Judicial review — Mandamus — Ministerial discretion — Minister promising to issue modified permit upon Hospital Center's relocation to Montreal — Minister subsequently refusing to issue modified permit — Minister failing to act in accordance

Ministre de la Santé et des Services sociaux *Appelant*

c.

Centre hospitalier Mont-Sinaï *Intimé*

et

Elliot L. Bier, Howard Blatt, Peter Erenyi, Ruth Kovac, Mary Likoudis, Avrum P. Orenstein, Charles Roth (en leur qualité d'administrateurs du Centre hospitalier Mont-Sinaï) *Intimés*

et

Centre hospitalier gériatrique Maïmonides *Intimé*

RÉPERTORIÉ : CENTRE HOSPITALIER MONT-SINAÏ *c.* QUÉBEC (MINISTRE DE LA SANTÉ ET DES SERVICES SOCIAUX)

Référence neutre : 2001 CSC 41.

N° du greffe : 27022.

2000 : 12 décembre; 2001 : 29 juin.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit administratif — Contrôle judiciaire — Pouvoir ministériel discrétionnaire — Promesse du ministre de délivrer un permis modifié une fois le Centre hospitalier déménagé à Montréal — Ministre refusant par la suite de délivrer un permis modifié — Le pouvoir ministériel discrétionnaire a-t-il été exercé? — L'exercice du pouvoir ministériel discrétionnaire a-t-il été validement infirmé? — Loi sur les services de santé et les services sociaux, L.R.Q., ch. S-5, art. 138, 139.1.

Droit administratif — Contrôle judiciaire — Mandamus — Pouvoir ministériel discrétionnaire — Promesse du ministre de délivrer un permis modifié une fois le Centre hospitalier déménagé à Montréal — Ministre refusant par la suite de délivrer un permis modifié —

with prior exercise of discretion — Whether an order in the nature of mandamus appropriate — Code of Civil Procedure, R.S.Q., c. C-25, art. 100.

The Mount Sinai Hospital Center was originally established in Sainte-Agathe, Quebec, as a long-term treatment facility dealing primarily with patients suffering from tuberculosis. During the 1950s, the Center began to introduce new programs and services and developed a general respiratory expertise in a setting with both long-term and short-term care facilities. This change in services was known to the government which throughout funded all of the Center's activities. In 1984, negotiations between the Center and the Ministry of Health and Social Services to move the Center to Montreal began. At that time, the Center was operating under its original permit for 107 long-term care beds even though it had for 10 years been providing 57 long-term care beds and 50 intermediary or short-term care beds. The Center wanted its permit altered to reflect the reality of the services it offered. The Minister promised the Center that it would formally alter the permit once the Center moved to Montreal. The promise to issue the correct permit was reaffirmed on various occasions. Once the Center had moved to Montreal, in January 1991, it made a formal request to the Minister for a regularization of the permit. Without giving the Center an opportunity to make submissions on the issue, in October 1991, the Minister informed the Center that it would not receive the promised permit and would have to operate under the old unaltered permit. This was despite the fact that the services being offered still included short-term services funded by the government. The Center brought an action in mandamus before the Superior Court, requesting that the court order the Minister to issue the promised permit. Relying on the legitimate expectation created by the Minister's conduct, the Superior Court allowed the mandamus application in part and ordered that the Minister hear the Center's submissions before deciding whether the alteration of the permit was in the public interest. The Court of Appeal allowed the Center's appeal. Applying the doctrine of public law promissory estoppel, the Court of Appeal ordered the Minister to issue the promised permit.

Held: The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, Iacobucci, Major and Bastarache JJ.: It is unnecessary to decide whether the legitimate expectation created by the course of dealings between the Center and the Minister can result in a substantive remedy beyond the procedural protection pro-

Ministre n'agissant pas conformément à l'exercice antérieur de son pouvoir discrétionnaire — Une ordonnance de type mandamus est-elle appropriée? — Code de procédure civile, L.R.Q., ch. C-25, art. 100.

À l'origine, le Centre hospitalier Mont-Sinaï était un établissement de soins de longue durée situé à Sainte-Agathe (Québec) et destiné principalement aux patients atteints de tuberculose. Au cours des années 50, le Centre a commencé à offrir de nouveaux programmes et services et a développé une grande expertise en matière de maladies respiratoires grâce à des installations mixtes de soins de courte et de longue durée. Le gouvernement était au fait de ces nouveaux services et il a continué de financer l'ensemble des activités du Centre. En 1984, le ministère de la Santé et des Services sociaux a entrepris des négociations avec le Centre en vue d'un éventuel déménagement à Montréal. À l'époque, le Centre fonctionnait en vertu de son permis initial pour 107 lits de longue durée même s'il exploitait déjà depuis 10 ans 57 lits de longue durée et 50 lits de durée intermédiaire ou de courte durée. Il voulait que son permis soit modifié de manière à le rendre conforme à la réalité. Le ministre a promis au Centre de modifier officiellement le permis après le déménagement à Montréal. La promesse de délivrer le permis approprié a été réitérée à maintes reprises. Une fois déménagé à Montréal en janvier 1991, le Centre a présenté au ministre une demande officielle de régularisation de son permis. Sans lui donner la possibilité de se faire entendre sur la question, le ministre a, en octobre 1991, informé le Centre qu'il n'obtiendrait pas le permis promis et qu'il devrait fonctionner sous le régime de l'ancien permis non modifié, et ce, même si les services qu'il offrait comprenaient toujours des services de courte durée financés par le gouvernement. Le Centre a présenté à la Cour supérieure une requête en *mandamus*, dans laquelle il lui demandait d'ordonner au ministre de délivrer le permis promis. Invoquant l'expectative légitime engendrée par le comportement du ministre, la Cour supérieure a accueilli en partie la requête en *mandamus* et a ordonné au ministre d'entendre le Centre avant de décider s'il était dans l'intérêt public de modifier le permis. La Cour d'appel a accueilli l'appel du Centre et, appliquant la théorie de la préclusion promissoire en droit public, elle a ordonné au ministre de délivrer le permis promis.

Arrêt : Le pourvoi est rejeté.

Les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major et Bastarache : Il est inutile de déterminer si l'expectative légitime résultant des rapports entre le Centre et le ministre peut donner lieu à une réparation substantielle en plus de la protection procédurale offerte par le

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vided by the right to be heard either within an expanded doctrine of legitimate expectations or under public law promissory estoppel. The facts of this case created a situation that cannot accurately be characterized as a renewal of an existing permit under s. 139.1 of the *Act respecting health services and social services*, R.S.Q., c. S-5. The purpose of s. 139.1 is to give the Minister a discretion that is confined to situations of permit renewal. Although s. 139.1 allows the Minister to change the category, class, kind or capacity indicated on the permit, these changes are confined to the context of a renewal application and are reserved for situations where the Minister is considering alterations that would be in the public interest at his or her own initiative. Since the entire mechanism of s. 139.1 does not apply to a situation where the change is raised by the party rather than the Minister, it does not apply in the present situation. Here, the Center's request was to change its permit rather than renew it. This case falls to be decided under s. 138 of the Act which governs requests for a change to or alteration of an existing permit.

It cannot be said that the Center actually possessed the modified permit and that it was merely a matter of the wording of the permit that was at issue when it made the regularization request in January 1991. Being entitled to a permit is different than actually holding it. The Center was acting under its long-term care permit with the government's acquiescence. The government's behaviour, while not rising to the level of issuing an acquired or implied permit, did result in the exercise of the Minister's discretion. Section 138 imputes to the Minister an exercise of discretion with respect to whether granting a particular temporary or permanent permit will be in the public interest. This discretion was exercised when the Minister promised the Center that it would receive the modified permit, encouraged the move to Montreal, endorsed the financing campaign focussed on the role of the Center as a long-term and short-term care hospital, and continued to fund the short-term care services despite the mismatch between those services and the Center's permit. The specific conduct of the Minister in this case indicates that his discretion was exhausted and the Minister was bound when the Center made the request for the promised permit.

The evidence establishes that the Minister's discretion under s. 138 was exercised by the date of the Center's move to Montreal in January 1991. The decision to

droit d'être entendu, que ce soit en vertu d'une théorie élargie de l'expectative légitime ou en vertu de la préclusion promissoire en droit public. Les faits de la présente affaire sont à l'origine d'une situation qui ne saurait être qualifiée de renouvellement d'un permis existant aux termes de l'art. 139.1 de la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-5. L'article 139.1 vise à conférer un pouvoir ministériel discrétionnaire limité aux cas de renouvellement de permis. Bien que l'art. 139.1 permette au ministre de modifier la catégorie, la classe, le type ou la capacité indiqués sur le permis, ces modifications sont restreintes au contexte d'une demande de renouvellement et aux cas où le ministre examine, de sa propre initiative, la possibilité d'apporter des modifications qui seraient dans l'intérêt public. Étant donné que l'art. 139.1 ne s'applique pas intégralement aux cas où la modification est demandée par la partie en cause plutôt que par le ministre, cette disposition ne s'applique pas à la présente situation. En l'espèce, le Centre demandait la modification de son permis et non pas son renouvellement. La présente affaire doit être tranchée en fonction de l'art. 138 de la Loi qui régit les demandes de changement ou de modification d'un permis existant.

On ne peut pas dire que le Centre possédait effectivement le permis modifié et que seule la question du libellé du permis se posait lorsqu'il a présenté la demande de régularisation en janvier 1991. Avoir droit à un permis est différent du fait de le posséder. Le Centre agissait en vertu de son permis d'établissement de soins de longue durée avec l'assentiment du gouvernement. Même s'il n'équivalait pas à la délivrance d'un permis acquis ou implicite, le comportement du gouvernement constituait l'exercice du pouvoir discrétionnaire du ministre. L'article 138 attribue au ministre le pouvoir discrétionnaire de décider s'il est dans l'intérêt public de délivrer un permis temporaire ou permanent particulier. Le ministre a exercé ce pouvoir discrétionnaire en promettant au Centre de lui délivrer le permis modifié, en encourageant le déménagement à Montréal, en s'associant à la campagne de financement axée sur le rôle du Centre en tant qu'hôpital offrant à la fois des soins de longue et de courte durée et en continuant de financer les services de courte durée malgré leur non-concordance avec le permis du Centre. Le comportement particulier que le ministre a adopté en l'espèce indique qu'il a épuisé son pouvoir discrétionnaire, et le ministre était lié lorsque le Centre a demandé la délivrance du permis promis.

La preuve démontre que le pouvoir ministériel discrétionnaire conféré par l'art. 138 avait déjà été exercé au moment du déménagement du Centre à Montréal en jan-

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refuse to issue the modified permit in October 1991 was not a valid reversal of the exercise of the Minister's discretion. First, the financial reasons cited for the Minister's decision were groundless. Prior to the refusal, the issue of additional resources and funding had never been raised by ministerial officials. The evidence does not indicate that the Center would have to change any of its activities in order to satisfy the requirements of the permit it asked for, thereby requiring more funding. Second, the Minister's behaviour since the October 1991 refusal of the permit modification is inconsistent with finding that the exercise of the discretion has in fact been genuinely reversed. The evidence indicates that, in his subsequent behaviour, the Minister has acted as if the original exercise of his discretion is what was actually in operation. Since the Minister decided that it was in the public interest for the Center to operate as a long-term and short-term care facility and having continued to see things this way even after the move, the Minister must issue the 1991-1993 permit recognizing the Center's vocation as a provider of both long-term and short-term care. Where the Minister has failed to act in accordance with a prior exercise of his discretion, the criteria for the issuance of an order of mandamus are met and the Minister should be ordered to deliver the required permit. Although art. 100 of the *Code of Civil Procedure* provides that extraordinary remedies are not generally available against the Crown, this rule does not apply in circumstances where, as in this case, the Minister acts outside the limits of his competence.

Per McLachlin C.J. and Binnie J.: The appeal should be dismissed, but this conclusion should be reached by a different route. What is crucial to the Center's case is not so much the Minister's state of mind as the web of understandings and incremental agreements that came into existence with the concurrence, indeed encouragement, of successive Ministers. What began with an abstract notion of "the public interest" became, through private initiative and ministerial response, a specific embodiment of the public interest in terms of bricks and mortar, facilities and location. Not only did successive Ministers subscribe to this embodiment of the public interest, they encouraged the Center to act on it, and the Center did so.

Three hurdles must be surmounted in order for the Center to successfully obtain the requested permit: (1) the Minister's decision not to issue the modified permit must be quashed; (2) the Minister is to be fixed with the conception of the public interest he and his predecessors agreed upon with the Center between 1984 and October

vier 1991. Le refus de délivrer le permis modifié en octobre 1991 n'a pas validement infirmé l'exercice du pouvoir discrétionnaire du ministre. Premièrement, les raisons de nature financière invoquées à l'appui de la décision du ministre étaient sans fondement. Avant le refus, les fonctionnaires du ministère n'avaient jamais soulevé la question des ressources et du financement supplémentaires. La preuve n'indique pas que, pour respecter les exigences du permis demandé, le Centre devrait modifier ses activités et aurait ainsi besoin de plus d'argent. Deuxièmement, le comportement adopté par le ministre depuis qu'il a refusé la modification du permis en octobre 1991 ne permet pas de conclure qu'il a vraiment infirmé l'exercice de son pouvoir discrétionnaire. La preuve indique que le ministre a agi par la suite conformément à l'exercice initial de son pouvoir discrétionnaire. Étant donné qu'il a décidé qu'il était dans l'intérêt public que le Centre offre des soins de longue et de courte durée et qu'il a continué d'avoir cette perception même après le déménagement, le ministre doit reconnaître la vocation du Centre en tant qu'établissement de soins de longue et de courte durée en délivrant le permis pour la période 1991-1993. Lorsque le ministre n'agit pas conformément à l'exercice antérieur de son pouvoir discrétionnaire, les conditions de délivrance d'une ordonnance de *mandamus* sont remplies et il y a lieu de lui ordonner de délivrer le permis sollicité. Même si l'art. 100 du *Code de procédure civile* prévoit qu'en général il n'y a lieu à aucun recours extraordinaire contre l'État, cette règle ne s'applique pas dans les cas où, comme en l'espèce, un ministre outrepasse les limites de sa compétence.

Le juge en chef McLachlin et le juge Binnie : Il y a lieu de rejeter le pourvoi, mais à l'issue d'un raisonnement différent. Ce qui est décisif pour la cause du Centre n'est pas tant l'état d'esprit du ministre que la série d'accords et d'ententes progressives conclus avec l'appui, voire l'encouragement, des ministres qui se sont succédé. Ce qui a commencé par une notion abstraite de « l'intérêt public » est devenu, au fil d'initiatives privées et de réponses ministérielles, une image précise de l'intérêt public représentée par la brique, le mortier, les installations et l'emplacement. Non seulement les ministres qui se sont succédé ont-ils souscrit à cette représentation de l'intérêt public, mais encore ils ont encouragé le Centre à agir en conséquence, ce que ce dernier a fait.

Trois obstacles doivent être surmontés pour que le Centre réussisse à obtenir le permis demandé : (1) la décision du ministre de ne pas délivrer le permis modifié doit être annulée; (2) le ministre doit s'en tenir à la conception de l'intérêt public que ses prédécesseurs et lui-même partageaient avec le Centre entre 1984 et octo-

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1991; and (3) based on that conception of the public interest, mandamus must be available to enforce the mandatory duty under s. 138 of the *Act respecting health services and social services*, R.S.Q., c. S-5, to issue the 1991-1993 modified permit. The Minister's power under s. 138 is framed as a broad policy discretion to be exercised "in the public interest". This discretion, however broadly framed, is not unfettered.

The Minister's failure to extend even minimal procedural fairness to the Center should result in the setting aside of his decision to refuse the application for a modified permit. The Center had no notice that the Minister was about to reverse his position, or the reasons for reversal, and no opportunity to present argument as to why the Minister's earlier and long-standing view that the public interest favoured a modified Center should prevail.

The availability and content of procedural fairness are generally driven by the nature of the applicant's interest and the nature of the power exercised by the public authority in relation to that interest. The doctrine of legitimate expectations, on the other hand, looks to the conduct of the public authority in the exercise of that power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified. The expectations must not conflict with the public authority's statutory remit. Although the doctrine of legitimate expectations is limited to procedural relief, it must be acknowledged that in some cases it is difficult to distinguish the procedural from the substantive. This distinction should be made on the basis of the underlying principle that broad public policy is preeminently for the Minister to determine, not the courts. On the facts of this case, the doctrine of legitimate expectations does not add to the relief otherwise available under the ordinary rules of procedural fairness.

Estoppel may be available to give substantive relief against a public authority, including a Minister, in narrow circumstances. The requirements of estoppel go well beyond the requirements of the doctrine of legitimate expectations. All the elements of private law promissory estoppel are present in this case. However, public law promissory estoppel requires an additional appreciation of the legislative intent embodied in the

bre 1991; (3) compte tenu de cette conception de l'intérêt public, un *mandamus* doit pouvoir être délivré pour faire exécuter l'obligation qu'impose l'art. 138 de la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-5, de délivrer le permis modifié pour la période 1991-1993. Le pouvoir conféré au ministre par l'art. 138 est libellé comme un large pouvoir discrétionnaire, en matière de politique générale, qui doit être exercé dans « l'intérêt public ». Cependant, ce pouvoir discrétionnaire n'est pas absolu, quelque général que puisse être son libellé.

Vu que le ministre n'a rien fait pour que le Centre bénéficie de la moindre équité procédurale, il y a lieu d'annuler sa décision de rejeter la demande de permis modifié. Le Centre n'a été avisé ni du fait que le ministre était sur le point de revenir sur sa position ni des motifs de ce revirement, et il n'a pas eu non plus l'occasion d'expliquer pourquoi devait prévaloir l'opinion qu'avait eue pendant longtemps le ministre, selon laquelle il était dans l'intérêt public que le Centre subisse des changements.

La possibilité d'invoquer l'équité procédurale et le contenu de cette forme d'équité dépendent généralement de la nature de l'intérêt du demandeur et de la nature du pouvoir exercé par l'autorité publique relativement à cet intérêt. Par contre, la théorie de l'expectative légitime s'attache à la conduite de l'autorité publique dans l'exercice de ce pouvoir et notamment aux pratiques établies, à la conduite ou aux affirmations qui peuvent être qualifiées de claires, nettes et explicites. Les expectatives ne doivent pas entrer en conflit avec le mandat légal de l'autorité publique. Bien que la théorie de l'expectative légitime soit restreinte à la réparation procédurale, il faut reconnaître qu'il est parfois difficile de différencier ce qui est de nature procédurale et ce qui est de nature substantielle. Cette distinction devrait être fondée sur le principe sous-jacent selon lequel l'établissement des politiques générales d'intérêt public relève d'abord et avant tout du ministre et non pas des tribunaux. D'après les faits de la présente affaire, la théorie de l'expectative légitime n'ajoute rien à la réparation par ailleurs disponible en vertu des règles ordinaires de l'équité procédurale.

Dans certains cas particuliers, la préclusion peut être invoquée pour obliger une autorité publique, y compris un ministre, à accorder une réparation substantielle. Les conditions d'application de la préclusion vont bien au-delà de celles de la théorie de l'expectative légitime. Tous les éléments de la préclusion promissoire en droit privé sont présents en l'espèce. Toutefois, la préclusion promissoire en droit public exige, en plus, que l'on

power whose exercise is sought to be estopped. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text. The wording of the particular statutory power in question and the status of who wields it is important. Section 138 mandates the Minister in broad terms to act in the public interest, and if the public interest as he defines it is opposed to the award of the modified permit, then a court should not estop the Minister from doing what he considers his duty.

Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally be reviewable only on a standard of patent unreasonableness. The broad regulatory purpose of the permit in the context of the legislation designed to regulate the provision of health services "in the public interest" favours a high degree of deference as does the expertise of the Minister and his advisors, and the Minister's position in the upper echelon of decision makers under statutory and prerogative powers. The exercise of the power turns on the Minister's appreciation of the public interest, which is a function of public policy in its fullest sense. In this case, the Minister's decision to refuse the modified permit was patently unreasonable in terms of the public interest as he and his predecessors had defined it over a period of seven years of consultation, encouragement and assurances to the Center, and in his total lack of regard for the implications for the Center of suddenly reversing his position and breaking his promises. While the Court ought to be and would be sensitive to any serious policy reason offered by the Minister for a redefinition of the public interest, no such policy reason was articulated in the Ministers' decision.

In the result, in this case, there is a patently unreasonable decision reached by a procedure that was demonstrably unfair. The only option available to the Minister that is not patently unreasonable is to issue the 1991-1993 modified permit based on the conception of the public interest espoused by the Minister and his predecessors up to that time. Once the present situation is regularized by the issuance of the 1991-1993 modified permit, the current status and entitlement of the Center can

détermine l'intention que le législateur avait en conférant le pouvoir dont on cherche à empêcher l'exercice. Des circonstances qui pourraient par ailleurs donner lieu à la préclusion peuvent devoir céder le pas à un intérêt public prépondérant exprimé dans le texte législatif. Le libellé du pouvoir particulier conféré par la loi et le statut de la personne qui l'exerce sont des éléments importants. Le ministre est mandaté en termes larges par l'art. 138 pour agir dans l'intérêt public, et s'il juge qu'il est contraire à l'intérêt public de délivrer le permis modifié, le tribunal ne doit pas l'empêcher de faire ce qu'il considère être son devoir.

Le contrôle des décisions que des ministres prennent en exerçant des pouvoirs discrétionnaires en contexte administratif ne doit généralement pouvoir être fait que selon la norme du caractère manifestement déraisonnable. Dans le contexte de la mesure législative destinée à régir la prestation de services de santé conformément à « l'intérêt public », l'objet général du permis favorise l'adoption d'une norme de retenue élevée, tout comme le fait l'expertise du ministre et de ses conseillers, ainsi que la position élevée que ce dernier occupe dans la hiérarchie des décideurs qui exercent une prérogative ou un pouvoir conféré par la loi. L'exercice du pouvoir dépend de ce que le ministre considère être dans l'intérêt public, ce qui est un excellent exemple de mesure touchant l'intérêt public. En l'espèce, la décision du ministre de refuser le permis modifié est manifestement déraisonnable en raison de la façon dont celui-ci et ses prédécesseurs ont défini l'intérêt public pendant les sept années au cours desquelles ils ont consulté et encouragé le Centre et lui ont donné des assurances, et en raison de l'omission totale du ministre de prendre en considération les conséquences que son revirement soudain d'opinion et le manquement à ses promesses entraîneraient pour le Centre. Alors que notre Cour devrait tenir compte — et tiendrait effectivement compte — de tout motif de politique sérieux exposé par le ministre pour justifier une nouvelle définition de l'intérêt public, la décision du ministre ne fait état d'aucun motif de cette nature.

En définitive, une décision manifestement déraisonnable a ici été prise d'une façon visiblement inéquitable. Le ministre n'a qu'un seul choix qui ne soit pas manifestement déraisonnable et ce choix consiste à délivrer le permis modifié pour la période 1991-1993 conformément à la conception de l'intérêt public que lui-même et ses prédécesseurs avaient adoptée jusqu'à cette époque. Une fois que la situation actuelle aura été régularisée par la délivrance du permis modifié pour la période 1991-1993, le ministre actuel pourra alors évaluer, à la lumière de la loi et des circonstances actuelles, le statut

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thereafter be assessed by the present Minister on the basis of the present law and the present circumstances.

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de l'établissement intimé et ce à quoi il a maintenant droit.

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Citée par le juge Bastarache

Distinction d'avec l'arrêt : *Comeau's Sea Foods Ltd. c. Canada (Ministre des Pêches et des Océans)*, [1997] 1 R.C.S. 12; **arrêts mentionnés :** *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *S.T.C. c. Canada (Procureur général)*, [1989] 1 C.F. 643; *Apotex Inc. c. Canada (Procureur général)*, [1994] 1 C.F. 742, conf. par [1994] 3 R.C.S. 1100; *Morin c. Driscoll College Inc.*, [1979] R.P. 198; *Procureur général de la province de Québec c. Laurendeau*, [1985] R.D.J. 513; *Charles Bentley Nursing Home Inc. c. Ministre des Affaires sociales*, [1978] C.S. 30.

Citée par le juge Binnie

Arrêts mentionnés : *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24; *Nenn c. La Reine*, [1981] 1 R.C.S. 631; *Canada (Procureur général) c. Purcell*, [1996] 1 C.F. 644; *Canadian Superior Oil Ltd. c. Paddon-Hughes Development Co.*, [1970] R.C.S. 932; *Gilbert Steel Ltd. c. University Construction Ltd.* (1976), 12 O.R. (2d) 19; *Hill c. Nouvelle-Écosse (Procureur général)*, [1997] 1 R.C.S. 69; *Cleveland Board of Education c. Loudermill*, 470 U.S. 532 (1985); *Perry c. Sindermann*, 408 U.S. 593 (1972); *Mathews c. Eldridge*, 424 U.S. 319 (1976); *Barry c. Barchi*, 443 U.S. 55 (1979); *Roncarelli c. Duplessis*, [1959] R.C.S. 121; *Padfield c. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *Bendahmane c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1989] 3 C.F. 16; *Sous-ministre du Revenu du Québec c. Transport Lessard (1976) Ltée*, [1985] R.D.J. 502; *Aurchem Exploration Ltd. c. Canada* (1992), 91 D.L.R. (4th) 710; *Apotex Inc c. Canada (Procureur général)*, [1994] 3 R.C.S. 1100, conf. [1994] 1 C.F. 742; *Re Webb and Ontario Housing Corp.* (1978), 22 O.R. (2d) 257; *Hutfield c. Fort Saskatchewan General Hospital District No. 98 Board* (1986), 49 Alta. L.R. (2d) 256, conf. par (1988), 52 D.L.R. (4th) 562; *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S.

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2 F.C. 68; *Bloomfield v. Saskatchewan (Minister of Health)*, [1986] S.J. No. 675 (QL); *R. v. Secretary of State for the Home Department, ex parte Khan*, [1984] 1 W.L.R. 1337; *R. v. Secretary of State for the Home Department, ex parte Ruddock*, [1987] 2 All E.R. 518; *R. v. Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd.*, [1995] 2 All E.R. 714; *R. v. North and East Devon Health Authority, ex parte Coughlan*, [2000] 3 All E.R. 850; *Webb v. Ireland*, [1988] I.R. 353; *Attorney-General (NSW) v. Quin* (1990), 64 A.L.J.R. 327; *Administrator, Transvaal v. Traub*, 1989 (4) SA 731; *R. v. Inland Revenue Commissioners, ex parte M.F.K. Underwriting Agents Ltd.*, [1990] 1 W.L.R. 1545; *Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs* (1990), 19 A.L.D. 577; *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995), 183 C.L.R. 273; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264; *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1996] 3 F.C. 259; *Bawolak v. Exroy Resources Ltd.*, [1993] R.D.J. 192; *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12; *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d) 49; *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.*, [1994] 1 S.C.R. 80; *Robertson v. Minister of Pensions*, [1949] 1 K.B. 227; *Lever Finance Ltd. v. Westminster (City) London Borough Council*, [1971] 1 Q.B. 222; *North Western Gas Board v. Manchester Corp.*, [1963] 3 All E.R. 442; *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973); *United States v. Asmar*, 827 F.2d 907 (1987); *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50; *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211; *The King v. Dominion of Canada Postage Stamp Vending Co.*, [1930] S.C.R. 500; *Granger v. Canada (Canada Employment and Immigration Commission)*, [1989] 1 S.C.R. 141, aff'g [1986] 3 F.C. 70; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223; *MacMillan Bloedel Ltd. v. Minister of Forests of British Columbia*, [1984] 3 W.W.R. 270; *Lazarov v. Secretary of State of Canada*, [1973] F.C. 927; *Re Stora Kopparbergs Bergslags Aktiebolag and Nova Scotia Woodlot Owners' Association* (1975), 61 D.L.R. (3d) 97; *Canadian National Railway Co. v. Fraser-Fort George (Regional District)* (1996), 140 D.L.R. (4th) 23; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; *Re Sheehan and*

653; *Gingras c. Canada*, [1990] 2 C.F. 68; *Bloomfield c. Saskatchewan (Minister of Health)*, [1986] S.J. No. 675 (QL); *R. c. Secretary of State for the Home Department, ex parte Khan*, [1984] 1 W.L.R. 1337; *R. c. Secretary of State for the Home Department, ex parte Ruddock*, [1987] 2 All E.R. 518; *R. c. Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd.*, [1995] 2 All E.R. 714; *R. c. North and East Devon Health Authority, ex parte Coughlan*, [2000] 3 All E.R. 850; *Webb c. Ireland*, [1988] I.R. 353; *Attorney-General (NSW) c. Quin* (1990), 64 A.L.J.R. 327; *Administrator, Transvaal c. Traub*, 1989 (4) SA 731; *R. c. Inland Revenue Commissioners, ex parte M.F.K. Underwriting Agents Ltd.*, [1990] 1 W.L.R. 1545; *Haoucher c. Minister for Immigration, Local Government and Ethnic Affairs* (1990), 19 A.L.D. 577; *Minister of State for Immigration and Ethnic Affairs c. Teoh* (1995), 183 C.L.R. 273; *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602; *Apotex Inc. c. Canada (Procureur général)*, [2000] 4 C.F. 264; *Canada (Procureur général) c. Canada (Commissaire de l'enquête sur l'approvisionnement en sang au Canada)*, [1996] 3 C.F. 259; *Bawolak c. Exroy Resources Ltd.*, [1993] R.D.J. 192; *Comeau's Sea Foods Ltd. c. Canada (Ministre des Pêches et des Océans)*, [1997] 1 R.C.S. 12; *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d) 49; *Commission hydro-électrique de Kenora (Ville) c. Vacationland Dairy Co-operative Ltd.*, [1994] 1 R.C.S. 80; *Robertson c. Minister of Pensions*, [1949] 1 K.B. 227; *Lever Finance Ltd. c. Westminster (City) London Borough Council*, [1971] 1 Q.B. 222; *North Western Gas Board c. Manchester Corp.*, [1963] 3 All E.R. 442; *Office of Personnel Management c. Richmond*, 496 U.S. 414 (1990); *United States c. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973); *United States c. Asmar*, 827 F.2d 907 (1987); *Maracle c. Travellers Indemnity Co. of Canada*, [1991] 2 R.C.S. 50; *St. Ann's Island Shooting and Fishing Club Ltd. c. The King*, [1950] R.C.S. 211; *The King c. Dominion of Canada Postage Stamp Vending Co.*, [1930] R.C.S. 500; *Granger c. Canada (Commission de l'Emploi et de l'Immigration du Canada)*, [1989] 1 R.C.S. 141, conf. [1986] 3 C.F. 70; *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corp.*, [1948] 1 K.B. 223; *MacMillan Bloedel Ltd. c. Minister of Forests of British Columbia*, [1984] 3 W.W.R. 270; *Lazarov c. Secrétaire d'État du Canada*, [1973] C.F. 927; *Re Stora Kopparbergs Bergslags Aktiebolag and Nova Scotia Woodlot Owners' Association* (1975), 61 D.L.R. (3d) 97; *Canadian National Railway Co. c. Fraser-Fort George (Regional District)* (1996), 140 D.L.R. (4th) 23; *Maple Lodge Farms*

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APPEAL from a judgment of the Quebec Court of Appeal, [1998] R.J.Q. 2707, 9 Admin. L.R. (3d) 161, [1998] Q.J. No. 2982 (QL), affirming a judgment of the Superior Court, J.E. 92-1815. Appeal dismissed.

Patrice Claude, *Anne-Marie Brunet* and *Jean-François Jobin*, for the appellant.

Gilles Poulin and *Elliot L. Bier*, for the respondents Mount Sinai Hospital Center and Elliot L. Bier et al.

No one appeared for the respondent Maimonides Hospital Geriatric Centre.

The reasons of McLachlin C.J. and Binnie J. were delivered by

1 BINNIE J. — I agree with my colleague Justice Bastarache that this appeal should be dismissed. I also agree with his rejection of the respondents' claim that they already possessed the modified permit at the time of the Mount Sinai Hospital Center's move from Sainte-Agathe to Montreal and that all that remained was to bring the wording of the permit into line with the legal reality. As my colleague points out in para. 97, "being entitled to the permit is different than actually holding it". In government, nothing is done until it is done.

2 My colleague, Bastarache J., puts the focus on the Minister of Health and Social Services and concludes that the Minister had in fact exercised his discretion under s. 138 of the *Act respecting*

Roy, Claudine. *La théorie de l'expectative légitime en droit administratif.* Cowansville, Qué. : Yvon Blais, 1993.
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POURVOI contre un arrêt de la Cour d'appel du Québec, [1998] R.J.Q. 2707, 9 Admin. L.R. (3d) 161, [1998] A.Q. nº 2982 (QL), confirmant un jugement de la Cour supérieure, J.E. 92-1815. Pourvoi rejeté.

Patrice Claude, *Anne-Marie Brunet* et *Jean-François Jobin*, pour l'appelant.

Gilles Poulin et *Elliot L. Bier*, pour les intimés le Centre hospitalier Mont-Sinaï et Elliot L. Bier et autres.

Personne n'a comparu pour l'intimé le Centre hospitalier gériatrique Maïmonides.

Version française des motifs du juge en chef McLachlin et du juge Binnie rendus par

LE JUGE BINNIE — Je suis d'accord avec mon collègue le juge Bastarache pour dire qu'il y a lieu de rejeter le présent pourvoi. Je souscris également à son rejet de l'argument des intimés, selon lequel ils possédaient déjà le permis modifié au moment du déménagement du Centre hospitalier Mont-Sinaï de Sainte-Agathe à Montréal et que tout ce qu'il restait à faire était d'en rendre le libellé conforme à la réalité juridique. Comme mon collègue le souligne au par. 97, « avoir droit au permis est différent du fait de le posséder ». Au gouvernement, une mesure ne se concrétise qu'au moment où elle est prise.

Mon collègue le juge Bastarache met l'accent sur le ministre de la Santé et des Services sociaux et conclut que celui-ci avait effectivement exercé son pouvoir discrétionnaire en vertu de l'art. 138

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health services and social services, R.S.Q., c. S-5 (now s. 441 of the *Act respecting health services and social services*, R.S.Q., c. S-4.2), culminating in the Center's move to Montreal in January 1991 (para. 105). The various actions and communications by the Minister with the respondents are considered as evidence of how and when the discretion was exercised (para. 101). The issue, on this view, is whether the original exercise of the s. 138 discretion was validly reversed in the October 3, 1991 decision to deny the modified permit (para. 107).

de la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-5 (maintenant l'art. 441 de la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-4.2), ce qui avait abouti au déménagement du Centre à Montréal en janvier 1991 (par. 105). Selon lui, les différentes mesures que le ministre a prises à l'égard des intimés et les communications qu'il a eues avec eux témoignent de la façon dont le pouvoir discrétionnaire a été exercé et du moment où il l'a été (par. 101). Dans cette optique, il s'agit de savoir si l'exercice initial du pouvoir discrétionnaire conféré par l'art. 138 a été validement infirmé dans la décision du 3 octobre 1991 de refuser le permis modifié (par. 107).

There is, of course, a distinction between the making of a decision and the documentation of it, but to apply that distinction here raises serious practical problems. When, precisely, did the Minister cross the boundary between deliberation and decision? How is the citizen and, importantly, how is the Minister to know when his or her decision-making power has been exercised? Is the allegation of an exercised power sufficient to expose the Minister to pre-trial discovery on his state of mind? How much mental commitment by the Minister will be held to be enough to lock in a "decision"?

3 Naturellement, il existe une distinction entre prendre une décision et en établir l'existence au moyen de documents, mais cette distinction pose en l'espèce de graves problèmes pratiques. À quel moment exactement le ministre est-il passé de la délibération à une décision? Comment le citoyen peut-il savoir que le ministre a exercé son pouvoir décisionnel, et ce qui est important, comment le ministre peut-il savoir qu'il a exercé ce pouvoir? L'allégation selon laquelle il y a eu exercice de pouvoir suffit-elle pour exposer le ministre à un interrogatoire préalable sur son état d'esprit? Dans quelle mesure le ministre doit-il s'être engagé moralement à agir pour que l'on puisse considérer qu'il a pris une « décision »?

I prefer the approach of the Quebec Court of Appeal which rested its decision on an analysis of the relationship between the respondents and the Minister. The communications from the Minister are not simply evidence of the state of the Minister's mind, but are the source of the respondents' entitlement. In other words, if the successive Ministers had gone through the same cogitations and deliberations as they did between 1984 and 1991, but kept their thoughts to themselves, I think it unlikely the respondents would succeed in obtaining the order they seek.

4 Je préfère l'approche de la Cour d'appel du Québec qui a fondé sa décision sur une analyse des rapports entre les intimés et le ministre. Les communications du ministre ne font pas que témoigner de l'état d'esprit de ce dernier; elles sont aussi à l'origine du droit des intimés. En d'autres termes, j'estime que les intimés n'obtiendraient probablement pas l'ordonnance qu'ils sollicitent si les ministres qui se sont succédé s'étaient livrés, sans exprimer leur pensée, aux cogitations et aux délibérations auxquelles ils se sont livrés entre 1984 et 1991.

What is crucial to the respondents' case is that successive Ministers not only communicated their view that the Center's change of operations to include short-term care was in the public interest (in terms which amounted to a promise that the

5 Ce qui est décisif pour la cause des intimés est non seulement le fait que les ministres qui se sont succédé ont exprimé l'opinion que l'ajout des soins de courte durée aux services déjà offerts par le Centre était dans l'intérêt public (et ce, en des

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modified permit would be issued) but the respondents relied on those representations and communications. Inexplicably, once the respondents applied for the modified permit as promised, the ministerial wind shifted without notice. The Minister simply announced that short-term beds must be coupled with enhanced diagnostic and treatment facilities which the respondents had not proposed and which the Minister, despite his insistence, was not prepared to fund. This is what the Minister wrote:

[TRANSLATION] The excellence achieved by this hospital in so-called intermediate care of respiratory illnesses was developed within the framework of a permit for 107 long-term beds. If 50 of those beds were now reclassified to become short-term beds, as you are asking, it would be necessary to strengthen the establishment's capacity to deal with more acute and more complex clinical problems than at present. It would be necessary for that purpose to grant it additional resources, something which the Government is not able to do.

The review of the case conducted by my Department concludes that Mount Sinai Hospital's permit should remain what it is, namely 107 long-term beds, an opinion which I share.

6 It is evident on the face of the letter that no weight whatsoever was placed by the Minister on the implications for the respondents of the broken promises.

I. The Legal Issues

7 The wording of s. 138 of the old Act is crucial:

138. Every person applying for a permit must send his application to the Minister in accordance with the regulations.

The Minister shall issue a permanent permit or a temporary permit if he considers that it is in the public interest. [Emphasis added.]

Accordingly, *if* the Minister forms the opinion, as a matter of policy, that the public interest would be served by the modified facility, then he *shall* (mandatory) issue the permit. There are thus three stages to the respondents' challenge: (1) the October 3, 1991 decision must

termes équivalant à une promesse de délivrer le permis modifié), mais encore le fait que les intimés se sont fiés à ces déclarations et à ces communications. Fait inexplicable, lorsque ces derniers ont demandé le permis modifié qui leur avait été promis, le vent a soudainement tourné au ministère. Le ministre a simplement exigé que les lits destinés aux soins de courte durée soient combinés à des installations de diagnostic et de traitement améliorées, une mesure que les intimés n'avaient pas proposée et que, malgré son insistance, le ministre n'était pas prêt à financer. Voici ce que le ministre a écrit :

L'excellence développée par cet hôpital dans les soins dits intermédiaires des maladies respiratoires l'a été dans le cadre d'un permis de 107 lits de longue durée. Si, aujourd'hui, 50 de ces lits étaient reclassifiés pour devenir des lits de courte durée, tel que vous le demandez, il faudrait renforcer la capacité de l'établissement pour faire face à des problèmes cliniques plus aigus et plus complexes que présentement. Il faudrait, à cette fin, lui accorder des ressources additionnelles, ce que le Gouvernement n'est pas en mesure de faire.

L'analyse du dossier effectuée par mon ministère conclut que le permis de l'hôpital Mont-Sinaï doit demeurer ce qu'il est, soit 107 lits de longue durée, avis que je partage.

Il ressort clairement de cette lettre que le ministre n'a accordé aucune importance aux conséquences du manquement à ses promesses pour les intimés.

I. Les questions de droit

La formulation de l'art. 138 de l'ancienne loi est déterminante :

138. Toute personne qui sollicite un permis doit transmettre sa demande au ministre conformément aux règlements.

Le ministre délivre un permis permanent ou un permis temporaire s'il estime que l'intérêt public le justifie. [Je souligne.]

Par conséquent, *si* le ministre est d'avis, en principe, que l'intérêt public serait servi par l'établissement modifié, il *délivre* alors (obligatoirement) le permis. La contestation des intimés comporte donc trois étapes : (1) la décision du 3 octobre 1991 doit

ber 3, 1991 decision is to be quashed; (2) the Minister is to be fixed with the conception of the public interest he and his predecessors agreed upon with the respondents between 1984 and October 2, 1991; and (3) based on that conception of the public interest, *mandamus* is to issue to enforce the mandatory duty under s. 138 ("shall") to issue the modified permit.

This case is not the simple scenario of an application for a permit followed by a refusal "in the public interest". From 1984 onwards the respondents worked closely with Ministry regulators. A web of understandings and incremental agreements came into existence with the concurrence indeed encouragement of successive Ministers. What perhaps began with an abstract notion of "the public interest" became, through private initiative and ministerial response, a specific embodiment of the public interest in terms of bricks and mortar, facilities and location. Not only did successive Ministers subscribe to this embodiment of the public interest, they encouraged the respondents to act on it. If this were a private law situation there would likely be a breach of contract. This is not, of course, a private law situation.

II. The Case for the Appellant Minister

Counsel for the Minister emphasized that s. 138 clearly shows a legislative intent that the public interest is to be determined by the Minister, not by the courts. The validity of the legislation is unchallenged. The Minister was entirely familiar with the Center and over the course of seven years had heard whatever the respondents had to say. Ministerial decisions in such circumstances command deference: *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24; *Nenn v. The Queen*, [1981] 1 S.C.R. 631; *Canada (Attorney General) v. Purcell*, [1996] 1 F.C. 644 (C.A.). The Minister says that neither the doctrine of legitimate expectations nor estoppel operates to entitle the respondents to substantive relief, i.e., the modified permit. Estoppel can only be used as a shield, not a sword: *Cana-*

être annulée; (2) le ministre doit s'en tenir à la conception de l'intérêt public que ses prédécesseurs et lui-même partageaient avec les intimés entre 1984 et le 2 octobre 1991; (3) compte tenu de cette conception de l'intérêt public, il faut délivrer un *mandamus* pour faire exécuter l'obligation qu'impose l'art. 138 de délivrer le permis modifié.

8 Il n'est pas question en l'espèce d'une simple demande de permis suivie d'un refus justifié par « l'intérêt public ». Depuis 1984, les intimés travaillent en étroite collaboration avec les fonctionnaires du ministère responsables de la réglementation. Une série d'accords et d'ententes progressives ont été conclus avec l'appui, voire l'encouragement, des ministres qui se sont succédé. Ce qui a peut-être commencé par une notion abstraite de « l'intérêt public » est devenu, au fil d'initiatives privées et de réponses ministérielles, une image précise de l'intérêt public représentée par la brique, le mortier, les installations et l'emplacement. Non seulement les ministres qui se sont succédé ont-ils souscrit à cette représentation de l'intérêt public, mais encore ils ont encouragé les intimés à agir en conséquence. S'il s'agissait d'une situation relevant du droit privé, il y aurait probablement inexécution de contrat. De toute évidence, nous ne sommes pas en présence d'une telle situation.

II. L'argumentation du ministre appelant

9 L'avocat du ministre a souligné que l'art. 138 démontre clairement que le législateur a voulu que ce soit le ministre, et non pas les tribunaux, qui détermine ce qui est dans l'intérêt public. La validité de ce texte législatif n'est pas contestée. Le ministre connaissait très bien le Centre et, pendant sept ans, il avait entendu tout ce que les intimés avaient à dire. En pareil cas, une décision ministérielle commande la retenue : *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24; *Nenn c. La Reine*, [1981] 1 R.C.S. 631; *Canada (Procureur général) c. Purcell*, [1996] 1 C.F. 644 (C.A.). Le ministre prétend que ni la théorie de l'expectative légitime ni la préclusion (*estoppel*) ne donnent aux intimés le droit à une réparation substantielle, c'est-à-dire le permis modifié. La préclusion ne peut être utili-

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dian Superior Oil Ltd. v. Paddon-Hughes Development Co., [1970] S.C.R. 932, at pp. 937-39; *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 12 O.R. (2d) 19 (C.A.), at p. 23.

III. The Case for the Respondents

10 The respondents do not dispute the general principle of deference to ministerial discretion. They rely, however, on the web of relationships developed in the seven years preceding the October 3, 1991 rejection. Their legal position may be rationalized in several different ways:

(1) They had a *right* to the modified permit to "regularize" the hospital bed situation brought about by the mutual agreement with the Minister. The Court should consider as done that which *ought* to have been done;

(2) *Procedural fairness* dictated that the application for a modified permit should have been granted;

(3) While there may have been no *right* as such to a modified permit, the respondents had a reasonable and legitimate *expectation* that the modified permit would issue. The Minister had so promised, it was within his statutory power to keep his promise, and there was no overriding public interest that might justify the promise being broken;

(4) The Minister was *estopped* by his representations from insisting on an unfettered discretion in October 1991 to grant or withhold the modified permit. Too much water had gone under the bridge. The representations, and conduct of successive Ministers from 1984 onwards, led the respondents to modify their operations to include short-term care, launch a fundraising campaign and move to a new facility in Montreal. The Minister could not belatedly escape this history on October 3, 1991. The discretion which he otherwise might have possessed was fettered;

sée que comme un bouclier et non comme une épée : *Canadian Superior Oil Ltd. c. Paddon-Hughes Development Co.*, [1970] R.C.S. 932, p. 937-939; *Gilbert Steel Ltd. c. University Construction Ltd.* (1976), 12 O.R. (2d) 19 (C.A.), p. 23.

III. L'argumentation des intimés

Les intimés ne contestent pas le principe général de la retenue envers le pouvoir discrétionnaire du ministre. Ils invoquent cependant l'ensemble des rapports développés au cours des sept années qui ont précédé le rejet du 3 octobre 1991. Leur position sur le plan juridique peut s'expliquer de plusieurs façons :

(1) Ils avaient *droit* au permis modifié pour « régulariser » la situation de l'hôpital sur le plan des lits dont il disposait à la suite de l'entente mutuelle avec le ministre. La Cour doit considérer comme accompli ce qui aurait *dû* l'être.

(2) L'*équité procédurale* exigeait que la demande de permis modifié soit accueillie.

(3) Même s'il se peut qu'il n'y ait eu aucun *droit* comme tel à un permis modifié, les intimés *s'attendaient* raisonnablement et légitimement à ce qu'un tel permis soit délivré. Le ministre l'avait promis, la loi l'habilitait à tenir sa promesse et aucun intérêt public prépondérant n'était susceptible de justifier le manquement à cette promesse.

(4) Les affirmations du ministre l'*empêchaient* de soutenir qu'il avait, en octobre 1991, un pouvoir discrétionnaire absolu d'accorder ou de refuser le permis modifié. Trop d'eau avait coulé sous les ponts. Par leurs affirmations et leur comportement, les ministres qui se sont succédé depuis 1984 ont amené les intimés à modifier leurs activités en ajoutant des soins de courte durée, à lancer une campagne de financement et à déménager dans de nouvelles installations à Montréal. Le ministre ne pouvait pas, en fin de compte, échapper à ces faits le 3 octobre 1991. Il y avait entrave au pouvoir discrétionnaire qu'il aurait par ailleurs détenu.

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(5) The ministerial decision should be set aside on one ground of *abuse of discretion.* The dealings of successive Ministers with the respondents between 1984 and 1991 reflected a considered view of the public interest which was repudiated on October 3, 1991 without any regard for a very relevant consideration, namely the implications of that decision for the respondents. If the Minister were to decide consistently with the view of the public interest he had previously espoused, the modified permit would issue. No plausible reason was given for the breach of the promise of a modified permit. The decision of October 3, 1991 was, in the circumstances, patently unreasonable.

(5) Il y a lieu d'annuler la décision du ministre pour cause d'*abus de pouvoir discrétionnaire*. Les rapports que les ministres qui se sont succédé ont eus avec les intimés entre 1984 et 1991 reflétaient une conception réfléchie de l'intérêt public qui a été rejetée le 3 octobre 1991 sans qu'un facteur très pertinent soit pris en considération, à savoir les conséquences de cette décision pour les intimés. Si le ministre devait prendre une décision conforme à sa conception antérieure de l'intérêt public, le permis modifié serait délivré. Aucun motif plausible n'a été donné à l'appui du manquement à la promesse de délivrer un permis modifié. Dans les circonstances, la décision du 3 octobre 1991 était manifestement déraisonnable.

It will be noted that most of these claims would lead, if anywhere, to procedural relief. That is not, as stated, the respondents' ultimate objective. While in some cases a litigant relies on a substantive claim to justify procedural protection, in this case the respondents rely to some extent on the alleged violation of their procedural rights to nourish the claim to a substantive remedy.

11 On notera que la plupart de ces arguments ne pourraient mener qu'à une réparation procédurale s'ils étaient retenus. Tel n'est pas, comme nous l'avons vu, l'objectif ultime des intimés. Bien que, dans certains cas, une partie puisse invoquer un droit substantiel pour justifier une protection procédurale, les intimés en l'espèce invoquent, dans une certaine mesure, une prétendue violation de leurs droits procéduraux pour solliciter une réparation substantielle.

I will address each of these legal arguments in turn.

12 J'aborderai chacun de ces arguments juridiques successivement.

A. *Do the Respondents Possess an Acquired Right to a Modified Permit?*

A. *Les intimés ont-ils le droit acquis d'obtenir un permis modifié?*

In oral argument it was suggested that perhaps the respondents could bring themselves within the principle applied in *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69. In that case a farm had been bifurcated by a new provincial highway. The farmer claimed that when expropriating his land for that purpose 27 years earlier, the province had included as part of the compensation package an equitable easement permitting him to move cattle and equipment across the highway from one side of his farm to the other. Both the farmer and the province had clearly acted on that basis for the previous 27 years. The province eventually repudiated the understanding contending that it had never acknowledged the interest in the land *in writing* as

13 On a prétendu en plaidoirie que les intimés pouvaient être en mesure d'invoquer le principe appliqué dans *Hill c. Nouvelle-Écosse (Procureur général)*, [1997] 1 R.C.S. 69. Dans cette affaire, une nouvelle route provinciale séparait une ferme en deux. Le fermier prétendait que la province lui avait notamment accordé, à titre de contrepartie pour l'expropriation de ses terres 27 ans auparavant, une servitude en *equity* l'autorisant à traverser la route avec son bétail et sa machinerie pour se rendre d'un bout à l'autre de sa ferme. Le fermier et la province s'étaient manifestement comporté en ce sens au cours des 27 années précédentes. La province a par la suite rejeté l'entente en soutenant qu'elle n'avait jamais reconnu *par écrit* l'existence

required by s. 21 of the *Public Highways Act*, R.S.N.S. 1954, c. 235. Our Court concluded that there had been "part performance" by the province, and "[q]uite simply equity recognizes as done that which ought to have been done. A verbal agreement which has been partly performed will be enforced" (*per* Cory J., at paras. 11-12).

14 *Hill* involved an equitable interest in land. In the present case the respondents cannot be said to have a "right" much less a proprietary right to the award of a permit. The mere expectation of a favourable outcome to the application (when eventually made), fuelled by ministerial statements and conduct, is still no more than an expectation. The respondents had not even applied for the modified permit until they relocated to Montreal in 1991.

15 In the United States a broad interpretation is sometimes given to the notion of "property" for the purposes of the due process clause (e.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (state employment); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (right to social security disability benefits); and *Barry v. Barchi*, 443 U.S. 55 (1979) (renewal of horse trainer's licence)), but even the U.S. cases seem to contemplate the possession and expected continuation of an existing permit or benefit, not the hoped-for acquisition of a new one.

16 Putting aside, then, the initial challenge based on *Hill*, the other arguments that are marshalled in support of the respondents' position proceed from very general propositions (e.g., the availability of procedural fairness) to narrower propositions that are highly specific to the dealings between the parties in this case (e.g., estoppel). Under whatever label, however, the steady drumbeat of the respondents' complaint is that they were treated by the Minister in an unfair and high-handed manner. It is true, as the appellant points out, that the Minister's

de l'intérêt dans les terres visées, comme l'exigeait l'art. 21 de la *Public Highways Act*, R.S.N.S. 1954, ch. 235. Notre Cour a conclu qu'il y avait eu « exécution partielle » par la province et que « [l]'*equity* reconnaît tout simplement comme accompli ce qui aurait dû l'être. Il sera possible de demander l'exécution d'une entente verbale qui a été accomplie en partie » (le juge Cory, par. 11-12).

L'arrêt *Hill* portait sur un intérêt en *equity* dans des terres. Dans la présente affaire, on ne peut pas dire que les intimés possèdent un « droit » et encore moins un droit propriétal à la délivrance d'un permis. La simple attente d'un dénouement favorable concernant la demande (lorsqu'elle sera présentée), alimentée par les déclarations et le comportement du ministre, n'est jamais rien de plus qu'une attente. Les intimés n'avaient même pas demandé le permis modifié avant de déménager à Montréal en 1991.

Aux États-Unis, la notion de « propriété » est parfois interprétée largement pour les fins de la clause de l'application régulière de la loi (voir, par exemple, *Cleveland Board of Education c. Loudermill*, 470 U.S. 532 (1985) (emploi de fonctionnaire); *Perry c. Sindermann*, 408 U.S. 593 (1972); *Mathews c. Eldridge*, 424 U.S. 319 (1976) (droit aux prestations d'invalidité de la sécurité sociale); et *Barry c. Barchi*, 443 U.S. 55 (1979) (renouvellement de permis d'entraîneur de chevaux)). Cependant, même la jurisprudence américaine semble concerner la possession et la continuation prévue d'un permis ou d'un avantage existant, et non l'espoir d'obtenir un nouveau permis ou un nouvel avantage.

Donc, si on fait abstraction de la contestation initiale fondée sur l'arrêt *Hill*, les autres arguments avancés à l'appui de la position des intimés partent de propositions très générales (par exemple, l'existence d'équité procédurale) pour arriver à des propositions plus restreintes qui sont, dans une très large mesure, propres aux rapports entre les parties en l'espèce (par exemple, la préclusion). Toutefois, à quelque égard que ce soit, ce dont se plaignent constamment les intimés, c'est que le ministre les a traités d'une manière inéquitable et arbitraire. À

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power under s. 138 is framed as a broad policy discretion to be exercised "in the public interest". Yet the discretion, however broadly framed, is not unfettered. At the very least the Minister must exercise the power for the purposes for which it was granted: *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), at p. 1030. The Minister must observe procedural fairness in dealing with the respondents' interests in their application for a permit: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. Other limitations are more controversial. Where, as here, the Minister makes representations by word or conduct that someone will receive or retain a benefit, or that some procedural right will be afforded before a decision is taken, the availability and/or content of procedural fairness may be enlarged under the doctrine of legitimate expectation: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.); C. Roy, *La théorie de l'expectative légitime en droit administratif* (1993). Where the representations were known to and relied upon by an individual affected, and such reliance would result in a detriment to that person if the Minister were to backtrack on his earlier representations, there is arguably (unless the statute or an overriding public interest dictates a contrary result) an estoppel: *Sous-ministre du Revenu du Québec v. Transport Lessard (1976) Ltée*, [1985] R.D.J. 502 (C.A.); *Aurchem Exploration Ltd. v. Canada* (1992), 91 D.L.R. (4th) 710 (F.C.T.D.). Moreover, if in light of the foregoing constraints, whether implied by law or self-imposed by the Minister, the resulting decision is patently unreasonable, it may be quashed (*Baker v. Canada*, *supra*) and an order in the nature of mandamus may be granted to require the Minister, again in the absence of an overriding public interest to the contrary, to issue the modified permit (*Apotex Inc. v. Canada (Attorney General)*, [1994] 3 S.C.R.

vrai dire, comme le souligne l'appelant, le pouvoir conféré au ministre par l'art. 138 est libellé comme un large pouvoir discrétionnaire, en matière de politique générale, qui doit être exercé dans « l'intérêt public ». Néanmoins, ce pouvoir discrétionnaire n'est pas absolu, quelque général que puisse être son libellé. Le ministre doit à tout le moins l'exercer aux fins pour lesquelles il est conféré : *Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 140; *Padfield c. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), p. 1030. Il doit respecter les principes d'équité procédurale lorsqu'il examine l'intérêt des intimés dans leur demande de permis : *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311. D'autres restrictions sont plus controversées. Dans les cas où, comme en l'espèce, le ministre fait comprendre, par ses paroles ou par son comportement, que quelqu'un recevra ou conservera un avantage ou qu'un droit procédural sera accordé avant la prise d'une décision, la possibilité d'invoquer l'équité procédurale ou la teneur de cette forme d'équité peut être élargie en vertu de la théorie de l'expectative légitime : *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *Bendahmane c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1989] 3 C.F. 16 (C.A.); C. Roy, *La théorie de l'expectative légitime en droit administratif* (1993). On peut soutenir que, à moins que la loi ou un intérêt public prépondérant ne dicte le contraire, la préclusion s'applique lorsque la personne concernée était au fait des affirmations et s'y est fiée, et qu'elle subirait un préjudice si le ministre revenait sur ses affirmations antérieures : *Sous-ministre du Revenu du Québec c. Transport Lessard (1976) Ltée*, [1985] R.D.J. 502 (C.A.); *Aurchem Exploration Ltd. c. Canada* (1992), 91 D.L.R. (4th) 710 (C.F. 1re inst.). De plus, si, à la lumière des contraintes susmentionnées, peu importe qu'elles découlent de la loi ou que le ministre se les soit imposées lui-même, la décision résultante est manifestement déraisonnable, elle peut être annu-

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1100, aff'g [1994] 1 F.C. 742 (C.A.)). The list of limitations is not exhaustive.

17 At the end of the day, the respondents' main hurdle is that they do not seek procedural relief. They want the Court to grant substantive relief. They don't want a hearing or more consultation. The events in question took place 10 years ago. The world has moved on. They want the Court to order the Minister to issue the 1991-1993 modified permit.

B. *The Minister Failed to Observe Procedural Fairness*

18 If the respondents did not have a "right" to a modified permit, they nevertheless had a direct financial interest in the outcome of their application sufficient to trigger the duty of procedural fairness. They were, after all, existing permit holders. Their request was for permit modifications. As stated by Le Dain J. in *Cardinal v. Director of Kent Institution*, *supra*, at p. 653:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. . . .

19 The respondents were entitled to procedural fairness irrespective of the existence of representations and pieces of correspondence from the Minister. The *nature of the respondents' interest* was sufficient: *Re Webb and Ontario Housing Corp.* (1978), 22 O.R. (2d) 257 (C.A.), *per* MacKinnon A.C.J.O., at p. 265; *Hutfield v. Fort Saskatchewan General Hospital District No. 98 Board* (1986), 49 Alta. L.R. (2d) 256 (Q.B.), at pp. 262-64, aff'd on other grounds (1988), 52 D.L.R. (4th) 562 (Alta. C.A.). Moreover,

lée (*Baker c. Canada*, précité) et une ordonnance de type *mandamus* peut être accordée pour obliger le ministre à délivrer le permis modifié, là encore pourvu qu'aucun intérêt public prépondérant ne dicte le contraire (*Apotex Inc. c. Canada (Procureur général)*, [1994] 3 R.C.S. 1100, confirmant [1994] 1 C.F. 742 (C.A.)). La liste des restrictions n'est pas exhaustive.

En fin de compte, le principal obstacle auquel se heurtent les intimés est le fait qu'ils ne sollicitent pas une réparation procédurale. Ils veulent que notre Cour leur accorde une réparation substantielle. Ils ne veulent ni se faire entendre ni être consultés davantage. Les événements en question datent de 10 ans. Les temps ont changé. Ils veulent que notre Cour ordonne au ministre de délivrer le permis modifié pour la période 1991-1993.

B. *Le ministre n'a pas respecté les principes d'équité procédurale*

Si les intimés n'avaient pas « droit » à un permis modifié, ils avaient néanmoins, dans l'issue de leur demande, un intérêt financier direct suffisant pour déclencher une obligation d'équité procédurale. Après tout, ils possédaient déjà un permis. Ils demandaient que leur permis soit modifié. Comme l'a précisé le juge Le Dain dans *Cardinal c. Directeur de l'établissement Kent*, précité, p. 653 :

> Cette Cour a confirmé que, à titre de principe général de *common law*, une obligation de respecter l'équité dans la procédure incombe à tout organisme public qui rend des décisions administratives qui ne sont pas de nature législative et qui touchent les droits, privilèges ou biens d'une personne . . .

Les intimés avaient droit à l'équité procédurale indépendamment de l'existence des affirmations et des lettres émanant du ministre. La *nature de l'intérêt des intimés* suffisait : *Re Webb and Ontario Housing Corp.* (1978), 22 O.R. (2d) 257 (C.A.), le juge MacKinnon, juge en chef adjoint de l'Ontario, p. 265; *Hutfield c. Fort Saskatchewan General Hospital District No. 98 Board* (1986), 49 Alta. L.R. (2d) 256 (B.R.), p. 262-264, confirmé pour d'autres motifs (1988), 52 D.L.R. (4th) 562 (C.A. Alb.). De plus,

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[c]ontemporary administrative law takes a very broad view of the range of the rights, privileges and interests that will attract a right to procedural fairness.

(D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) vol. 2, at p. 7-31)

Once triggered, the *content* of procedural fairness is generally a function of (i) the nature of the decision to be made, (ii) the relationship between the decision maker and the individual, and (iii) the effect of the decision on the individual's rights: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 669.

Even minimal procedural fairness was not extended to the respondents in this case. They had no notice that the Minister was about to reverse his position, or the reasons for the reversal, and no opportunity to present argument as to why the Minister's earlier and long-standing view that the public interest favoured a modified Mount Sinai Hospital Center should prevail. These defects enable the respondents to achieve the first of their objectives, namely the setting aside of the Minister's October 3, 1991 decision. However, as stated, they want more.

C. *The Doctrine of Legitimate Expectation*

The respondents argue that the doctrine of legitimate expectations can be used to compel not only procedural protection but a substantive result provided such result is not contrary to law and is otherwise within the power of the Minister, which in this case it would be (see S. J. Schønberg, *Legitimate Expectations in Administrative Law* (2000), ch. 4). The prior jurisprudence in this Court is against such a proposition: see *Old St. Boniface*, *supra*, at pp. 1203-4; *Reference re Canada Assistance Plan*, *supra*, at pp. 557-58; *Baker v. Canada*, *supra*, at para. 26. However, the respondents say that this doctrine is rapidly evolving and expanding, and has been employed in Canada and elsewhere to impose a substantive rather than merely procedural result on decision makers exercising statutory or prerogative powers. Relevant

[TRADUCTION] [l]e droit administratif contemporain interprète très largement la portée des droits, privilèges et intérêts qui donnent droit à l'équité procédurale.

(D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), vol. 2, p. 7-31)

20 Une fois qu'intervient l'équité procédurale, son *contenu* dépend généralement (i) de la nature de la décision qui doit être rendue, (ii) des rapports existant entre le décideur et le particulier, et (iii) de l'effet de la décision sur les droits du particulier : *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653, p. 669.

21 En l'espèce, les intimés n'ont même pas bénéficié de la moindre équité procédurale. Ils n'ont été avisés ni du fait que le ministre était sur le point de revenir sur sa position ni des motifs de ce revirement, et ils n'ont pas eu non plus l'occasion d'expliquer pourquoi devait prévaloir l'opinion qu'avait eue pendant longtemps le ministre, selon laquelle il était dans l'intérêt public que le Centre hospitalier Mont-Sinaï subisse des changements. Grâce à ces déficiences, les intimés atteignent leur premier objectif, à savoir l'annulation de la décision rendue le 3 octobre 1991 par le ministre. Toutefois, comme nous l'avons vu, ils veulent davantage.

C. *La théorie de l'expectative légitime*

22 Les intimés font valoir que la théorie de l'expectative légitime peut être utilisée pour forcer à accorder non seulement une protection procédurale, mais également une réparation substantielle, pourvu que cette dernière ne soit pas contraire à la loi et qu'elle relève par ailleurs du pouvoir du ministre, ce qui serait le cas en l'espèce (voir S. J. Schønberg, *Legitimate Expectations in Administrative Law* (2000), ch. 4). La jurisprudence antérieure de notre Cour milite contre un tel argument; voir *Vieux St-Boniface*, précité, p. 1203-1204; *Renvoi relatif au Régime d'assistance publique du Canada*, précité, p. 557-558; *Baker c. Canada*, précité, par. 26. Les intimés affirment cependant que cette théorie évolue et prend de l'essor rapidement et qu'elle a été utilisée au Canada et à l'étranger pour obliger les décideurs qui exercent une

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authorities include the decision of a panel of the Quebec Court of Appeal in *Sous-ministre du Revenu du Québec v. Transport Lessard (1976) Ltée*, *supra*; trial level decisions elsewhere in Canada including *Gingras v. Canada*, [1990] 2 F.C. 68 (T.D.), and *Bloomfield v. Saskatchewan (Minister of Health)*, [1986] S.J. No. 675 (QL) (Q.B.); in England by Parker L.J. in *R. v. Secretary of State for the Home Department, ex parte Khan*, [1984] 1 W.L.R. 1337 (C.A.), and subsequently by Taylor J. (later Lord Chief Justice) in *R. v. Secretary of State for the Home Department, ex parte Ruddock*, [1987] 2 All E.R. 518 (Q.B.), and Sedley J. (later Lord Justice) in *R. v. Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd.*, [1995] 2 All E.R. 714 (Q.B.), at p. 724 (which contains a useful discussion of European law to the same effect). More recently in *R. v. North and East Devon Health Authority, ex parte Coughlan*, [2000] 3 All E.R. 850, the English Court of Appeal has resoundingly confirmed that in English law the doctrine of legitimate expectations *does* give rise to substantive remedies. Lord Woolf M.R. was unequivocal at para. 71:

prérogative ou un pouvoir conféré par la loi à accorder une réparation substantielle plutôt que simplement procédurale. La jurisprudence pertinente comprend l'arrêt *Sous-ministre du Revenu du Québec c. Transport Lessard (1976) Ltée*, précité, rendu par la Cour d'appel du Québec, des décisions rendues ailleurs au Canada par des tribunaux de première instance, dont *Gingras c. Canada*, [1990] 2 C.F. 68 (1re inst.), et *Bloomfield c. Saskatchewan (Minister of Health)*, [1986] S.J. No. 675 (QL) (B.R.), ainsi que les décisions rendues en Angleterre par le lord juge Parker dans *R. c. Secretary of State for the Home Department, ex parte Khan*, [1984] 1 W.L.R. 1337 (C.A.), et par la suite par le juge Taylor (plus tard lord juge en chef) dans *R. c. Secretary of State for the Home Department, ex parte Ruddock*, [1987] 2 All E.R. 518 (Q.B.), de même que par le juge Sedley (plus tard lord juge) dans *R. c. Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd.*, [1995] 2 All E.R. 714 (Q.B.), p. 724 (qui contient une analyse utile du droit européen au même effet). Plus récemment, dans *R. c. North and East Devon Health Authority, ex parte Coughlan*, [2000] 3 All E.R. 850, la Cour d'appel d'Angleterre a confirmé d'une manière retentissante qu'en droit anglais la théorie de l'expectative légitime donne *effectivement* lieu à des réparations substantielles. Le maître des rôles lord Woolf affirme, d'une manière non équivoque, au par. 71 :

> Fairness in such a situation, if it is to mean anything, must for the reasons we have considered include fairness of outcome. This in turn is why the doctrine of legitimate expectation has emerged as a distinct application of the concept of abuse of power in relation to substantive as well as procedural benefits. . . . [Emphasis added.]

> [TRADUCTION] Pour signifier quelque chose dans un tel cas, l'équité doit, pour les raisons que nous avons examinées, comporter l'équité de l'issue de l'affaire. Cela explique pourquoi la théorie de l'expectative légitime s'est révélée comme une application distincte du concept de l'abus de pouvoir relativement aux avantages tant substantiels que procéduraux . . . [Je souligne.]

23 A similar approach has been adopted in Ireland (*Webb v. Ireland*, [1988] I.R. 353 (S.C.)) and in a more tentative way was expressed by the High Court of Australia in *Attorney-General (NSW) v. Quin* (1990), 64 A.L.J.R. 327, *per* Mason C.J., at p. 336:

Un point de vue semblable a été adopté en Irlande (*Webb c. Ireland*, [1988] I.R. 353 (S.C.)) et a été exprimé de manière plus hypothétique par la Haute Cour d'Australie dans *Attorney-General (NSW) c. Quin* (1990), 64 A.L.J.R. 327, le juge en chef Mason, p. 336 :

> It is possible perhaps that there may be some cases in which substantive protection can be afforded and ordered by the court, without detriment to the public

> [TRADUCTION] Il se pourrait que, dans certains cas, le tribunal puisse accorder et ordonner une protection substantielle sans pour autant compromettre l'intérêt public

interest intended to be served by the exercise of the relevant statutory or prerogative power.

(Australia seems subsequently to have moved against the granting of substantive relief: C. Stewart, "Substantive Unfairness: A New Species of Abuse of Power?" (2000), 28 *Fed. L. Rev.* 617, at p. 634.) See also the decision of the Appellate Division of the South African Supreme Court in *Administrator, Transvaal v. Traub*, 1989 (4) SA 731. There is also some academic support for the extension of the application of the doctrine of legitimate expectations to substantive rights; see, e.g., C. Forsyth, "*Wednesbury* protection of substantive legitimate expectations", [1997] *Pub. L.* 375. Against this is put the traditional view that "statutory authorities cannot disable themselves from the future exercise of their jurisdiction or powers by the giving of assurances": D. J. Mullan, *Administrative Law* (2001), at p. 380.

Part of the difficulty with the contending positions in this case is that in English law, and in the law of those jurisdictions that have followed the English lead in this matter, the doctrine of legitimate expectations performs a number of functions that in Canada are kept distinct. Lord Woolf M.R. in *Coughlan*, *supra*, identified the unifying theme as "administrative fairness" of which procedural fairness and substantive fairness are connected parts. (See also *R. v. Inland Revenue Commissioners, ex parte M.F.K. Underwriting Agents Ltd.*, [1990] 1 W.L.R. 1545 (Q.B.), *per* Bingham L.J. (now in the H.L.), at pp. 1569-70.) On the *substantive* side, Lord Woolf M.R. summarizes his position thus at para. 82:

Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual data — in other words, as not ordinarily open to judicial review. The court's task — and this is not always understood — is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power. In many cases the authority will already have considered this and made appropriate exceptions . . . or resolved to

que l'exercice de la prérogative ou du pouvoir conféré par la loi vise à servir.

(L'Australie semble s'être prononcée par la suite contre les réparations substantielles : C. Stewart, « Substantive Unfairness : A New Species of Abuse of Power? » (2000), 28 *Fed. L. Rev.* 617, p. 634.) Voir aussi l'arrêt *Administrator, Transvaal c. Traub*, 1989 (4) SA 731, rendu par la Section d'appel de la Cour suprême de l'Afrique du Sud. Certains auteurs préconisent également l'application de la théorie de l'expectative légitime aux droits substantiels; voir, par exemple, C. Forsyth, « *Wednesbury* protection of substantive legitimate expectations », [1997] *Pub. L.* 375. Par contre, il y a le point de vue traditionnel selon lequel [TRADUCTION] « les décideurs désignés par la loi ne peuvent pas donner des assurances qui les rendront inhabiles à exercer ultérieurement leur compétence ou leurs pouvoirs » : D. J. Mullan, *Administrative Law* (2001), p. 380.

24 Une partie du problème causé par les positions opposées en l'espèce émane du fait qu'en droit anglais et dans le droit des ressorts qui ont suivi l'exemple anglais à cet égard, la théorie de l'expectative légitime remplit un certain nombre de fonctions qui sont différenciées au Canada. Dans l'arrêt *Coughlan*, précité, le maître des rôles lord Woolf a affirmé que le thème unificateur est [TRADUCTION] « l'équité administrative » à laquelle se rattachent l'équité procédurale et l'équité substantielle. (Voir également *R. c. Inland Revenue Commissioners, ex parte M.F.K. Underwriting Agents Ltd.*, [1990] 1 W.L.R. 1545 (Q.B.), le lord juge Bingham (maintenant à la Chambre des lords), p. 1569-1570.) Sur le plan *substantiel*, le maître des rôles lord Woolf résume ainsi sa position, au par. 82 :

[TRADUCTION] Vu que la politique (conforme à la loi) est du ressort exclusif de l'autorité publique, les tribunaux considèrent que les motifs qui en sous-tendent l'établissement ou la modification font partie des faits — autrement dit, qu'ils échappent généralement au contrôle judiciaire. La tâche du tribunal — ce qui n'est pas toujours bien compris — consiste donc seulement à se demander si l'application de la politique à un individu amené à s'attendre à un résultat différent est un exercice de pouvoir équitable. Dans bien des cas, l'autorité se

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pay compensation where money alone will suffice. But where no such accommodation is made, it is for the court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power.

sera déjà posée la question et aura établi les exceptions appropriées [. . .] ou décidé de verser une indemnité financière lorsque cette forme d'indemnité suffit. Mais lorsqu'aucun accommodement de ce genre n'est consenti, il incombe au tribunal de décider si l'omission de répondre aux attentes de l'individu est inéquitable au point de constituer un abus du pouvoir de la part de l'autorité.

25 In *Coughlan* itself a woman with severe physical disabilities was induced by the local health authority to move from a hospital to a nursing home on the promise that there she would have a "home for life" (para. 4). Five years later, after some consultation and for reasons that the court found to be perfectly rational (para. 65), the local health authority decided to close the nursing home. The decision was quashed because, though rational and reached after some consultation, the court concluded that the public authority had placed insufficient weight on its earlier promise of a "home for life".

Dans l'affaire *Coughlan* même, les autorités locales en matière de santé avaient incité une femme atteinte de déficiences physiques graves à déménager d'un hôpital à une maison de soins infirmiers, en lui promettant qu'elle y trouverait un [TRADUCTION] « foyer pour la vie » (par. 4). Cinq années plus tard, à la suite de consultations et pour des raisons jugées parfaitement logiques par la cour (par. 65), les autorités locales en matière de santé ont décidé de fermer la maison de soins infirmiers. Toutefois, la cour a annulé cette décision, même si elle était logique et avait été prise à la suite de consultations, en expliquant que l'autorité publique n'avait pas accordé suffisamment d'importance à sa promesse antérieure d'un « foyer pour la vie ».

26 It thus appears that the English doctrine of legitimate expectation has developed into a comprehensive code that embraces the full gamut of administrative relief from procedural fairness at the low end through "enhanced" procedural fairness based on conduct, thence onwards to estoppel (though it is not to be called that) including substantive relief at the high end, i.e., the end representing the greatest intrusion by the courts into public administration. The intrusion is said to be justified by the multiplicity of conflicting decisions by a public authority on the same point directed to the same individual(s), *per* Lord Woolf M.R. in *Coughlan*, *supra*, at para. 66:

Il appert donc que la théorie anglaise de l'expectative légitime est devenue un code exhaustif englobant toute la gamme des recours en matière de droit administratif, qui va de l'équité procédurale, en passant par l'équité procédurale « améliorée » fondée sur le comportement, pour atteindre le niveau le plus haut où l'ingérence des tribunaux dans l'administration publique est la plus grande — celui où se situe la préclusion (*estoppel*) (même si ce recours ne doit pas être qualifié ainsi) qui justifie la réparation substantielle. Cette ingérence est justifiée, dit-on, par la multitude de décisions contradictoires prises par une autorité publique sur le même sujet et concernant le ou les mêmes individus; le maître des rôles lord Woolf dans *Coughlan*, précité, par. 66 :

In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process. The present class of case is visibly different. It involves not one but two lawful exercises of power (the promise and the policy change) by the same public

[TRADUCTION] Ordinairement, il n'est pas permis d'invoquer l'abus de pouvoir pour modifier une décision rationnelle qui a été prise légalement dans un but approprié. La présente catégorie d'affaires est visiblement différente. Il y est question, non pas d'un seul, mais de deux exercices légaux de pouvoir (la promesse et le

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authority, with consequences for individuals trapped between the two.

changement de politique) par la même autorité publique, qui entraînent des conséquences pour les individus coincés entre les deux.

In ranging over such a vast territory under the banner of "fairness", it is inevitable that sub-classifications must be made to differentiate the situations which warrant highly intrusive relief from those which do not. Many of the English cases on legitimate expectations relied on by the respondents, at the low end, would fit comfortably within our principles of procedural fairness. At the high end they represent a level of judicial intervention in government policy that our courts, to date, have considered inappropriate in the absence of a successful challenge under the *Canadian Charter of Rights and Freedoms*.

27 En classant un domaine aussi vaste sous la bannière de « l'équité », il faut nécessairement établir des sous-catégories pour différencier les cas qui justifient une réparation très interventionniste de ceux qui ne la justifient pas. De nombreuses décisions anglaises en matière d'expectative légitime, invoquées par les intimés et situées à l'extrémité inférieure de la gamme, cadreraient bien avec nos principes d'équité procédurale. Les décisions invoquées qui se situent à l'extrémité supérieure de la gamme témoignent d'un degré d'intervention judiciaire dans la politique gouvernementale que nos tribunaux ont jusqu'à présent jugé inapproprié en l'absence de contestation fructueuse fondée sur la *Charte canadienne des droits et libertés*.

Canadian cases tend to differentiate for analytical purposes the related concepts of procedural fairness and the doctrine of legitimate expectation. There is, on the one hand, a concern that treating procedural fairness as a subset of legitimate expectations may unnecessarily complicate and indeed inhibit rather than encourage the development of the highly flexible rules of procedural fairness: D. Wright, "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law" (1997), 35 *Osgoode Hall L.J.* 139. On the other hand, there is a countervailing concern that using a Minister's prior conduct against him as a launching pad for substantive relief may strike the wrong balance between private and public interests, and blur the role of the court with the role of the Minister.

28 La jurisprudence canadienne tend à différencier, aux fins d'analyse, les notions connexes de l'équité procédurale et la théorie de l'expectative légitime. D'une part, on craint que considérer l'équité procédurale comme un sous-ensemble d'expectatives légitimes ne complique inutilement et, en fait, ne nuise à l'évolution des règles très souples de l'équité procédurale, au lieu de la favoriser : D. Wright, « Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law » (1997), 35 *Osgoode Hall L.J.* 139. D'autre part, il y a la crainte inverse que le fait d'invoquer le comportement antérieur d'un ministre pour solliciter une réparation substantielle ne contribue à établir un équilibre erroné entre les intérêts privés et les intérêts publics et à confondre le rôle du tribunal avec celui du ministre.

Under our case law the availability and content of procedural fairness are generally driven by the nature of the applicant's interest and the nature of the power exercised by the public authority in relation to that interest: Brown and Evans, *supra*, p. 7-13 *et seq.*; D. J. Mullan, "'Confining the Reach of Legitimate Expectations' Case Comment: *Sunshine Coast Parents for French v. School District No. 46 (Sunshine Coast)*" (1991), 44 Admin. L.R. 245, at p. 248. The doctrine of legitimate expectations, on the other hand, looks to the *conduct* of the

29 Selon notre jurisprudence, la possibilité d'invoquer l'équité procédurale et le contenu de cette forme d'équité dépendent généralement de la nature de l'intérêt du demandeur et de la nature du pouvoir exercé par l'autorité publique relativement à cet intérêt : Brown et Evans, *op. cit.*, p. 7-13 et suiv.; D. J. Mullan, « "Confining the Reach of Legitimate Expectations" Case Comment : *Sunshine Coast Parents for French v. School Disctrict No. 46 (Sunshine Coast)* » (1991), 44 Admin. L.R. 245, p. 248. Par contre, la théorie de l'expectative

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public authority in the exercise of that power (*Old St. Boniface*, *supra*, at p. 1204) including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified (Brown and Evans, *supra*, at p. 7-41). The expectations must not conflict with the public authority's statutory remit.

30 The doctrine of legitimate expectations is sometimes treated as a form of estoppel, but the weight of authority and principle suggests that an applicant who relies on the doctrine of legitimate expectations may show, but does not necessarily have to show, that he or she was aware of such conduct, or that it was relied on with detrimental results. This is because the focus is on promoting "regularity, predictability, and certainty in government's dealing with the public": S. A. de Smith, H. Woolf and J. Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at p. 417, to which the editors add, at p. 426, that insisting on estoppel-type requirements would

> involve unfair discrimination between those who were and were not aware of the representation and would benefit the well-informed or well-advised. It would also encourage undesirable administrative practice by too readily relieving decision-makers of the normal consequences of their actions.

The High Court of Australia espouses a similar view:

> But, more importantly, the notion of legitimate expectation is not dependent upon any principle of estoppel. Whether the Minister can be estopped in the exercise of his discretion is another question; it was not a question raised by the appellant. Legitimate expectation does not depend upon the knowledge and state of mind of the individual concerned, although such an expectation may arise from the conduct of a public authority towards an individual. . . .

(*Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs* (1990), 19 A.L.D. 577, *per* Toohey J., at p. 590)

légitime s'attache à la *conduite* de l'autorité publique dans l'exercice de ce pouvoir (*Vieux St-Boniface*, précité, p. 1204) et notamment aux pratiques établies, à la conduite ou aux affirmations qui peuvent être qualifiées de claires, nettes et explicites (Brown et Evans, *op. cit.*, p. 7-41). Les expectatives ne doivent pas entrer en conflit avec le mandat légal de l'autorité publique.

La théorie de l'expectative légitime est parfois considérée comme une forme de préclusion, mais il ressort amplement de la jurisprudence, de la doctrine et des principes que le demandeur qui invoque la théorie de l'expectative légitime peut mais ne doit pas nécessairement démontrer qu'il était au fait de la conduite en cause ou qu'il s'y est fié à son détriment. Cela s'explique par le fait que l'accent est mis sur la promotion de [TRADUCTION] « la régularité, [de] la prévisibilité et [de] la certitude des rapports du gouvernement avec le public » : S. A. de Smith, H. Woolf et J. Jowell, *Judicial Review of Administrative Action* (5e éd. 1995), p. 417, ce à quoi les éditeurs ajoutent, à la p. 426, qu'insister sur l'existence de conditions semblables à celles qui justifient la préclusion

> [TRADUCTION] entraînerait une discrimination injuste entre ceux qui connaissaient et ceux qui ignoraient l'existence de l'affirmation et avantagerait ceux qui étaient bien informés. Les pratiques administratives malencontreuses seraient aussi encouragées en raison de la trop grande facilité avec laquelle les décideurs échapperaient aux conséquences normales de leurs actes.

La Haute Cour d'Australie adopte un point de vue similaire :

> [TRADUCTION] Mais, qui plus est, la notion d'expectative légitime ne repose sur aucun principe de préclusion. La question de savoir si le ministre peut être empêché d'exercer son pouvoir discrétionnaire est une autre question, qui n'a pas été soulevée par l'appelant. L'expectative légitime ne dépend pas de la connaissance et de l'état d'esprit de l'individu concerné, bien qu'elle puisse découler de la conduite d'une autorité publique à l'égard d'un individu . . .

(*Haoucher c. Minister for Immigration, Local Government and Ethnic Affairs* (1990), 19 A.L.D. 577, le juge Toohey, p. 590)

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See also *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995), 183 C.L.R. 273 (H.C.).

It is difficult at one and the same time thus to lower the bar to the application of the doctrine of legitimate expectation (for good policy reasons) but at the same time to expand greatly its potency for overruling the Minister or other public authority on matters of substantive policy. One would normally expect *more* intrusive forms of relief to be accompanied by *more* demanding evidentiary requirements.

In *Reference re Canada Assistance Plan*, Sopinka J. (citing *Old St. Boniface*, *supra*) regarded the doctrine of legitimate expectations as "an extension of the rules of natural justice and procedural fairness" which may afford "a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity" (p. 557 (emphasis added)). In referring to the making of representations, of course, Sopinka J. was not limiting relief just to representations but intended to include whatever procedural remedies might be appropriate on the facts of a particular case. Procedure is a broad term. The door was shut only against substantive relief. It seems to me, notwithstanding the respondents' argument, that this conclusion should be affirmed. If the Court is to give substantive relief, more demanding conditions precedent must be fulfilled than are presently required by the doctrine of legitimate expectation.

In *Reference re Canada Assistance Plan*, *supra*, Sopinka J. went on to note two further limitations. He quoted at p. 558 from *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602. The first limitation was that: "A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion"

Voir également *Minister of State for Immigration and Ethnic Affairs c. Teoh* (1995), 183 C.L.R. 273 (H.C.).

31 Il est difficile de diminuer ainsi les exigences nécessaires à l'application de la théorie de l'expectative légitime (pour de bonnes raisons de politique générale), tout en augmentant considérablement la possibilité que cette théorie permette de renverser la décision du ministre ou d'une autre autorité publique sur des questions de politique substantielle. On s'attendrait normalement à ce qu'une forme de réparation *plus* interventionniste soit assortie d'exigences *plus* strictes en matière de preuve.

32 Dans le *Renvoi relatif au régime d'assistance publique du Canada*, le juge Sopinka (citant l'arrêt *Vieux St-Boniface*, précité) a considéré la théorie de l'expectative légitime comme « le prolongement des règles de justice naturelle et de l'équité procédurale » qui peut donner « à une personne touchée par la décision d'un fonctionnaire public la possibilité de présenter des observations dans des circonstances où, autrement, elle n'aurait pas cette possibilité » (p. 557 (je souligne)). Il va sans dire que, lorsqu'il a parlé de présenter des observations, le juge Sopinka ne limitait pas la réparation à des observations, mais qu'il avait plutôt l'intention d'inclure toute réparation procédurale qui pourrait se révéler appropriée selon les faits d'une affaire donnée. Le mot « procédure » est large. La porte n'a été fermée qu'aux réparations substantielles. Il me semble que, malgré l'argument des intimés, il y a lieu de confirmer cette conclusion. Des conditions préalables plus strictes que celles dictées actuellement par la théorie de l'expectative légitime doivent être remplies pour que la Cour accorde une réparation substantielle.

33 Dans le *Renvoi relatif au Régime d'assistance publique du Canada*, précité, le juge Sopinka ajoute deux autres restrictions. Il cite, à la p. 558, un passage de l'arrêt *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602. La première restriction était la suivante : « Une décision purement administrative, fondée sur des motifs généraux d'ordre public, n'accordera normalement aucune protection procédurale à

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(p. 558 (emphasis added)). I will return to the notion of "abuse of discretion" below.

l'individu, et une contestation de pareille décision devra se fonder sur un abus de pouvoir discrétionnaire » (p. 558 (je souligne)). Je reviendrai plus loin à la notion d'« abus de pouvoir discrétionnaire ».

34 The second limitation was that "public bodies exercising legislative functions may not be amenable to judicial supervision" (p. 558 (emphasis added)). *Reference re Canada Assistance Plan* dealt with the application of the doctrine of legitimate expectations to Parliament where the need for judicial restraint is obvious. There may be difficulty in other contexts in distinguishing when the legislative exception applies and where it does not, as debated in the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264, especially Evans J.A. at para. 105 *et seq*. That issue remains open for another day.

La seconde restriction veut qu'« on ne [puisse] soumettre à la surveillance judiciaire les organismes publics qui exercent des fonctions de nature législative » (p. 558 (je souligne)). Le *Renvoi relatif au Régime d'assistance publique du Canada* portait sur l'application de la théorie de l'expectative légitime au législateur dans les cas où la retenue judiciaire s'impose clairement. Il peut être difficile, dans d'autres contextes, de déterminer quand l'exception législative s'applique et quand elle ne s'applique pas, comme cela a été débattu en Cour d'appel fédérale dans l'affaire *Apotex Inc. c. Canada (Procureur général)*, [2000] 4 C.F. 264, notamment dans les motifs du juge Evans, aux par. 105 et suiv. Cette question reste à trancher.

35 In affirming that the doctrine of legitimate expectations is limited to procedural relief, it must be acknowledged that in some cases it is difficult to distinguish the procedural from the substantive. In *Bendahmane v. Canada*, *supra*, for example, a majority of the Federal Court of Appeal considered the applicant's claim to the benefit of a refugee backlog reduction program to be procedural (p. 33) whereas the dissenting judge considered the claimed relief to be substantive (p. 25). A similarly close call was made in *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1996] 3 F.C. 259 (T.D.). An undue focus on formal classification and categorization of powers at the expense of broad principles flexibly applied may do a disservice here. The inquiry is better framed in terms of the underlying principle mentioned earlier, namely that broad public policy is pre-eminently for the Minister to determine, not the courts.

En confirmant que la théorie de l'expectative légitime est restreinte à la réparation procédurale, il faut reconnaître qu'il est parfois difficile de différencier ce qui est de nature procédurale et ce qui est de nature substantielle. Par exemple, dans *Bendahmane c. Canada*, précité, les juges majoritaires de la Cour d'appel fédérale ont considéré comme étant de nature procédurale la demande présentée par le requérant en vue de bénéficier d'un programme de réduction de l'arriéré des revendications du statut de réfugié (p. 33), alors que le juge dissident estimait que la réparation demandée était de nature substantielle (p. 25). Une décision tout aussi serrée a été rendue dans *Canada (Procureur général) c. Canada (Commissaire de l'enquête sur l'approvisionnement en sang au Canada)*, [1996] 3 C.F. 259 (1re inst.). L'insistance trop grande sur une qualification et une catégorisation formelles des pouvoirs aux dépens d'une application souple des principes généraux peut être nuisible en l'espèce. Il vaut mieux poser la question sous l'angle du principe sous-jacent mentionné précédemment, à savoir que l'établissement des politiques générales d'intérêt public relève d'abord et avant tout du ministre et non pas des tribunaux.

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The classification of relief as "substantive" however should be made in light of the principled basis for its exclusion rather than as a matter of form. Where, as in *Bendahmane v. Canada*, relief can reasonably be characterized as procedural in light of the underlying principle of deference on matters of substantive policy, then generally speaking it should be.

It follows from the foregoing that decisions of the English courts and other courts that give effect to *substantive* legitimate expectations must be read with due regard to the differences in Canadian law.

In this case, as stated earlier, the Minister's decision will be set aside through the application of the ordinary rules of procedural fairness. There is no need to expand either the availability or content of procedural fairness because of the conduct of successive Ministers which amounts, in this respect, only to an aggravating circumstance. There is, in short, no need to resort to the doctrine of legitimate expectations to achieve procedural relief and, as explained, substantive relief is not available under this doctrine.

D. *Promissory Estoppel*

The Quebec Court of Appeal concluded ([1998] R.J.Q. 2707) that while the Minister was not required by the doctrine of legitimate expectations to issue the modified permit, he was estopped by his earlier representations and conduct from refusing to do so. The evidence here went well beyond what is necessary to establish legitimate expectations. In determining that an estoppel remedy was available, Robert J.A. relied on, *inter alia*, *Transport Lessard*, *supra*, and *Aurchem*, *supra*. Reference should also be made to *Bawolak v. Exroy Resources Ltd.*, [1993] R.D.J. 192 (C.A.), and D. J. Mullan, "*Canada Assistance Plan* — Denying Legitimate Expectation a Fair Start?" (1993), 7 Admin. L.R. (2d) 269, at p. 290. Robert J.A. noted that the question whether estoppel is available

36 La qualification de la réparation comme étant « de nature substantielle » doit être effectuée en fonction des fondements de principe sur lesquels reposent son exclusion plutôt que d'être traitée comme une question de forme. Lorsque, comme dans l'arrêt *Bendahmane c. Canada*, la réparation peut raisonnablement être qualifiée de procédurale compte tenu du principe de retenue applicable aux questions de politique substantielle, il y a généralement lieu de la qualifier ainsi.

37 Il s'ensuit que la jurisprudence des tribunaux anglais et d'autres tribunaux étrangers qui donne effet à une expectative légitime *sur le plan du fond* doit être interprétée à la lumière des différences en droit canadien.

38 En l'espèce, comme nous l'avons vu, la décision du ministre sera annulée par l'application des règles ordinaires de l'équité procédurale. Il n'est pas nécessaire d'élargir la possibilité d'invoquer l'équité procédurale ou le contenu de cette forme d'équité en raison du comportement de ministres s'étant succédé qui, à cet égard, ne constitue qu'une circonstance aggravante. Bref, il n'est pas nécessaire de recourir à la théorie de l'expectative légitime pour obtenir une réparation procédurale et, comme je l'ai expliqué, cette théorie ne permet pas d'obtenir une réparation substantielle.

D. *La préclusion promissoire (promissory estoppel)*

39 La Cour d'appel du Québec a conclu ([1998] R.J.Q. 2707) que, même si le ministre n'était pas tenu de délivrer le permis modifié en vertu de la théorie de l'expectative légitime, ses affirmations et son comportement antérieurs l'empêchaient de refuser de le faire. La preuve en l'espèce était plus que suffisante pour établir l'existence d'une expectative légitime. En décidant que la préclusion pouvait être invoquée, le juge Robert s'est fondé notamment sur les décisions *Transport Lessard* et *Aurchem*, précitées. Il y a aussi lieu de mentionner l'affaire *Bawolak c. Exroy Resources Ltd.*, [1993] R.D.J. 192 (C.A.), et l'article de D. J. Mullan, intitulé « *Canada Assistance Plan* — Denying Legitimate Expectation a Fair Start? » (1993), 7 Admin. L.R. (2d) 269, p. 290. Le juge Robert a souligné

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against a Minister of the Crown was left open by this Court in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, *per* Major J., at para. 57. See also P. McDonald, "Contradictory Government Action: Estoppel of Statutory Authorities" (1979), 17 *Osgoode Hall L.J.* 160, at pp. 180-81.

que la question de la possibilité d'invoquer la préclusion contre un ministre a été laissée en suspens par notre Cour dans l'arrêt *Comeau's Sea Foods Ltd. c. Canada (Ministre des Pêches et des Océans)*, [1997] 1 R.C.S. 12, le juge Major, par. 57. Voir également P. McDonald, « Contradictory Government Action : Estoppel of Statutory Authorities » (1979), 17 *Osgoode Hall L.J.* 160, p. 180-181.

40 I agree with Robert J.A. that estoppel may be available against a public authority, including a Minister, in narrow circumstances. The interesting analysis of McDonald, *supra*, illustrates the variety of circumstances in which the issue has arisen, and the variegated responses given by the courts. A form of estoppel was applied not only by the Quebec Court of Appeal in *Transport Lessard*, *supra*, but by the Ontario Court of Appeal in *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d) 49, and by this Court (albeit against a municipality) in *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.*, [1994] 1 S.C.R. 80. Reference has already been made to the *Aurchem* decision of Strayer J. in the Federal Court, Trial Division, that estopped a mining recorder from refusing to register claims. There are several pertinent decisions in Britain, many of them authored by Lord Denning, that include *Robertson v. Minister of Pensions*, [1949] 1 K.B. 227, at p. 231, and *Lever Finance Ltd. v. Westminster (City) London Borough Council*, [1971] 1 Q.B. 222 (C.A.), but also *North Western Gas Board v. Manchester Corp.*, [1963] 3 All E.R. 442 (C.A.), *per* Sellers L.J. at p. 451.

Je suis d'accord avec le juge Robert pour dire que, dans certains cas particuliers, la préclusion peut être invoquée contre une autorité publique, y compris un ministre. L'analyse intéressante de McDonald, *loc. cit.*, illustre les différentes circonstances dans lesquelles la question s'est posée ainsi que les diverses réponses données par les tribunaux. Une forme de préclusion a été appliquée non seulement par la Cour d'appel du Québec dans *Transport Lessard*, précité, mais aussi par la Cour d'appel de l'Ontario dans *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d) 49, et par notre Cour (quoique contre une municipalité) dans *Commission hydro-électrique de Kenora (Ville) c. Vacationland Dairy Co-operative Ltd.*, [1994] 1 R.C.S. 80. Il a déjà été question de la décision rendue dans *Aurchem* par le juge Strayer, de la Section de première instance de la Cour fédérale, qui a interdit à un registraire minier de refuser d'enregistrer des concessions. Plusieurs décisions pertinentes ont été rendues en Grande-Bretagne, dont de nombreuses ont été rendues par lord Denning, notamment *Robertson c. Minister of Pensions*, [1949] 1 K.B. 227, p. 231, et *Lever Finance Ltd. c. Westminster (City) London Borough Council*, [1971] 1 Q.B. 222 (C.A.), mais aussi *North Western Gas Board c. Manchester Corp.*, [1963] 3 All E.R. 442 (C.A.), le lord juge Sellers, p. 451.

41 In the more recent English cases estoppel too has been swallowed up under the general heading of fairness; see *Coughlan*, *supra*, at para. 80:

Dans les décisions anglaises plus récentes, la préclusion a également été intégrée dans la rubrique générale de l'équité; voir *Coughlan*, précité, par. 80 :

As Lord Donaldson MR said in *R v ITC, ex p TSW* (5 February 1992, unreported): "The test in public law is

[TRADUCTION] Comme le maître des rôles lord Donaldson l'a dit dans *R. c. ITC, ex p TSW* (5 février

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fairness, not an adaptation of the law of contract or estoppel".

1992) (non publié) : « Le critère applicable en droit public est l'équité, et non pas une adaptation du droit des contrats ou la préclusion ».

It is to be emphasized that the requirements of estoppel go well beyond the requirements of the doctrine of legitimate expectations. As mentioned, the doctrine of legitimate expectations does not necessarily, though it may, involve personal knowledge by the applicant of the conduct of the public authority as well as reliance and detriment. Estoppel clearly elevates the evidentiary requirements that must be met by an applicant.

42 Il faut souligner que les conditions d'application de la préclusion vont bien au-delà de celles de la théorie de l'expectative légitime. Comme je l'ai mentionné, il n'est pas (absolument) nécessaire, dans le cas de l'expectative légitime, que le demandeur ait eu une connaissance personnelle de la conduite de l'autorité, qu'il s'y soit fié, et ce, à son détriment. Par contre, le demandeur qui invoque la préclusion doit nettement satisfaire à des exigences plus strictes en matière de preuve.

In the United States (where administrative law is heavily influenced by the due process clause in the Constitution) the courts have shown reluctance to hold government estopped. There are policy reasons for this as well as legal reasons:

43 Aux États-Unis (où le droit administratif est fortement influencé par la clause d'application régulière de la loi figurant dans la Constitution), les tribunaux hésitent à permettre que la préclusion soit invoquée contre le gouvernement, et ce, tant pour des raisons de politique générale que pour des raisons d'ordre juridique :

The federal government implements hundreds of extraordinarily complicated regulatory and benefit programs. Millions of civil servants give advice to citizens daily concerning their rights and duties under these programs. Erroneous advice is both inevitable and commonplace. The Internal Revenue Service (IRS) provides a good illustration. It is one of the federal agencies that is most respected for its competence. Yet, each year the General Accounting Office (GAO) conducts a study of the taxpayer advice provided by IRS, and each year that study shows that IRS gives erroneous advice in somewhere between 10 and 20 percent of all cases. Some taxpayers are injured by reliance on IRS' advice, but millions of taxpayers are benefited by its availability.

[TRADUCTION] Le gouvernement fédéral met en œuvre des centaines de programmes de réglementation et de prestations extrêmement complexes. Des millions de fonctionnaires renseignent quotidiennement des citoyens au sujet de leurs droits et obligations en vertu de ces programmes. Les renseignements erronés sont à la fois inévitables et habituels. L'Internal Revenue Service (IRS) est un bon exemple de cette situation. Il compte parmi les organismes fédéraux les plus respectés en raison de sa compétence. Pourtant, chaque année, le General Accounting Office (GAO) mène une étude des renseignements fournis par l'IRS aux contribuables et, chaque année, cette étude démontre que l'IRS donne des renseignements erronés dans une proportion de 10 à 20 pour 100 des cas. Certains contribuables subissent un préjudice en se fiant aux renseignements reçus de l'IRS, mais des millions de contribuables profitent de la disponibilité de cet organisme.

(K. C. Davis and R. J. Pierce Jr., *Administrative Law Treatise* (3rd ed. 1994), vol. 2, at pp. 229-30)

(K. C. Davis et R. J. Pierce Jr., *Administrative Law Treatise* (3e éd. 1994), vol. 2, p. 229-230)

Decisions in which the U.S. Supreme Court has however refused to rule out public law estoppel entirely (at least in theory) include *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), at p. 423, and *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655

44 La Cour suprême des États-Unis a cependant refusé d'écarter entièrement la préclusion en droit public (du moins en théorie), notamment dans les arrêts *Office of Personnel Management c. Richmond*, 496 U.S. 414 (1990), p. 423, et *United States c. Pennsylvania Industrial Chemical Corp.*,

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(1973). Circuit courts which have allowed estoppel against the government in exceptional circumstances are referred to in *United States v. Asmar*, 827 F.2d 907 (3rd Cir. 1987), at p. 911, note 4. Professors Davis and Pierce, *supra*, suggest at p. 231 that a successful claim for equitable estoppel in the United States would have to involve at least the following characteristics: "(1) unequivocal advice from an unusually authoritative source; (2) reasonable reliance on that advice by an individual; (3) extreme harm resulting from that reliance; and (4) gross injustice to the individual in the absence of judicial estoppel".

411 U.S. 655 (1973). L'arrêt *United States c. Asmar*, 827 F.2d 907 (3rd Cir. 1987), p. 911, note 4, énumère des décisions où des cours de circuit ont permis que la préclusion soit invoquée contre le gouvernement dans des circonstances exceptionnelles. Les professeurs Davis et Pierce, *op. cit.*, indiquent, à la p. 231, que pour invoquer avec succès la préclusion en *equity* aux États-Unis, il faut à tout le moins démontrer ce qui suit : [TRADUCTION] « (1) un renseignement non équivoque a été donné par une autorité inhabituelle; (2) un individu s'est fié raisonnablement à ce renseignement; (3) l'individu en cause a, de ce fait, subi un préjudice extrême; (4) une injustice flagrante sera causée à l'individu si le tribunal ne retient pas la préclusion invoquée ».

45 In this case Robert J.A. adopted the private law definition of promissory estoppel provided by Sopinka J. in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, at p. 57:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, [1] by words or conduct, made a promise or assurance [2] which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, [3] in reliance on the representation, [4] he acted on it or in some way changed his position. . . .
>
> [T]he promise must be unambiguous but could be inferred from circumstances.

En l'espèce, le juge Robert a adopté la définition de droit privé de la préclusion promissoire (*promissory estoppel*) fournie par le juge Sopinka dans l'arrêt *Maracle c. Travellers Indemnity Co. of Canada*, [1991] 2 R.C.S. 50, p. 57 :

> Les principes de l'irrecevabilité fondée sur une promesse [*promissory estoppel*] sont bien établis. Il incombe à la partie qui invoque cette exception d'établir que l'autre partie a, [1] par ses paroles ou sa conduite, fait une promesse ou donné une assurance [2] destinées à modifier leurs rapports juridiques et à inciter à l'accomplissement de certains actes. De plus, le destinataire des déclarations doit prouver que, [3] sur la foi de celles-ci, [4] il a pris une mesure quelconque ou a de quelque manière changé sa position. . .
>
> [L]a promesse doit être non équivoque, mais [. . .] elle peut s'inférer des circonstances.

46 If this were a private law case I would agree that the elements of promissory estoppel are present. The evidence goes well beyond what is necessary to trigger procedural fairness or the doctrine of legitimate expectations. Successive Ministers made clear and specific representations that were intended to be acted on, and were in fact acted upon by the respondents. Ministers encouraged the new mix of short and long-term care beds which they knew would impact the legal relationship, i.e., the respondents' compliance with the existing permit, and the resulting need for permit modifications. Assurances were given with respect to the

Si la présente affaire relevait du droit privé, je conviendrais que les éléments de la préclusion promissoire sont présents. La preuve est plus que suffisante pour que s'applique l'équité procédurale ou la théorie de l'expectative légitime. Lorsque les ministres qui se sont succédé ont fait des affirmations claires et précises, ils entendaient que les intimés agissent en conséquence et c'est ce que ces derniers ont fait. Ces ministres ont encouragé la nouvelle combinaison de lits de courte durée et de lits de longue durée en sachant qu'elle aurait un effet sur les rapports juridiques, à savoir le respect du permis existant par les intimés et la nécessité

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issuance of a modified permit. If the Minister is allowed to reverse his promise of a modified permit after the respondents had made changes to their hospital operations, including the fund-raising campaign and the move to Montreal, the respondents say they would have acted on the Minister's promises to their detriment.

However this is not a private law case. Public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text. As stated in *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, *per* Rand J., at p. 220: "there can be no estoppel in the face of an express provision of a statute" (emphasis added). See also *The King v. Dominion of Canada Postage Stamp Vending Co.*, [1930] S.C.R. 500.

Here the Minister is mandated in broad terms to act in the public interest, and if the public interest as he defines it is opposed to the award of the modified permit, then I do not think a court should estop the Minister from doing what he considers to be his duty. What is at issue is not so much the Minister's ability to change policies but the fate of individuals caught in the transition between successive and inconsistent ministerial decisions on the same subject. As a matter of statutory interpretation, it seems clear from the broad test of s. 138 ("the public interest") that the legislature intended the Minister, not the courts, to determine the appropriate transitional arrangements from the old policy (which welcomed a mix of 57 long-term care beds and 50 short-term care beds) to the new policy (50 short-term care beds would only be welcome if accompanied by enhanced diagnostic and treatment services in addition to the existing operating room, laboratories and radiology facilities).

subséquente de modifier le permis. Des assurances ont été données quant à la délivrance d'un permis modifié. Si on permet au ministre de revenir sur sa promesse de délivrer un permis modifié après que les intimés aient changé les activités de leur hôpital et qu'ils aient notamment effectué la campagne de financement et le déménagement à Montréal, les intimés affirment qu'ils auront agi, à leur détriment, sur la foi des promesses du ministre.

47 Toutefois, l'affaire ne relève pas du droit privé. La préclusion en droit public exige clairement que l'on détermine l'intention que le législateur avait en conférant le pouvoir dont on cherche à empêcher l'exercice. La loi est suprême. Des circonstances qui pourraient par ailleurs donner lieu à la préclusion peuvent devoir céder le pas à un intérêt public prépondérant exprimé dans le texte législatif. Comme le juge Rand l'a affirmé dans l'arrêt *St. Ann's Island Shooting and Fishing Club Ltd. c. The King*, [1950] R.C.S. 211, p. 220 : [TRADUCTION] « il ne peut pas y avoir préclusion face à une disposition explicite d'une loi » (je souligne). Voir également *The King c. Dominion of Canada Postage Stamp Vending Co.*, [1930] R.C.S. 500.

48 En l'espèce, le ministre est mandaté en termes larges pour agir dans l'intérêt public, et s'il juge qu'il est contraire à l'intérêt public de délivrer le permis modifié, le tribunal ne doit pas, selon moi, l'empêcher de faire ce qu'il considère être son devoir. Ce qui est en cause n'est pas tant le pouvoir du ministre de modifier ses politiques que le sort des individus aux prises avec une suite de décisions ministérielles contradictoires sur le même sujet. Sur le plan de l'interprétation législative, il semble ressortir du critère général de l'art. 138 (« l'intérêt public ») que le législateur a voulu que ce soit le ministre, et non pas les tribunaux, qui détermine les mesures transitoires nécessaires pour passer de l'ancienne politique (autorisant une combinaison de 57 lits de longue durée et de 50 lits de courte durée) à la nouvelle politique (selon laquelle les 50 lits de courte durée ne seraient permis que s'ils étaient assortis de services de diagnostic et de traitement améliorés en plus de la salle d'opération, des laboratoires et des installations de radiologie déjà en place).

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49 I mentioned at the outset that the wording of the particular statutory power in question and who wields it (a Minister) is important. The cases that are relied upon by the respondents generally deal with lesser powers or a narrower discretion at a lower level of officialdom. In *Transport Lessard*, *supra*, the issue was the interpretation of a sales tax provision in relation to the bulk sale of trucking equipment (and estoppel was applied despite the caution expressed by this Court in *Granger v. Canada (Canada Employment and Immigration Commission)*, [1989] 1 S.C.R. 141, aff'g [1986] 3 F.C. 70 (C.A.)). The issue in *Re Multi-Malls*, *supra*, was a Minister's procedural decision to decline to refer a planning document to the Ontario Municipal Board for review. In *Aurchem*, *supra*, the issue was the refusal of a mining recorder to register certain mining claims because of defects of form. Strayer J. emphasized that the intended effect of his order was not to impede changes in policy but to protect people caught in the transition from a relaxed regime to a more strict regime. The regulatory requirements were matters of form not substance and the statute itself contemplated the possibility of waiver. In none of these cases was the statutory power of decision framed in broad policy terms comparable to s. 138 of the legislation at issue here.

J'ai mentionné, au départ, que le libellé du pouvoir particulier conféré par la loi et l'identité de celui qui l'exerce (un ministre) sont des éléments importants. De manière générale, la jurisprudence invoquée par les intimés a trait à des pouvoirs moindres ou à un pouvoir discrétionnaire plus limité à un niveau administratif moins élevé. L'arrêt *Transport Lessard*, précité, portait sur l'interprétation d'une disposition relative à la taxe de vente applicable à la vente en bloc de matériel de camionnage (et la préclusion a été appliquée en dépit de la mise en garde de notre Cour dans *Granger c. Canada (Commission de l'Emploi et de l'Immigration du Canada)*, [1989] 1 R.C.S. 141, confirmant [1986] 3 C.F. 70 (C.A.)). Dans l'arrêt *Re Multi-Malls*, précité, le litige portait sur la décision de nature procédurale d'un ministre de refuser de soumettre un document de planification à l'examen de la Commission des affaires municipales de l'Ontario. Dans la décision *Aurchem*, précitée, il était question du refus d'un registraire minier d'enregistrer certaines concessions minières en raison de vices de forme. Le juge Strayer a souligné que son ordonnance visait non pas à empêcher les changements de politique, mais plutôt à protéger les personnes prises dans la transition d'un régime souple à un régime plus strict. Les exigences réglementaires relevaient de la forme et non pas du fond, et la loi elle-même prévoyait la possibilité de renoncer à leur application. Dans aucune de ces affaires, la disposition législative conférant le pouvoir décisionnel n'était-elle rédigée de manière aussi large que l'art. 138 de la loi dont il est question en l'espèce.

50 The appellant also complains that the Quebec Court of Appeal in this case used estoppel as a sword rather than a shield, but (as in *Aurchem*) this could be rationalized merely as having precluded the Minister from relying on factors that he was, in all the circumstances, estopped from taking into consideration.

L'appelant reproche aussi à la Cour d'appel du Québec d'avoir, en l'espèce, utilisé la préclusion comme une épée plutôt que comme un bouclier, mais (comme dans *Aurchem*) cette mesure pourrait se justifier simplement par le fait qu'elle a empêché le ministre de se fonder sur des éléments qu'il ne pouvait, dans aucun cas, prendre en considération.

51 There is a public law dimension to the law of estoppel which must be sensitive to the factual and legal context. Here the primary considerations are the wording of s. 138 and the status of the decision

La règle de la préclusion comporte un aspect de droit public qui doit tenir compte du contexte factuel et juridique. En l'espèce, les principales considérations sont le libellé de l'art. 138 et le statut du

maker. Estoppel is, in my view, not available on the facts of this case in the way in which it was applied by the Quebec Court of Appeal.

E. *The Minister's Decision Amounted to an Abuse of Discretion*

The final issue is whether the Minister's decision was patently unreasonable in light of all the circumstances. This issue goes to the substance of the decision as opposed to the process by which it was reached. The respondents place weight in particular on five factors: (i) the view of the public interest that the Minister and his predecessors espoused to the respondents up to October 3, 1991, namely that the mix of facilities offered by the Center in Montreal would be in the public interest; (ii) representations by the Minister and reliance and detriment on the part of the respondents; (iii) the failure of the Minister to give a rational public interest justification for reneging on an otherwise lawful result; (iv) the Minister's failure to take into consideration the impact of his sudden reversal on the respondents' interest; and (v) in the circumstances, the patent unreasonableness of the resulting decision of October 3, 1991. In other words, the facts which gave rise to the arguments about procedural fairness, legitimate expectations and estoppel are recycled in the abuse of discretion analysis.

I mentioned earlier the "abuse of discretion" exception to the customary deference paid to ministerial decision making as noted by Dickson J. in *Martineau v. Matsqui*, *supra*, and reported by Sopinka J. in *Reference re Canada Assistance Plan*, *supra*. Their concern was with procedural fairness. However, the English courts have long extended "abuse of discretion" to substantive decision making which they call "*Wednesbury* unreasonableness" after *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.). The *Wednesbury* case was cited with approval in *Baker v. Canada*, *supra*, at para. 53. See generally H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the

décideur. J'estime que, d'après les faits de la présente affaire, la préclusion ne peut pas être appliquée comme l'a fait la Cour d'appel du Québec.

E. *La décision du ministre équivalait à un abus de pouvoir discrétionnaire*

52 La dernière question qui se pose est de savoir si la décision du ministre était manifestement déraisonnable compte tenu de l'ensemble des circonstances. Cette question touche au fond de la décision plutôt qu'à la façon dont celle-ci a été prise. Les intimés mettent l'accent sur cinq facteurs notamment : (i) la conception de l'intérêt public que le ministre et ses prédécesseurs ont partagée avec les intimés jusqu'au 3 octobre 1991, à savoir que la combinaison d'installations offerte par le Centre à Montréal serait dans l'intérêt public; (ii) les affirmations du ministre, le fait que les intimés s'y soient fiés, et ce, à leur détriment; (iii) l'omission du ministre de donner une justification rationnelle fondée sur l'intérêt public pour revenir sur une mesure par ailleurs conforme à la loi; (iv) le défaut du ministre de prendre en considération l'effet de son revirement soudain d'opinion sur l'intérêt des intimés; (v) dans les circonstances, le caractère manifestement déraisonnable de la décision subséquente du 3 octobre 1991. En d'autres termes, les faits à l'origine des arguments concernant l'équité procédurale, l'expectative légitime et la préclusion sont repris dans l'analyse de l'abus de pouvoir discrétionnaire.

53 J'ai déjà mentionné l'exception de « l'abus de pouvoir discrétionnaire » à la retenue dont fait habituellement l'objet la prise de décisions ministérielles, que le juge Dickson souligne dans un passage de l'arrêt *Martineau c. Matsqui*, précité, repris par le juge Sopinka dans le *Renvoi relatif au Régime d'assistance publique du Canada*, précité. Les deux juges se souciaient de l'équité procédurale. Toutefois, les tribunaux anglais appliquent depuis longtemps l'« abus de pouvoir discrétionnaire » à la prise de décisions de fond, ce qu'ils appellent « le caractère déraisonnable de *Wednesbury* », d'après l'arrêt *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.). L'arrêt *Wednesbury* a été cité

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Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at p. 285 *et seq.*

avec approbation dans *Baker c. Canada*, précité, par. 53. Voir, de manière générale, H. W. MacLauchlan, « Transforming Administrative Law : The Didactic Role of the Supreme Court of Canada » (2001), 80 *R. du B. can.* 281, p. 285 et suiv.

54 *Baker v. Canada* established that the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness. The result, as noted by Professor D. J. Mullan in *Administrative Law*, *supra*, at p. 108, was to provide "an overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision makers". The unified approach was to some extent anticipated by earlier decisions in relation to the exercise of ministerial discretion by the British Columbia Court of Appeal in *MacMillan Bloedel Ltd. v. Minister of Forests of British Columbia*, [1984] 3 W.W.R. 270, *per* Macfarlane J.A., at p. 282, and by the Federal Court of Appeal in *Lazarov v. Secretary of State of Canada*, [1973] F.C. 927, *per* Thurlow J.A., at pp. 938-39. See also *Re Stora Kopparbergs Bergslags Aktiebolag and Nova Scotia Woodlot Owners' Association* (1975), 61 D.L.R. (3d) 97 (N.S.C.A.), and *Canadian National Railway Co. v. Fraser-Fort George (Regional District)* (1996), 140 D.L.R. (4th) 23 (B.C.C.A.).

L'arrêt *Baker c. Canada* a établi que la norme de contrôle en matière d'abus de pouvoir discrétionnaire peut en principe aller de la norme de la décision correcte, en passant par celle du caractère déraisonnable, jusqu'à la norme du caractère manifestement déraisonnable. Comme l'a expliqué le professeur D. J. Mullan, dans *Administrative Law*, *op. cit.*, p. 108, il en résulte [TRADUCTION] « une théorie générale ou unificatrice de contrôle des décisions de fond prises par tout décideur qui exerce une prérogative ou un pouvoir conféré par la loi ». La méthode unifiée a été prévue jusqu'à un certain point dans les arrêts antérieurs relatifs à l'exercice du pouvoir discrétionnaire d'un ministre qui ont été rendus par la Cour d'appel de la Colombie-Britannique dans *MacMillan Bloedel Ltd. c. Minister of Forests of British Columbia*, [1984] 3 W.W.R. 270, le juge Macfarlane, p. 282, et par la Cour d'appel fédérale dans l'arrêt *Lazarov c. Secrétaire d'État du Canada*, [1973] C.F. 927, le juge Thurlow, p. 938-939. Voir également *Re Stora Kopparbergs Bergslags Aktiebolag and Nova Scotia Woodlot Owners' Association* (1975), 61 D.L.R. (3d) 97 (C.A.N.-É.), et *Canadian National Railway Co. c. Fraser-Fort George (Regional District)* (1996), 140 D.L.R. (4th) 23 (C.A.C.-B.).

55 In *Baker v. Canada* itself, L'Heureux-Dubé J., speaking for the Court, concluded, at para. 62, that the appropriate standard of review in that case was reasonableness *simpliciter*. That conclusion must be seen in light of the special facts. The appellant, Mavis Baker, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption based on humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act*, R.S.C. 1985, c. I-2, from the requirement that an application for permanent residence must be made from outside of Canada. This application was supported by letters indicating concern about the availability of medical treat-

Dans l'arrêt *Baker c. Canada* lui-même, le juge L'Heureux-Dubé, s'exprimant au nom de notre Cour, a conclu, au par. 62, que la norme de contrôle appropriée dans cette affaire était celle de la décision raisonnable *simpliciter*. Il faut interpréter cette conclusion à la lumière des faits particuliers. Une mesure d'expulsion a été prise contre l'appelante, Mavis Baker, mère d'enfants à charge nés au Canada. Elle a alors demandé d'être dispensée de faire sa demande de résidence permanente de l'extérieur du Canada, pour des raisons d'ordre humanitaire, conformément au par. 114(2) de la *Loi sur l'immigration*, L.R.C. 1985, ch. I-2. Sa demande était appuyée de lettres exprimant des inquiétudes

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ment in her country of origin and the effect of her possible departure on her Canadian-born children. Her application was refused on the ground that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. While the decision was made in the name of the Minister of Citizenship and Immigration, it was found as a fact that the decision had been made under delegated authority by an immigration officer whose notes were accepted as a written memorandum of the reasons for decision (para. 44). The immigration officer operated within guidelines laid down by the Minister. His mandate was to apply those guidelines, which required him to

> be alert to possible humanitarian grounds, [to] consider the hardship that a negative decision would impose upon the claimant or close family members, and [to] consider as an important factor the connections between family members. (para. 72)

It was alleged that the immigration officer, who was required to operate within the four corners of the guidelines, had violated the express rules laid down by his own Minister. In these somewhat unusual circumstances the Court concluded that the decision should be reviewed on the basis of reasonableness *simpliciter*.

The Court noted in *Baker v. Canada*, *supra*, *per* L'Heureux-Dubé J., at para. 53, that ordinarily ministerial decisions of a discretionary nature have been accorded a very high level of deference, citing *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, at pp. 7-8. At para. 56, L'Heureux-Dubé J. states:

> The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options.

Deference may be enhanced by the particular language used in the legislation: *Re Sheehan and Criminal Injuries Compensation Board* (1975), 52 D.L.R. (3d) 728 (Ont. C.A.), where s. 5 of the *Law Enforcement Compensation Act*, R.S.O. 1970,

quant à la possibilité d'obtenir un traitement médical dans son pays d'origine et quant à l'effet de son départ éventuel sur ses enfants nés au Canada. Sa demande a été rejetée pour le motif qu'il n'y avait pas suffisamment de raisons humanitaires pour justifier de traiter sa demande au Canada. Bien que cette décision ait été prise au nom du ministre de la Citoyenneté et de l'Immigration, il a été tenu pour acquis qu'elle résultait de l'exercice d'un pouvoir délégué par un agent d'immigration dont les notes ont été considérées comme document constatant les motifs de sa décision (par. 44). L'agent d'immigration avait agi dans le cadre des directives établies par le ministre. Son mandat consistait à appliquer ces directives selon lesquelles il devait

> être conscient des considérations humanitaires possibles, [. . .] tenir compte des difficultés qu'une décision défavorable imposerait au demandeur ou aux membres de sa famille proche, et [. . .] considérer comme un facteur important les liens entre les membres d'une famille. (par. 72)

Il a été allégué que l'agent d'immigration, qui était tenu d'agir dans le cadre des directives, avait violé les règles explicites établies par son propre ministre. Dans ces circonstances quelque peu inhabituelles, notre Cour a conclu que la décision devait faire l'objet d'un contrôle selon la norme de la décision raisonnable *simpliciter*.

56 Notre Cour a souligné, dans l'arrêt *Baker c. Canada*, précité (le juge L'Heureux-Dubé, par. 53), que les décisions ministérielles de nature discrétionnaire font habituellement l'objet d'une très grande retenue, citant *Maple Lodge Farms Ltd. c. Gouvernement du Canada*, [1982] 2 R.C.S. 2, p. 7-8. Le juge L'Heureux-Dubé précise, au par. 56 :

> La démarche pragmatique et fonctionnelle peut tenir compte du fait que plus le pouvoir discrétionnaire accordé à un décideur est grand, plus les tribunaux devraient hésiter à intervenir dans la manière dont les décideurs ont choisi entre diverses options.

57 Une plus grande retenue peut se révéler nécessaire en raison du libellé particulier de la loi : *Re Sheehan and Criminal Injuries Compensation Board* (1975), 52 D.L.R. (3d) 728 (C.A. Ont.), où l'art. 5 de la *Law Enforcement Compensation Act*,

c. 237, required the Board to "have regard to all such circumstances as it considers relevant" (emphasis added).

58 Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness. This case shows why. The broad regulatory purpose of the ministerial permit is to regulate the provision of health services "in the public interest". This favours a high degree of deference, as does the expertise of the Minister and his advisors, not to mention the position of the Minister in the upper echelon of decision makers under statutory and prerogative powers. The exercise of the power turns on the Minister's appreciation of the public interest, which is a function of public policy in its fullest sense. The privative language in s. 139.1, while not directly relevant except to a renewal, reinforces the high level of deference owed in this case ("[t]he decision of the Minister is final and without appeal").

59 Accordingly, the appropriate standard of review in this case is patent unreasonableness.

60 Resort to the doctrine of "unreasonableness" to test the validity of substantive decisions was elaborated in *Baker v. Canada*, *supra*, at para. 53:

> A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction.

61 *Baker v. Canada* went on to hold that the Minister and immigration officials had given insufficient

R.S.O. 1970, ch. 237, obligeait la Commission à [TRADUCTION] « tenir compte de toutes les circonstances qu'elle considère pertinentes » (je souligne).

La norme de retenue la plus élevée, celle du caractère manifestement déraisonnable, doit généralement être appliquée aux décisions que prennent des ministres en exerçant des pouvoirs discrétionnaires en contexte administratif. La présente affaire montre pourquoi il doit en être ainsi. Le permis délivré par le ministre a pour objet général de régir la prestation de services de santé conformément à « l'intérêt public ». Cela favorise l'adoption d'une norme de retenue élevée, tout comme le fait l'expertise du ministre et de ses conseillers, sans compter la position élevée que ce dernier occupe dans la hiérarchie des décideurs qui exercent une prérogative ou un pouvoir conféré par la loi. L'exercice du pouvoir dépend de ce que le ministre considère être dans l'intérêt public, ce qui est un excellent exemple de mesure touchant l'intérêt public. Bien qu'elle ne soit directement pertinente que dans les cas de renouvellement, la formulation privative de l'art. 139.1 confirme le degré élevé de retenue qui s'impose en l'espèce (« [l]a décision du ministre est finale et sans appel »).

Par conséquent, la norme de contrôle appropriée en l'espèce est celle du caractère manifestement déraisonnable.

Le recours au principe du « caractère déraisonnable » pour vérifier la validité des décisions de fond remonte à l'arrêt *Baker c. Canada*, précité, par. 53 :

> Un principe général relatif au «caractère déraisonnable» a parfois été appliqué aussi à des décisions discrétionnaires: *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). À mon avis, ces principes englobent deux idées centrales — qu'une décision discrétionnaire, comme toute autre décision administrative, doit respecter les limites de la compétence conférée par la loi, mais que les tribunaux devront exercer une grande retenue à l'égard des décideurs lorsqu'ils contrôlent ce pouvoir discrétionnaire et déterminent l'étendue de la compétence du décideur.

La Cour a également conclu, dans *Baker c. Canada*, que le ministre et les fonctionnaires de

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weight to the impact of the decision on Ms. Baker and her Canadian-born children. This is part of the traditional *Wednesbury* test, as pointed out in *Coughlan*, *supra*, where Lord Woolf M.R. noted, at para. 58, that the test under *Wednesbury* "will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise" (emphasis added). He went to say at para. 81: "We would prefer to regard the *Wednesbury* categories themselves as the major instances (not necessarily the sole ones) . . . of how public power may be misused". On that basis he subsumed "unreasonableness" into the global English concept of administrative unfairness.

l'Immigration n'avaient pas accordé suffisamment d'importance à l'effet de la décision sur M^me^ Baker et ses enfants nés au Canada. Cela fait partie du critère traditionnel de l'arrêt *Wednesbury*, comme le fait remarquer le maître des rôles lord Woolf, dans l'arrêt *Coughlan*, précité, lorsqu'il affirme, au par. 58, que le critère de l'arrêt *Wednesbury* [TRADUCTION] « est la rationalité et la question de savoir si l'organisme public a accordé suffisamment d'importance aux conséquences du manquement à la promesse » (je souligne). Ce dernier ajoute, au par. 81 : « Nous préférerions considérer que les catégories de *Wednesbury* constituent en soi les meilleurs exemples (et non pas nécessairement les seuls) . . . de la mauvaise utilisation qui peut être faite du pouvoir public ». Voilà pourquoi il a intégré le « caractère déraisonnable » dans le concept global anglais de l'iniquité administrative.

Where Canadian law parts company with the developing English law is the assertion, which lies at the heart of the *Coughlan* treatment of *substantive* fairness, of the centrality of the judicial role in regulating government policy. In *Coughlan*, it is said, at para. 76, that the decision to withhold substantive relief under the doctrine of legitimate expectation

62 L'élément qui différencie le droit canadien du droit anglais émergent est l'affirmation, au cœur du traitement réservé à l'équité *substantielle* dans l'arrêt *Coughlan*, selon laquelle les tribunaux jouent un rôle central pour ce qui est de régir la politique gouvernementale. Dans l'arrêt *Coughlan*, par. 76, on affirme que le refus d'accorder une réparation substantielle en vertu de la théorie de l'expectative légitime

> can only be justified if there is an overriding public interest. Whether there is an overriding public interest is a question for the court. [Emphasis added.]

> [TRADUCTION] ne peut être justifié que s'il existe un intérêt public prépondérant. C'est aux tribunaux qu'il appartient de décider si un tel intérêt existe. [Je souligne.]

63 In Canada, at least to date, the courts have taken the view that it is generally the Minister who determines whether the public interest overrides or not. The courts will intervene only if it is established that the Minister's decision is patently unreasonable in the sense of irrational or perverse or (in language adopted in *Coughlan*, at para. 72) "so gratuitous and oppressive that no reasonable person could think [it] justified". This high requirement is met here where the unreasonableness, as in *Baker v. Canada*, turns on the singular lack of recognition of the serious consequences the Minister's sudden reversal of position inflicted on the respondents who were caught in the transition between the old policy (50 short-term care beds are in the

Au Canada, du moins jusqu'à maintenant, les tribunaux ont adopté le point de vue selon lequel il appartient généralement au ministre de décider si l'intérêt public l'emporte. Les tribunaux n'interviendront que s'il est établi que la décision du ministre est manifestement déraisonnable, au sens d'être irrationnelle ou abusive, ou (pour reprendre les termes utilisés dans *Coughlan*, par. 72) [TRADUCTION] « si arbitraire et oppressive qu'aucune personne raisonnable ne [la] jugerait justifiée ». Cette exigence stricte est respectée en l'espèce où, comme dans l'affaire *Baker c. Canada*, le caractère déraisonnable tient à l'absence singulière de reconnaissance des conséquences graves que le revirement soudain d'opinion du ministre a eu sur les

public interest) and the new policy (50 short-term care beds must be coupled to enhanced diagnostic and treatment facilities).

64 In my view the Minister's decision of October 3, 1991, was "patently unreasonable" in terms of the public interest as he and his predecessors had defined it over a period of seven years of consultation, encouragement and assurances to the respondents, and in his total lack of regard for the implications for the respondents of the Minister's broken promises.

65 While the Court ought to be and would be sensitive to any serious policy reason offered by the Minister for a redefinition of the public interest in this case, particularly in light of the broad scope of the discretionary power to act "in the public interest" in s. 138, no such policy reason was articulated by the Minister in his decision letter of October 3, 1991. The Minister did not resile from the file history. He did not suggest the 50 short-term care beds were not in the public interest. The only new element is that he stated the public interest would be even further advanced by additional resources for diagnosis and treatment that he was not prepared to fund. As my colleague points out at para. 114, "[a]t the very least, [the Minister's decision] must correspond to the reality of the situation".

IV. Conclusion

66 We are therefore presented with a patently unreasonable ministerial decision reached by a process that was demonstrably unfair. The web of representation, conduct, reliance and detriment discussed above, coupled with the Minister's failure to take the respondents' interests into account on October 3, 1991, precluded the Minister from repudiating the concept of the public interest con-

intimés, qui ont été pris entre l'ancienne politique (voulant que 50 lits destinés aux soins de courte durée soient dans l'intérêt public) et la nouvelle politique (selon laquelle 50 lits destinés aux soins de courte durée doivent être assortis de services de diagnostic et de traitement améliorés).

À mon avis, la décision ministérielle du 3 octobre 1991 est « manifestement déraisonnable » en raison de la façon dont celui-ci et ses prédécesseurs ont défini l'intérêt public pendant les sept années au cours desquelles ils ont consulté et encouragé les intimés et leur ont donné des assurances, et en raison de l'omission totale du ministre de prendre en considération les conséquences que le manquement à ses promesses entraînerait pour ces derniers.

Notre Cour devrait tenir compte — et tiendrait effectivement compte — de tout motif de politique sérieux exposé par le ministre pour justifier une nouvelle définition de l'intérêt public en l'espèce, surtout à la lumière de la portée générale du pouvoir discrétionnaire d'agir si « l'intérêt public le justifie », que lui confère l'art. 138. Cependant, le ministre n'a formulé aucun motif de cette nature dans la lettre du 3 octobre 1991 faisant état de sa décision, et n'a pas non plus contredit le dossier. Il n'a pas indiqué que les 50 lits destinés aux soins de courte durée n'étaient pas dans l'intérêt public. Le seul élément nouveau est qu'il a dit que l'intérêt public serait encore mieux servi par l'ajout de ressources en matière de diagnostic et de traitement qu'il n'était cependant pas prêt à financer. Comme mon collègue le souligne au par. 114, « la décision du ministre doit à tout le moins être conforme à la réalité ».

IV. Conclusion

Nous sommes donc en présence d'une décision ministérielle manifestement déraisonnable qui a été prise d'une façon visiblement inéquitable. L'ensemble des affirmations et du comportement auxquels les intimés se sont fiés à leur détriment, comme nous l'avons vu plus haut, conjugué à l'omission du ministre de tenir compte des intérêts de ces derniers le 3 octobre 1991, empêchaient le

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sistently espoused by Ministers over the seven-year period prior to that date.

In light of this history, the Minister ought not to be heard *now* (i.e., 10 years later) to advance a new vision of the public interest at odds with what was earlier said and done There is, on the facts of *this* case, only one option available to the Minister that is not patently unreasonable and that option is to issue the 1991-1993 modified permit (i.e., according to s. 138 of the Act then in force, the modified permit shall issue). Thus, in the end, albeit for somewhat different reasons, I agree with the disposition proposed by my colleague, Bastarache J.

The alternative would be for the Court to send the decision back to the Minister to be reconsidered in light of the legal constraints identified in this decision. Such a referral would amount to a direction to issue the 1991-1993 modified permit, and the whole procedure would, of course, have an air of unreality. The respondent hospital moved from Sainte-Agathe to Montreal 10 years ago. In the meantime, Ministers, policies and health budgets have come and gone. The governing legislation has been amended in significant and relevant aspects. If the present situation is regularized by the issuance of the 1991-1993 modified permit, the current status and entitlement of the respondents' facilities can thereafter be assessed by the present Minister on the basis of the present law and the present circumstances.

I would therefore dismiss the appeal.

The judgment of L'Heureux-Dubé, Gonthier, Iacobucci, Major and Bastarache JJ. was delivered by

BASTARACHE J. — This appeal involves a determination of the legality of a refusal by the appellant, the Minister of Health and Social Services (the "Minister"), to regularize the operating permit

ministre d'abandonner la notion de l'intérêt public que les ministres avaient constamment adoptée pendant les sept années précédentes.

67 Compte tenu de ces antécédents, le ministre ne devrait pas pouvoir *maintenant* (c'est-à-dire 10 ans plus tard) préconiser une nouvelle vision de l'intérêt public qui contredise ce qui a été dit et fait auparavant. D'après les faits de la *présente* affaire, le ministre n'a qu'un seul choix qui ne soit pas manifestement déraisonnable et ce choix consiste à délivrer le permis modifié pour la période 1991-1993 (c'est-à-dire que, selon l'art. 138 qui était alors en vigueur, le permis modifié doit être délivré). Ainsi, bien que ce soit pour des raisons quelque peu différentes, je souscris, en définitive, à la façon de trancher le pourvoi proposée par mon collègue le juge Bastarache.

68 L'autre solution serait que notre Cour renvoie la décision au ministre pour qu'il la réexamine à la lumière des contraintes juridiques décrites aux présentes. Un tel renvoi équivaudrait à un ordre de délivrer le permis modifié pour la période 1991-1993 et il est évident qu'il y aurait quelque chose d'invraisemblable dans cette démarche. L'hôpital intimé a déménagé de Sainte-Agathe à Montréal il y a 10 ans. Dans l'intervalle, les ministres, les politiques et les budgets en matière de santé se sont succédé. La loi applicable a subi des modifications importantes et pertinentes à certains égards. Une fois que la situation actuelle aura été régularisée par la délivrance du permis modifié pour la période 1991-1993, le ministre actuel pourra alors évaluer, à la lumière de la loi et des circonstances actuelles, le statut de l'établissement intimé et ce à quoi il a maintenant droit.

69 Je suis donc d'avis de rejeter le pourvoi.

Version française du jugement des juges L'Heureux-Dubé, Gonthier, Iacobucci, Major et Bastarache rendu par

70 LE JUGE BASTARACHE — La Cour est appelée, en l'espèce, à déterminer la légalité du refus de l'appelant, le ministre de la Santé et des Services sociaux (le « ministre »), de régulariser le permis

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of the respondent, the Mount Sinai Hospital Center (the "Center").

I. Facts

71 The Center was originally a long-term care treatment facility dealing primarily with patients with tuberculosis. During a time when treatment of tuberculosis consisted primarily of rest in an area where the air is pure, Sainte-Agathe was an appropriate location for such a centre. It was at that time perhaps best characterized as a sanatorium. However, during the 1950s, as the incidence of tuberculosis decreased and the nature and focus of respiratory disease and its treatment were changing, the Center began to introduce new programs and services, developing, in effect, a general respiratory expertise in a setting with both long-term and short-term care facilities. The short-term care services included palliative care, laboratory, radiology and operation services. Annual reports submitted to the government since 1974 indicate that this change in orientation, diversification and expansion into short-term care services was known to the government that throughout funded all of the Center's activities. Given the Center's distance from Montreal, where many of its patients requiring the short-term care services were now located, the impracticality of the Sainte-Agathe location became increasingly apparent. In 1984, negotiations between the Center and the Ministry of Health and Social Services to move the Center to Montreal began in earnest.

72 During these negotiations, the Center made it clear that the Center's permit was an important consideration. At that time, the Center was operating under its original permit for 107 long-term care beds despite the fact that by 1984, in addition to short-term care services and programs, it had for 10 years been providing 57 long-term care beds and 50 intermediary or short-term care beds. The Center wanted the permit altered to reflect the reality of the services it offered. It told the Ministry that its status as a provider of both long-term and

d'exploitation de l'intimé, le Centre hospitalier Mont-Sinaï (le « Centre »).

I. Les faits

À l'origine, le Centre était un établissement de soins de longue durée destiné principalement aux patients atteints de tuberculose. Il a été installé à Sainte-Agathe au moment où le repos dans une région où l'air est pur était la principale façon de traiter cette maladie. Il convenait peut-être davantage, à l'époque, de le qualifier de sanatorium. Toutefois, au cours des années 50, alors que l'incidence de la tuberculose diminuait et que la nature des maladies respiratoires et de leur traitement changeait, le Centre a commencé à offrir de nouveaux programmes et services, et en fait, à développer une grande expertise en matière de maladies respiratoires grâce à des installations mixtes de soins de courte et de longue durée. Au chapitre des soins de courte durée, le Centre offrait notamment des soins palliatifs, des services de laboratoire et de radiologie ainsi que des services opératoires. D'après les rapports annuels qui lui ont été soumis depuis 1974, le gouvernement était au fait de ce changement d'orientation, de cette diversification et de ces nouveaux services de courte durée, et il a continué de financer l'ensemble des activités du Centre. En raison de la distance à laquelle le Centre se trouvait de Montréal, d'où provenaient alors un bon nombre de ses patients nécessitant des soins de courte durée, il est devenu de plus en plus évident que sa localisation à Sainte-Agathe n'était plus pratique. En 1984, le ministère de la Santé et des Services sociaux a entrepris de sérieuses négociations avec le Centre en vue d'un éventuel déménagement à Montréal.

Pendant ces négociations, le Centre a indiqué clairement que son permis était important. À l'époque, le Centre fonctionnait en vertu de son permis initial pour 107 lits de longue durée quoique dès 1984, en plus d'offrir des services et programmes de courte durée, il exploitait déjà depuis 10 ans 57 lits de longue durée et 50 lits de durée intermédiaire ou de courte durée. Il voulait que le permis soit modifié de manière à le rendre conforme à la réalité. Il a informé le ministère qu'il s'était toujours présenté comme un établisse-

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short-term care was an important feature of its fund-raising campaign amongst the Jewish community in Montreal. The Ministry promised the Center that it would formally alter the permit once the Center made the move. Under the law in force at that time, *An Act respecting health services and social services*, R.S.Q., c. S-5, the Center suffered no prejudice by agreeing to wait, either administratively or financially. Subsequent years were spent raising the money to make the move, which ultimately cost six million dollars. Over that time, the promise to issue the correct permit was reaffirmed by subsequent occupants of the position of Minister.

ment offrant à la fois des soins de longue et de courte durée lors de ses campagnes de financement au sein de la communauté juive de Montréal. Le ministère a promis au Centre de modifier officiellement le permis après le déménagement. Selon la loi en vigueur à l'époque, à savoir la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-5, le Centre ne subirait aucun préjudice sur le plan administratif ou financier s'il acceptait d'attendre. Au cours des années suivantes, des fonds ont été recueillis pour effectuer le déménagement qui, en fin de compte, a coûté six millions de dollars. Pendant cette période, les ministres qui se sont succédé ont réitéré la promesse de délivrer le permis approprié.

Once the Center had moved to Montreal, in January 1991, and as the expiry date on its permit was approaching (March 31, 1991), it made the formal request to the Minister for a regularization of the permit on January 31, 1991. New legislation presented on December 10, 1990 was brought into force progressively as of September 4, 1991; *An Act respecting health services and social services*, R.S.Q., c. S-4.2. Its status under the old unaltered permit now put the Center in the category of "residential and long-term care centre", the practical consequence of which was the loss of its independent board of directors. Without giving the Center an opportunity to make submissions on the issue, the Minister wrote a letter, on October 3, 1991, informing the Center that it would not receive the promised permit and would have to operate under the old unaltered permit. This was despite the fact that the services being offered included short-term care services. The government continued to fund these services and did not require that they be discontinued. Although financial considerations were cited in the letter as the reason for the refusal, the Center had at no time asked for an increased level of funding for its short-term care services. It had provided these services since at least 1974 and there was no indication that it would not be able to continue to do so within its allocated budget.

73

Le Centre a déménagé à Montréal en janvier 1991 et, le 31 janvier 1991, alors que la date d'expiration de son permis approchait (le 31 mars 1991), le Centre a présenté au ministre une demande officielle de régularisation de son permis. Une nouvelle loi déposée le 10 décembre 1990 est entrée en vigueur progressivement à compter du 4 septembre 1991; il s'agissait de la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-4.2. En vertu de son ancien permis non modifié, le Centre se qualifiait désormais comme un « centre d'hébergement et de soins de longue durée », ce qui l'empêchait en pratique d'être représenté par un conseil d'administration autonome. Sans lui donner la possibilité de se faire entendre sur la question, le ministre a écrit une lettre, le 3 octobre 1991, informant le Centre qu'il n'obtiendrait pas le permis promis et qu'il devrait fonctionner sous le régime de l'ancien permis non modifié, et ce, même si les services qu'il offrait comprenaient des services de courte durée. Le gouvernement a continué de financer ces services et n'en a pas demandé l'interruption. Même si la lettre justifiait le refus par des considérations financières, le Centre n'avait jamais demandé plus d'argent pour fournir ses services de courte durée. Il fournissait ces services depuis au moins 1974 et rien n'indiquait qu'il ne pourrait pas continuer à le faire à l'intérieur de l'enveloppe budgétaire qui lui était allouée.

74 The Center brought an action in mandamus before the Superior Court, requesting that the court order the Minister to issue the promised permit. The Center also asked for the invalidation of the election of the unified board of directors in order to be able to elect its own board.

II. Legislation

75 Due to the fact that the Center's request was made on January 31, 1991, prior to the October 1, 1992 bringing into force of ss. 437 to 443 of the *Act respecting health services and social services*, R.S.Q., c. S-4.2, governing the issue and renewal of permits, it is the *Act respecting health services and social services*, R.S.Q., c. S-5 which applies to this request.

76 The relevant provisions of the *Act respecting health services and social services*, R.S.Q., c. S-5 (the "former law"), are:

136. No person may operate an establishment unless he holds a permanent permit or a temporary permit issued for such purpose by the Minister.

137. The permanent permit indicates the category of the establishment and its class, kind and capacity, if any.

. . .

138. Every person applying for a permit must send his application to the Minister in accordance with the regulations.

The Minister shall issue a permanent permit or a temporary permit if he considers that it is in the public interest.

139. A permanent permit is granted for a period of two years ending on 31 March.

A temporary permit is granted for a period of less than two years.

139.1 A permanent permit is renewed for two years if its holder fulfills the conditions prescribed by regulation.

However, the Minister may, after consultation with the regional council concerned, change the category, the class, the kind or capacity indicated on the permit if he considers that the public interest warrants it.

Le Centre a présenté à la Cour supérieure une requête en *mandamus*, dans laquelle il lui demandait d'ordonner au ministre de délivrer le permis promis. Il sollicitait également l'annulation de l'élection du conseil d'administration unifié afin d'être en mesure d'élire son propre conseil d'administration.

II. Les dispositions législatives

Étant donné que le Centre a présenté sa demande le 31 janvier 1991, c'est-à-dire avant l'entrée en vigueur, le 1er octobre 1992, des art. 437 à 443 de la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-4.2, qui régissent sur la délivrance et le renouvellement des permis, c'est la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-5, qui s'applique.

Les dispositions pertinentes de la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-5 (l'« ancienne loi »), sont les suivantes :

136. Nul ne peut exploiter un établissement s'il ne détient un permis permanent ou un permis temporaire délivré à cette fin par le ministre.

137. Le permis permanent indique la catégorie de l'établissement et, s'il y a lieu, sa classe, son type et sa capacité.

. . .

138. Toute personne qui sollicite un permis doit transmettre sa demande au ministre conformément aux règlements.

Le ministre délivre un permis permanent ou un permis temporaire s'il estime que l'intérêt public le justifie.

139. Un permis permanent est accordé pour une période de deux ans qui se termine le 31 mars.

Un permis temporaire est accordé pour une période inférieure à deux ans.

139.1 Un permis permanent est renouvelé pour deux ans si son détenteur remplit les conditions prescrites par règlement.

Cependant, le ministre peut, après consultation du conseil régional concerné, modifier la catégorie, la classe, le type ou la capacité indiqué au permis s'il estime que l'intérêt public le justifie.

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Before changing the category, class or kind indicated on the permit, the Minister must give the establishment concerned the opportunity to make representations to him.

The decision of the Minister is final and without appeal; it is not considered a refusal of renewal for the purposes of subdivision 2 of this division.

The holder of a permit that has been modified must take the necessary steps to comply with the new permit within six months of receiving it.

Certain features of the *Act respecting health services and social services*, R.S.Q., c. S-4.2 (the "new law"), also bear mentioning:

81. The mission of a hospital centre is to offer diagnostic services and general and specialized medical care. . . .

83. The mission of a residential and long-term care centre is to offer, on a temporary or permanent basis, alternative environment, lodging, assistance, support and supervision services as well as rehabilitation, psychosocial and nursing care and pharmaceutical and medical services to adults who, by reason of loss of functional or psychosocial autonomy can no longer live in their natural environment, despite the support of their families and friends.

. . .

119. A board of directors shall be established to administer all the institutions having their head offices in the territory of a regional county municipality and operating a residential and long-term care centre, or both a residential and long-term care centre and a general and specialized hospital centre with less than 50 beds.

. . .

126. A board of directors shall be established to administer . . .

. . . an institution which operates both a residential and long-term care centre and a general and specialized hospital centre with 50 beds or more.

Avant de modifier la catégorie, la classe ou le type indiqué au permis, le ministre doit donner à l'établissement concerné l'occasion de lui faire des représentations.

La décision du ministre est finale et sans appel; elle n'est pas considérée comme un refus de renouvellement aux fins de la sous-section 2 de la présente section.

Le détenteur d'un permis qui est modifié doit prendre les mesures nécessaires pour s'y conformer dans les six mois de la réception du nouveau permis.

77 Il vaut également la peine de mentionner certaines dispositions de la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-4.2 (la « nouvelle loi ») :

81. La mission d'un centre hospitalier est d'offrir des services diagnostiques et des soins médicaux généraux et spécialisés. . .

83. La mission d'un centre d'hébergement et de soins de longue durée est d'offrir de façon temporaire ou permanente un milieu de vie substitut, des services d'hébergement, d'assistance, de soutien et de surveillance ainsi que des services de réadaptation, psychosociaux, infirmiers, pharmaceutiques et médicaux aux adultes qui, en raison de leur perte d'autonomie fonctionnelle ou psychosociale, ne peuvent plus demeurer dans leur milieu de vie naturel, malgré le support de leur entourage.

. . .

119. Un conseil d'administration est formé pour administrer l'ensemble des établissements qui ont leur siège social dans le territoire d'une municipalité régionale de comté et qui exploitent soit un centre d'hébergement et de soins de longue durée, soit à la fois un centre d'hébergement et de soins de longue durée et un centre hospitalier de soins généraux et spécialisés de moins de 50 lits.

. . .

126. Un conseil d'administration est formé pour administrer . . .

. . . un établissement qui exploite à la fois un centre d'hébergement et de soins de longue durée et un centre hospitalier de soins généraux et spécialisés de 50 lits ou plus.

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III. Judicial History

A. *Quebec Superior Court*, J.E. 92-1815

78 In a decision rendered on November 9, 1992, Marcelin J. of the Superior Court of Quebec made at least five important findings of fact. First, she found that the Center had carried out mixed services of long-term and short-term care for a significant period of time while located in Sainte-Agathe. Second, she found that the Minister was aware that the Center operated not only as a long-term health care centre, but that it also provided other short-term care services. The government was funding these services and indicated its acquiescence despite the mismatch between the activities and the permit. Third, the discussions between the parties regarding the Center's relocation had always focussed on the question of allowing the Center to operate both long-term and short-term care beds. Fourth, the Center had received promises from government authorities to the effect that its permit would be amended upon its relocation to Montreal. And, fifth, she concluded that it was because of representations made by different persons who held office as Minister that the Center agreed to wait until it established itself in Montreal before formally requesting a modification of its permit.

79 Marcelin J. allowed the mandamus application in part. She found that the Ministry's promises and conduct created a "legitimate expectation" on the part of the Center that it would be given a permit that reflected the true nature of its operations once the move to Montreal was made. However, given that the doctrine of legitimate expectations is confined to natural justice and fairness (*audi alteram partem*) and procedural remedies but does not provide substantive rights, Marcelin J. did not order the Minister to issue the correct permit. The remedy was limited to an order for the Minister to hear the Center's submissions on the issue before making his decision whether or not the alteration of the permit was in the public interest.

80 Hence, Marcelin J. held that the October 3, 1991 letter was not a valid exercise of the Minister's dis-

III. Historique des procédures judiciaires

A. *Cour supérieure du Québec*, J.E. 92-1815

Dans sa décision du 9 novembre 1992, madame le juge Marcelin de la Cour supérieure du Québec a tiré au moins cinq conclusions de fait importantes. Premièrement, elle a conclu que le Centre exploitait depuis longtemps à Sainte-Agathe un centre mixte de soins de courte et de longue durée. Deuxièmement, elle a conclu que le ministre savait que le Centre exploitait non seulement un établissement de soins de longue durée, mais qu'il fournissait également des services de courte durée. Le gouvernement finançait ces services et manifestait son assentiment malgré la non-concordance des activités et du permis. Troisièmement, les discussions des parties relativement au déménagement du Centre avaient toujours porté sur des lits de courte et de longue durée. Quatrièmement, le Centre avait reçu des autorités gouvernementales des promesses selon lesquelles son permis serait modifié au moment de son déménagement à Montréal. Et, cinquièmement, elle a conclu que c'était à la suggestion des ministres qui se sont succédé que le Centre avait accepté d'attendre son transfert à Montréal pour demander officiellement la modification de son permis.

Madame le juge Marcelin a accueilli en partie la requête en *mandamus*. Selon elle, le ministère avait par ses promesses et son comportement créé une « expectative légitime » que le Centre obtiendrait un permis reflétant la vraie nature de ses activités une fois qu'il aurait déménagé à Montréal. Toutefois, étant donné que la théorie de l'expectative légitime est limitée à la justice naturelle et à l'équité (la règle *audi alteram partem*) ainsi qu'aux réparations procédurales, et qu'elle ne confère aucun droit substantiel, madame le juge Marcelin n'a pas ordonné au ministre de délivrer le permis approprié. Elle s'est contentée de lui ordonner d'entendre le Centre sur la question avant de décider s'il était dans l'intérêt public de modifier le permis.

Madame le juge Marcelin a donc estimé que la lettre du 3 octobre 1991 n'était pas un exercice

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cretion for two reasons. First, it did not respect the requirement in s. 139.1 that the Minister give the concerned institution the opportunity to make representations when contemplating the modification of a permit. Secondly, Marcelin J. pointed out that the refusal in the letter was premised on weak and insubstantial reasons — the purported financial claim could not be relied on when the Center had never asked for more money to operate long-term and short-term care services.

valide du pouvoir discrétionnaire du ministre pour deux raisons. En premier lieu, la lettre ne respectait pas l'exigence de l'art. 139.1 que le ministre donne à l'établissement concerné l'occasion de faire des représentations lorsqu'il envisage de modifier un permis. Madame le juge Marcelin a souligné, en deuxième lieu, que le refus contenu dans la lettre était motivé par des raisons fragiles et insuffisantes — on ne pouvait pas invoquer le prétendu argument financier vu que le Centre n'avait jamais demandé plus d'argent pour fournir des services de courte et de longue durée.

Noting that the Center had been operating without a permit since March 31, 1991, Marcelin J. ordered a renewal of the former permit (within 30 days of the judgment), and she ordered the Minister to consult with the Center on its decision with respect to the modified permit (within 90 days of the judgment). Marcelin J. said that [TRANSLATION] "the Center is entitled to receive a decision of the Minister which must not be an abuse of discretion and must be based on relevant grounds without hidden purposes [and not] for an ulterior motive". 81

Soulignant que le Centre fonctionnait sans permis depuis le 31 mars 1991, madame le juge Marcelin a ordonné le renouvellement de l'ancien permis (dans les 30 jours du jugement), en plus d'ordonner au ministre de consulter le Centre sur sa décision relative au permis modifié (dans les 90 jours du jugement). Elle a affirmé que « le Centre a le droit de recevoir une décision du ministre qui ne doit pas être un abus de discrétion et doit être fondée sur des motifs pertinents et sans buts cachés [et non] pour un motif ultérieur ».

With respect to the status of the unified board of directors, Marcelin J. was of the view that a determination of whether the election was valid was premature given the fact that the Minister had not yet given the Center a classification that would determine this issue, either by way of a renewal of the former permit or a valid decision with respect to the modification. Such a determination would have to wait for a valid exercise of the Minister's discretion. 82

Au sujet du conseil d'administration unifié, madame le juge Marcelin était d'avis qu'il était prématuré de se prononcer sur la validité de l'élection étant donné que le ministre n'avait pas encore attribué au Centre une classification déterminante à ce sujet soit en renouvelant l'ancien permis, soit en rendant une décision valide au sujet de la modification. Il faudrait attendre que le ministre ait exercé validement son pouvoir discrétionnaire pour se prononcer à cet égard.

The Center appealed the decision. 83

Le Centre a interjeté appel contre cette décision.

B. *Quebec Court of Appeal*, [1998] R.J.Q. 2707

B. *Cour d'appel du Québec*, [1998] R.J.Q. 2707

Speaking for all three members of the bench, Robert J.A. allowed the appeal, ordering the Minister to issue the permit it promised and cancelling the election of the unified board of directors in light of the Center's right to elect its own board. 84

S'exprimant au nom d'une formation de trois juges, le juge Robert a accueilli l'appel, ordonné au ministre de délivrer le permis promis et annulé l'élection du conseil d'administration unifié eu égard au droit du Centre d'élire son propre conseil d'administration.

First, Robert J.A. held that the court below made no error, still less a palpable and overriding error, 85

Le juge Robert a d'abord conclu que la cour de première instance n'avait commis aucune erreur, et

in its appreciation of the evidence. Marcelin J.'s findings of fact were upheld, i.e., that the Center had been operating both long-term and short-term care beds for many years, this was known by the government, the government promised the Center to regularize the permit once the move to Montreal was made, and it was on the basis of those promises that the Center agreed to wait until the move to make the formal request for the permit regularization. Robert J.A. revisited various pieces of evidence and confirmed these findings in various ways.

encore moins une erreur manifeste et dominante, dans son appréciation de la preuve. Il a confirmé les conclusions de fait de madame le juge Marcelin, à savoir que le Centre exploitait depuis de nombreuses années des lits de courte et de longue durée, qu'il le faisait à la connaissance du gouvernement, que le gouvernement lui avait promis de régulariser son permis après le déménagement à Montréal et que c'était sur la foi de ces promesses qu'il avait accepté d'attendre son déménagement pour demander officiellement la régularisation de son permis. Le juge Robert a réexaminé divers éléments de preuve et a confirmé ces conclusions de différentes manières.

86 Robert J.A. secondly confirmed Marcelin J.'s ruling that the doctrine of legitimate expectations is confined to a procedural remedy, at least as the law now stands in Canada. He reviewed the situation in various jurisdictions, noting that in the United Kingdom the doctrine has become a source of substantive as well as procedural rights, though not in Australia. Robert J.A. held that public law promissory estoppel was an alternate route that should be used in this case in order to confer a substantive remedy — the promised permit.

Il a ensuite confirmé la décision de madame le juge Marcelin que la théorie de l'expectative légitime est limitée aux réparations procédurales, du moins dans l'état actuel du droit au Canada. Il a examiné la situation dans différents ressorts, faisant remarquer qu'au Royaume-Uni, mais non en Australie, cette théorie est devenue une source de droits substantiels et de droits procéduraux. Le juge Robert a conclu que la préclusion promissoire (*promissory estoppel*) en droit public était un autre moyen qui devait être utilisé en l'espèce pour accorder une réparation substantielle — le permis promis.

87 Lastly, Robert J.A. held that it was not necessary to deal with the Center's claim that this was not a s. 139.1 situation engaging ministerial discretion but in effect a situation in which the Minister was bound to issue the permit under s. 138. The idea here was that, given government knowledge and approval, the Center in fact possessed the permit to operate the long-term and short-term care facility — it had in effect "acquired" the permit and it was only the wording of the permit that did not correspond to that reality. While saying that it was not necessary to deal with this issue for the purposes of the appeal, Robert J.A. noted that there might be problems with this approach because of the legal requirements related to "acquired rights".

Enfin, le juge Robert a décidé qu'il n'était pas nécessaire d'examiner l'argument du Centre selon lequel il s'agissait non pas d'un cas où le ministre pouvait exercer son pouvoir discrétionnaire aux termes de l'art. 139.1, mais en fait d'un cas où ce dernier était tenu de délivrer le permis en vertu de l'art. 138. Cet argument voulait qu'étant donné que tout s'était déroulé à la connaissance du gouvernement et avec son approbation, le Centre possédait en fait le permis d'exploiter l'établissement de soins de courte et de longue durée — il avait effectivement « acquis » le permis et seul le libellé du permis n'était pas conforme à la réalité. Tout en précisant qu'il n'était pas nécessaire de l'examiner pour les fins de l'appel, le juge Robert a fait remarquer que cette approche était susceptible de causer des problèmes en raison des exigences juridiques liées aux « droits acquis ».

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It was therefore on the basis of public law promissory estoppel that Robert J.A. ordered the Minister to issue the promised permit for April 1, 1991 to March 31, 1993 and the cancellation of the election of the unified board of directors.

The Minister appeals to this Court.

IV. Analysis

Although I agree with the Court of Appeal that the Minister is bound to issue the Center the promised permit, I do not think that the proper basis for this order is the application of public law promissory estoppel. It is my view that the best way to dispose of this appeal is to recognize that the facts of this case created a situation not accurately characterized as a renewal of an existing permit under s. 139.1 of the former law. This is a situation falling under s. 138 of that law under which the Minister was bound by a prior exercise of his discretion to issue the permit for both long-term and short-term care operations once the Center relocated to Montreal.

A. *Which Section of the Former Law Governs the Present Situation?*

Section 139.1 of the former law states:

A permanent permit is renewed for two years if its holder fulfills the conditions prescribed by regulation.

The regulation in question is the *Permits for Establishments (Issue and Renewal) Regulation*, O.C. 1373-84, (1984) 116 G.O. II, 2370. The conditions prescribed by this regulation include the requirements that the person making the demand for delivery or renewal be a Canadian citizen or permanent resident, domiciled in Quebec, solvent, not having received a sentence under the *Criminal Code* which has not been satisfied, and has forwarded to the Minister the required information. In other words, if this were the full content of s. 139.1, a renewal situation would not be one in which the Minister's discretion is engaged. If the

C'est donc en se fondant sur la théorie de la préclusion promissoire en droit public que le juge Robert a ordonné au ministre de délivrer le permis promis pour la période du 1er avril 1991 au 31 mars 1993 et qu'il a ordonné l'annulation de l'élection du conseil d'administration unifié. 88

Le ministre se pourvoit devant notre Cour. 89

IV. Analyse

Bien que je partage l'avis de la Cour d'appel que le ministre est tenu de délivrer le permis promis au Centre, je ne crois pas qu'il y ait lieu de recourir à la préclusion promissoire en droit public pour rendre cette ordonnance. Je suis d'avis que la meilleure façon de trancher le présent pourvoi est de reconnaître que les faits de la présente affaire sont à l'origine d'une situation qualifiée à tort de renouvellement d'un permis existant aux termes de l'art. 139.1 de l'ancienne loi. La situation relève plutôt de l'art. 138 de cette loi, en ce sens que le ministre avait déjà exercé son pouvoir discrétionnaire et qu'il était, de ce fait, tenu de délivrer le permis pour l'exploitation d'un établissement de soins de courte et de longue durée, une fois le Centre déménagé à Montréal. 90

A. *Quel article de l'ancienne loi s'applique à la situation qui nous occupe?*

L'article 139.1 de l'ancienne loi prévoit : 91

Un permis permanent est renouvelé pour deux ans si son détenteur remplit les conditions prescrites par règlement.

Le règlement en question est le *Règlement sur la délivrance et le renouvellement du permis d'un établissement*, décret 1373-84, (1984) 116 G.O. II, 2769. Parmi les conditions prescrites par ce règlement, il y a notamment celles voulant que la personne qui demande la délivrance ou le renouvellement soit un citoyen canadien ou un résident permanent domicilié au Québec, qu'elle soit solvable, qu'elle ne soit pas sous le coup d'une condamnation en vertu du *Code criminel* et qu'elle ait transmis au ministre les renseignements requis. En d'autres termes, si c'était là le contenu intégral de l'art. 139.1, le pouvoir discrétionnaire du ministre

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conditions set out in the regulation are satisfied, the permit is renewed.

92 Yet, s. 139.1 goes on to say:

> However, the Minister may, after consultation with the regional council concerned, change the category, the class, the kind or capacity indicated on the permit if he considers that the public interest warrants it.
>
> Before changing the category, class or kind indicated on the permit, the Minister must give the establishment concerned the opportunity to make representations to him.
>
> The decision of the Minister is final and without appeal; it is not considered a refusal of renewal for the purposes of subdivision 2 of this division.

These parts of s. 139.1 import a significant degree of discretion with respect to the Minister's power to modify the permit in a renewal situation (a change may be made "if he considers that the public interest warrants it") as well as adding finality to its exercise (the decision is "final and without appeal"). This is also the section that includes the Minister's obligation to give the affected institution the opportunity to make representations on its behalf. It is important to note at the outset that the purpose of s. 139.1 is to give the Minister a discretion that is confined to situations of permit renewal on the condition that the institution change its activities according to the new requirements that the Minister imposes reflecting his or her view of the public interest.

93 The relevant question is: was the Center's January 31, 1991 request a request for renewal of their permit subject to s. 139.1? My view is that it was not. First, I note that various documents reflect the parties' understanding that this was a request for changing the Center's permit rather than renewing it. For instance, on the application form submitted to the Minister on January 31, 1991, the Center has ticked the box "modification" rather than [TRANSLATION] "renewal". Correlatively, the Ministry refers to the situation as one of "modification" rather than renewal (September 14, 1990 letter). Second, the facts, as they were found by the court of first instance and strongly concurred with by the

ne s'appliquerait pas en matière de renouvellement. Si les conditions prescrites par le règlement sont remplies, le permis est renouvelé.

Pourtant, l'art. 139.1 ajoute :

> Cependant, le ministre peut, après consultation du conseil régional concerné, modifier la catégorie, la classe, le type ou la capacité indiqué au permis s'il estime que l'intérêt public le justifie.
>
> Avant de modifier la catégorie, la classe ou le type indiqué au permis, le ministre doit donner à l'établissement concerné l'occasion de lui faire des représentations.
>
> La décision du ministre est finale et sans appel; elle n'est pas considérée comme un refus de renouvellement aux fins de la sous-section 2 de la présente section.

Ces parties de l'art. 139.1 confèrent au ministre une grande discrétion dans l'exercice de son pouvoir de modifier le permis à l'occasion d'un renouvellement (une modification peut être apportée « s'il estime que l'intérêt public le justifie »), ainsi qu'un caractère définitif à l'exercice de ce pouvoir (la décision est « finale et sans appel »). C'est aussi cet article qui oblige le ministre à donner à l'établissement concerné l'occasion de faire des représentations. Il est important de souligner, au départ, que l'art. 139.1 vise à conférer un pouvoir ministériel discrétionnaire limité aux cas de renouvellement de permis pourvu que l'établissement en cause modifie ses activités en fonction des nouvelles exigences que le ministre impose dans ce qu'il estime être l'intérêt public.

La question qui se pose est la suivante : la demande que le Centre a présentée le 31 janvier 1991 était-elle une demande de renouvellement de permis assujettie à l'art. 139.1? J'estime que non. Premièrement, je constate que divers documents indiquent que les parties considéraient qu'il s'agissait d'une demande de modification du permis du Centre plutôt qu'une demande de renouvellement. Par exemple, sur le formulaire de demande présenté au ministre le 31 janvier 1991, le Centre a coché la case « modification » plutôt que la case « renouvellement ». Parallèlement, le ministère parle de « modification » plutôt que de renouvellement (lettre du 14 septembre 1990). Deuxième-

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Court of Appeal, indicate that the parties did not see the formal request that was to be made once the Center moved to Montreal as a renewal of the former permit, a permit that had not reflected the reality of the services the Center provided and the government funded since at least 1974. The understanding between the parties was that the permit would be finally altered to reflect the true vocation of the Center: a hospital that offered both long-term and short-term care and services. Both courts below referred to this as a "regularization" of the permit situation and I agree with this characterization. While this is accurately captured under the notion of changing the permit, it is not, in my view, accurate to refer to this as renewing that old inaccurate permit. Nor is it reasonable to conclude that the Minister was exercising his discretion to renew the Center's permit with a requirement that the institution change its activities in conformity with his determination of what was now in the public interest. The evidence is that the Minister was satisfied that the Center would continue to provide the same services and would receive the same level of funding.

ment, d'après les faits constatés par la cour de première instance et acceptés sans hésitation par la Cour d'appel, les parties ne considéraient pas que la demande officielle qui serait faite après le déménagement du Centre à Montréal viserait le renouvellement de l'ancien permis, qui, depuis au moins 1974, ne reflétait plus les services fournis par le Centre et financés par le gouvernement. Les parties estimaient que le permis serait finalement modifié de manière à refléter la véritable vocation du Centre, celle d'un hôpital offrant à la fois des soins de longue et de courte durée. Les deux cours d'instance inférieure ont qualifié cette mesure de « régularisation » du permis et je partage leur avis. Même si on peut parler avec raison de modification du permis, j'estime que c'est une erreur de qualifier la mesure en question de renouvellement de cet ancien permis non conforme à la réalité. Il n'est pas non plus raisonnable de conclure que le ministre a exercé son pouvoir discrétionnaire de renouveler le permis du Centre à la condition que l'établissement modifie ses activités conformément à ce qu'il jugeait alors être dans l'intérêt public. La preuve indique que le ministre était d'avis que le Centre continuerait d'offrir les mêmes services et de toucher le même financement.

Indeed, while it is true that s. 139.1 refers to change of the category, class, kind or capacity indicated on the permit, not only is this confined to the context of a renewal application, it is also reserved for a situation in which the Minister is considering alterations that would be in the public interest at his or her own initiative. In other words, the institution makes the renewal request that it must make every two years (even with a permanent permit) and the Minister can decide that a change that is in the public interest must be made. As long as the affected institution is given the opportunity to make representations and the decision is made in good faith, this decision is final and without appeal. However, the entire mechanism of s. 139.1 does not apply to a situation where the change is raised by the party rather than the Minister. It does not, therefore, apply in the present situation.

94

En réalité, même s'il est vrai que l'art. 139.1 parle de modifier la catégorie, la classe, le type ou la capacité indiqués sur le permis, cela est restreint non seulement au contexte d'une demande de renouvellement, mais encore aux cas où le ministre examine, de sa propre initiative, la possibilité d'apporter des modifications qui seraient dans l'intérêt public. En d'autres termes, l'établissement présente la demande de renouvellement tous les deux ans, comme il doit le faire (même dans le cas d'un permis permanent), et le ministre peut ordonner qu'une modification soit apportée si l'intérêt public justifie de le faire. La décision est finale et sans appel si elle a été prise de bonne foi et si l'établissement concerné a eu l'occasion de faire des représentations. Toutefois, l'art. 139.1 ne s'applique pas intégralement aux cas où la modification est demandée par la partie en cause plutôt que par le ministre. Cette disposition ne s'applique donc pas à la présente situation.

95 In my view, then, it was a mistake for Marcelin J. to have focussed on the "natural justice" concerns raised by the s. 139.1 obligation to hear from the Center. If this was a situation of renewal, she would have been right to say that the October 3, 1991 letter could not have been a valid exercise of discretion because of the failure to observe this requirement. However, it was not a situation of renewal, and, in my opinion, s. 139.1 is simply not engaged. It is unnecessary then to embark on the inquiry of whether the legitimate expectation created by the course of dealings between the parties can result in a substantive remedy beyond the procedural protection provided by the right to be heard, i.e., the issuance of the permit, either within an expanded doctrine of legitimate expectations or under public law promissory estoppel.

Par conséquent, j'estime que madame le juge Marcelin a commis une erreur en mettant l'accent sur les préoccupations de « justice naturelle » découlant de l'obligation d'entendre le Centre qu'impose l'art. 139.1. S'il s'était agi d'une demande de renouvellement, elle aurait eu raison d'affirmer que la lettre du 3 octobre 1991 ne pouvait pas constituer un exercice valide de pouvoir discrétionnaire en raison du manquement à cette obligation. Il ne s'agissait toutefois pas d'une demande de renouvellement et, selon moi, l'art. 139.1 ne s'applique tout simplement pas. Il est donc inutile de se demander si l'expectative légitime résultant des rapports entre les parties peut donner lieu à une réparation substantielle — la délivrance du permis — en plus de la protection procédurale offerte par le droit d'être entendu, que ce soit en vertu d'une théorie élargie de l'expectative légitime ou en vertu de la préclusion promissoire en droit public.

96 I believe it is s. 138 rather than s. 139.1 that governs the present situation. This section reads:

> Every person applying for a permit must send his application to the Minister in accordance with the regulations.
>
> The Minister shall issue a permanent permit or a temporary permit if he considers that it is in the public interest.

J'estime que c'est l'art. 138, et non pas l'art. 139.1, qui s'applique en l'espèce. Cet article prévoit :

> Toute personne qui sollicite un permis doit transmettre sa demande au ministre conformément aux règlements.
>
> Le ministre délivre un permis permanent ou un permis temporaire s'il estime que l'intérêt public le justifie.

It is clear that this is the provision governing requests for new permits, i.e., all those applying for a permit must make a request to the Minister that conforms to the regulations, and the Minister will give the permit if he or she decides that it is in the public interest. It is true that the Center's January 31, 1991 request for the promised "regularized" permit does not seem to be a request for a new permit but, as indicated by such evidence as the Center's choice of "modification" in the application form, a request for a change to or alteration of the existing permit. Is this a situation in which s. 138 applies? I note in this respect the following annotation from the Collection Lois et Règlements

Il est évident que cette disposition régit les demandes de nouveaux permis en ce sens que toute personne qui sollicite un permis doit présenter au ministre une demande conforme au règlement, et le ministre accorde le permis s'il estime que l'intérêt public le justifie. Il est vrai que la demande présentée par le Centre, le 31 janvier 1991, en vue d'obtenir le permis « régularisé » qui avait été promis, semble être non pas une demande de nouveau permis mais plutôt une demande de changement ou de modification du permis existant, comme l'indique notamment le fait d'avoir coché la case « modification » dans le formulaire de demande. S'agit-il d'un cas où l'art. 138 s'applique? Je souligne à cet égard la note suivante tirée de la Collection Lois et Règlements JUDICO, *Services de*

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JUDICO, *Services de santé et services sociaux* (7th ed. 1990-91), at p. 133:

[TRANSLATION] An establishment holding a permit which is applying for a modification or a change to the permit must make that application within the framework of section 138.

Hence, the Center's January 31, 1991 request would seem to be firmly housed within s. 138.

I do not agree with the Center's submissions that it in fact (and law) possessed the modified permit and that it was merely a matter of the wording of the permit that was at issue when it made the regularization request on January 31, 1991. In my view, being entitled to the permit is different than actually holding it. I agree here with Robert J.A. when he says that there are significant problems with saying that the Center "acquired" the permit by offering the short-term care services which admittedly were not only tolerated but actively funded by the government.

I note, in this respect, s. 140 of the former law which reads:

Every permit holder must carry on his activities within the limits fixed in his permit and keep the books and accounts prescribed by the regulations.

And s. 444 of the new law similarly reads:

The activities of a permit holder must be carried on within the scope of his permit.

While I do not wish to be taken as ruling on this matter directly, as neither party presented much in the way of material for or against the application of the doctrine of *droit acquis* to the present situation, it seems at the very least relevant, as Robert J.A. noted, that the Center was operating all of those years outside the boundaries of its permit. There may well be an issue of illegality that operates as a bar to the Center "acquiring" the permit in this way. I note in passing the correlative provision to s. 140, s. 141, a provision that would have been operating until the new law came into force, which reads:

santé et services sociaux (7e éd. 1990-1991), p. 133 :

L'établissement, détenteur d'un permis, qui demande une modification à ce permis ou un changement doit situer cette demande dans le cadre de l'article 138.

Partant, la demande présentée le 31 janvier 1991 par le Centre semble se situer nettement dans le cadre de l'art. 138.

97 Je ne suis pas d'accord avec les arguments du Centre selon lesquels il possédait en fait (et en droit) le permis modifié et que seule la question du libellé du permis se posait lorsqu'il a présenté la demande de régularisation le 31 janvier 1991. À mon avis, avoir droit au permis est différent du fait de le posséder. Je souscris ici à l'opinion du juge Robert qu'il est très difficile de dire que le Centre a « acquis » le permis en offrant des soins de courte durée qui, de l'aveu général, étaient non seulement tolérés, mais bel et bien financés par le gouvernement.

98 Je mentionne à cet égard l'art. 140 de l'ancienne loi, qui se lisait ainsi :

Tout détenteur de permis doit exercer ses activités à l'intérieur des limites fixées dans son permis et tenir les livres et comptes prescrits par les règlements.

L'article 444 de la nouvelle loi prévoit de la même façon :

Le titulaire d'un permis doit exercer ses activités conformément à ce qui est indiqué à son permis.

Même si je ne veux pas qu'on croie que je me prononce directement sur cette question étant donné que les parties ont fait valoir bien peu en faveur ou contre l'application de la théorie des droits acquis dans le présent cas, il semble à tout le moins utile de souligner, comme l'a fait le juge Robert, que le Centre a pendant toutes ces années excédé les limites de son permis. Il se peut bien qu'en raison de l'illégalité de ses activités le Centre n'ait pas pu « acquérir » le permis. Je relève en passant la disposition corrélative de l'art. 140, à savoir l'art. 141, qui s'est appliquée jusqu'à l'entrée en vigueur de la nouvelle loi :

141. Every permit holder must, at the times fixed by regulation or, failing such, at the request of the Minister, furnish to the Minister, in such form as the latter may prescribe,

(1) a detailed report of his activities containing the information prescribed by regulation;

(2) financial statements certified by the auditor of the establishment, in the case of a public establishment or a private establishment contemplated in sections 176 and 177.

This provision, it seems to me, is there to ensure that the Minister is kept apprised of an institution's activities. If that institution is operating outside the bounds of its permit and the Minister knows that as a result of these documents being provided to it, a characterization of the legality or illegality of the institution's operations must surely be influenced by this factor.

99 I acknowledge that there is often an important difference between a legal act and that which documents or records it, e.g., in the absence of a writing requirement, a writing attests to the existence of a contract that exists quite independently from that writing and while assisting in matters of proof is not essential to the very existence of the contract. However, I would hesitate to characterize a permit in the same way. I think an activity can be authorized without an implied or acquired permit *per se*. In other words, there may be permission in the sense of what is authorized but not in the sense of a permit as an object. In any event, I would prefer here to say that the activities were authorized (i.e., permitted) but that the permit itself did not yet exist. The Center was therefore acting under its long-term care permit with the government's acquiescence with respect to any issue related to the legality or illegality of that activity. It was not acting under an acquired or implied modified permit. It brought the request for modification at the time the parties agreed to, once the move to Montreal was made. It did this because it did not yet have that permit. While that request may well have been a request for something the Center saw itself as entitled to, it was not a purely empty or formal request for that which it already possessed. Indeed,

141. Un détenteur de permis doit, aux époques fixées par règlement ou, à défaut, sur demande du ministre, lui fournir en la forme qu'il prescrit :

1º un rapport détaillé de ses activités qui contient les renseignements prescrits par règlement;

2º des états financiers certifiés par le vérificateur de l'établissement, s'il s'agit d'un établissement public ou d'un établissement privé visé dans les articles 176 et 177.

Il me semble que cette disposition vise à garantir que le ministre soit tenu au courant des activités d'un établissement. Si cet établissement excède les limites de son permis et que le ministre le sait grâce aux documents qui lui sont fournis, ce fait influe sûrement sur la détermination de la légalité ou de l'illégalité des activités de l'établissement en question.

Je reconnais qu'il y a souvent une différence importante entre un acte juridique et le document qui le constate; par exemple, en l'absence d'exigence d'écrit, un document témoigne de l'existence d'un contrat qui existe tout à fait indépendamment de ce document et, bien que ce dernier soit utile en matière de preuve, il n'est pas essentiel à l'existence même du contrat. J'hésiterais toutefois à qualifier un permis de la même manière. Je pense qu'une activité peut être autorisée en l'absence de tout permis implicite ou acquis. En d'autres termes, il peut y avoir permission dans le sens de ce qui est autorisé, mais pas dans le sens d'un permis qui la constate. De toute manière, je préfère affirmer ici que les activités étaient autorisées (c'est-à-dire permises), mais que le permis lui-même n'existait pas encore. Le Centre agissait donc en vertu de son permis d'établissement de soins de longue durée avec l'assentiment du gouvernement pour ce qui est de décider de la légalité ou de l'illégalité de ses activités. Il n'agissait pas en vertu d'un permis modifié acquis ou implicite. Il a présenté la demande de modification au moment convenu par les parties, c'est-à-dire après le déménagement à Montréal. Il l'a fait parce qu'il ne possédait pas encore ce permis. Même si cette demande pouvait bien viser à obtenir ce à quoi le Centre considérait avoir droit, il ne s'agissait pas d'une simple demande pour la forme visant à obte-

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under this characterization, it would have been a s. 139.1 renewal request.

The government's behaviour, while not rising to the level of issuing an acquired or implied permit, did, in my opinion, result in an exercise of the Minister's discretion. When s. 138 says that "[t]he Minister shall issue a permanent permit or a temporary permit if he considers that it is in the public interest", this imputes to the Minister an exercise of discretion with respect to whether or not granting a particular temporary or permanent permit will be in the public interest. However, this discretion was exercised when the Minister promised the Center that it would receive the modified permit, encouraged the move to Montreal, endorsed the financing campaign focussed on the role of the Center as a long-term and short-term care hospital, and continued to fund the short-term care services despite the mismatch between those services and the Center's permit. When the Minister made those decisions and engaged in that behaviour with the Center, the Minister decided, for the purposes of s. 138, that it was in the public interest to give the Center a permanent permit for the operation of a long-term and short-term care institution. The actual granting of the permit was simply deferred until the move to Montreal was made. The fact that this course of dealings consisted of various elements and occurred over a long period of time is, in my view, no bar to looking at the overall situation and concluding that a decision with respect to the public interest was made and discretion on this issue was exercised. The Minister was therefore bound when the Center made the January 31, 1991 request to issue the promised permit. I believe that the fact that the Minister did not require any change in the activities of the Center is confirmation of the reasonableness of this conclusion. The specific conduct of the Minister in this case indicates that his discretion was exhausted. This does not mean that in a different set of circumstances the Minister could not, based on overriding policy concerns, in exceptional circumstances, reverse a prior discretionary decision.

nir ce qu'il possédait déjà. En fait, la demande présentée aurait été, dans ce sens, une demande de renouvellement visée par l'art. 139.1.

100 J'estime que, même s'il n'équivalait pas à la délivrance d'un permis acquis ou implicite, le comportement du gouvernement a constitué un exercice de pouvoir discrétionnaire du ministre. En précisant que « [l]e ministre délivre un permis permanent ou un permis temporaire s'il estime que l'intérêt public le justifie », l'art. 138 attribue au ministre le pouvoir discrétionnaire de décider s'il est dans l'intérêt public de délivrer un permis temporaire ou permanent particulier. Le ministre a toutefois exercé ce pouvoir discrétionnaire en promettant au Centre de lui délivrer le permis modifié, en encourageant le déménagement à Montréal, en s'associant à la campagne de financement axée sur le rôle du Centre en tant qu'hôpital offrant à la fois des soins de longue et de courte durée et en continuant de financer les services de courte durée malgré leur non-concordance avec le permis du Centre. Lorsque le ministre a pris ces décisions et adopté ce comportement avec le Centre, il a décidé, pour les fins de l'art. 138, qu'il était dans l'intérêt public d'accorder au Centre un permis permanent pour un établissement de soins de longue et de courte durée. La délivrance même du permis a simplement été retardée jusqu'à ce que le déménagement à Montréal ait été effectué. La diversité de ces rapports et leur échelonnement sur une longue période de temps n'empêchent pas, d'après moi, d'examiner l'ensemble de la situation ni de conclure qu'une décision concernant l'intérêt public a été prise et qu'il y a eu exercice de pouvoir discrétionnaire à cet égard. Le ministre était donc lié lorsque le Centre a demandé la délivrance du permis promis, le 31 janvier 1991. À mon avis, le fait qu'il n'a exigé aucune modification des activités du Centre confirme que cette conclusion est raisonnable. Le comportement particulier que le ministre a adopté en l'espèce indique qu'il a épuisé son pouvoir discrétionnaire. Cela ne signifie pas que, dans des circonstances différentes, il ne pourrait pas se fonder sur des considérations de politique générale prépondérantes pour revenir exceptionnellement sur une décision discrétionnaire antérieure.

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B. *When Was the Discretion Exercised?*

101 Given the veritable flurry of documents submitted attesting to the promise to regularize the Center's permit once the move to Montreal was made, it is difficult to pinpoint precisely when the Minister's discretion under s. 138 was exercised. It would therefore be helpful to begin with the earliest pieces of evidence in the record and follow the acts and documents that can be said to have solidified the promise made to the Center by the Minister and its representatives.

102 The Minister relies in his submissions on a document dated August 1984 entitled *Programme fonctionnel et technique* prepared by the Minister of Social Affairs. In this report, the Minister emphasizes the Center's role as a provider of intermediate pulmonary or respiratory care; see, e.g., pp. 7 and 9. The report signals, in a somewhat understated tone, the Minister's approbation of the Center's relocation from Sainte-Agathe to Montreal (p. 10). When the Center's vocation is first referred to in that document, the following wording is used (at p. 11):

[TRANSLATION] The vocation of Mount Sinai Hospital in Côte Saint-Luc is 107 long-term care beds: 50 intermediate pulmonary care beds and 57 physical care beds.

And again later (at p. 16):

[TRANSLATION] . . . 50 intermediate pulmonary care beds and 57 physical care beds.

It is significant that this document seems to stabilize the 50/57 split language in the course of dealings between the parties. This had been mentioned in an earlier May 8, 1984 letter appended to the report. However, the other letter appended there, an even earlier correspondence dated June 27, 1983, did not use this language. These prior letters had made references to future negotiation over the precise allocation of beds, assessments based on the needs of the community, etc., but, in my opinion, this August 1984 document entrenches the 50/57 language between the parties.

B. *Quand y a-t-il eu exercice du pouvoir discrétionnaire?*

En raison de l'abondance des documents déposés qui témoignent de la promesse de régulariser le permis du Centre après le déménagement à Montréal, il est difficile de déterminer avec précision le moment où le ministre a exercé le pouvoir discrétionnaire que lui confère l'art. 138. Il serait donc utile de commencer par examiner les éléments de preuve les plus anciens du dossier et de passer en revue les actes et documents qui, peut-on dire, ont renforcé la promesse faite au Centre par le ministre et ses représentants.

Le ministre s'appuie sur un document daté du mois d'août 1984 et intitulé *Programme fonctionnel et technique* préparé par le ministre des Affaires sociales. Dans ce rapport, le ministre souligne le rôle du Centre comme fournisseur de soins pulmonaires ou respiratoires intermédiaires; voir, par exemple, p. 7 et 9. Le rapport fait état, d'une manière quelque peu laconique, de l'approbation par le ministre de la relocalisation du Centre de Sainte-Agathe à Montréal (p. 10). Lorsque le document mentionne pour la première fois la vocation du Centre, il le fait dans les termes suivants (à la p. 11) :

La vocation de l'Hôpital Mont-Sinaï à Côte Saint-Luc est de 107 lits de soins de longue durée : 50 lits de soins pulmonaires intermédiaires et 57 lits de soins physiques.

Il ajoute, plus loin (à la p. 16) :

. . . 50 lits de soins pulmonaires intermédiaires et 57 lits de soins physiques.

Il importe de noter que ce document semble consacrer la formule 50/57 dans les rapports entre les parties. Cette formule figurait dans la lettre antérieure du 8 mai 1984 annexée au rapport. Cependant, elle n'apparaît pas dans l'autre lettre annexée au rapport, celle encore plus ancienne du 27 juin 1983. Ces lettres antérieures faisaient état de négociations futures portant sur la répartition précise des lits, d'évaluations fondées sur les besoins de la collectivité, et ainsi de suite, mais je suis d'avis que ce document du mois d'août 1984 consacre la formule 50/57 entre les parties.

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I cannot accept that the Minister looked at the 50/57 vocation in terms of an overall long-term care context given the "intermediary" nature of the authorized beds. As both courts below found, intermediary beds are considered, for the purposes of long-term or short-term care classification, short-term care beds. Moreover, it is unclear why, if the Ministry truly saw the intermediary beds it authorized as long-term care beds, it would even engage with the Center on the issue of the modification of its operating permit. If the Ministry really saw the intermediary beds this way, no modification to the permit would be required because the Center would be doing precisely what the permit indicated — running long-term care services. However, not only did the Ministry discuss with the Center the possibility of altering its permit, knowing that such an alteration was a central feature of the Center's fund-raising campaign, it in fact promised to do so once the move to Montreal was made.

Je ne puis reconnaître que le ministre situait la vocation 50/57 dans un contexte global de soins de longue durée étant donné la nature « intermédiaire » des lits autorisés. Comme l'ont conclu les deux cours d'instance inférieure, les lits de durée intermédiaire sont considérés comme des lits de courte durée, aux fins de classification. De plus, si le ministère considérait vraiment que les lits de durée intermédiaire autorisés étaient des lits de longue durée, on ne voit pas pourquoi il aurait même discuté avec le Centre de la possibilité de modifier son permis d'exploitation. Si le ministère percevait réellement ainsi les lits intermédiaires, aucune modification du permis ne serait nécessaire étant donné que le Centre ferait exactement ce que le permis prévoit — la prestation de services de longue durée. Toutefois, le ministère a non seulement discuté avec le Centre de la possibilité de modifier son permis en sachant que cette modification était au cœur de sa campagne de financement, mais encore il a effectivement promis de le modifier après le déménagement à Montréal. 103

Perhaps the most significant piece of evidence here is the November 21, 1989 letter written to the Center by the Conseil de la santé et des services sociaux de la région de Montréal métropolitain (C.S.S.S.R.M.M.). This letter sets out the relocation plan and acknowledges that in the 50/57 split, the 50 beds are to be short-term care beds. Here the commitment is expressed in the following way:

La lettre du 21 novembre 1989 que le Conseil de la santé et des services sociaux de la région de Montréal métropolitain a fait parvenir au Centre est peut-être l'élément de preuve le plus important en l'espèce. On y expose le plan de relocalisation tout en reconnaissant que, dans la répartition 50/57, les 50 lits doivent être réservés aux soins de courte durée. Dans cette lettre, on prévoit qu'il faudra que 104

[TRANSLATION] . . . fifty-seven (57) places to be reserved for long-term clientele and a maximum of fifty (50) places for intermediate short-term care.

. . . cinquante-sept (57) places soient réservées à la clientèle de longue durée et un maximum de cinquante (50) places pour des soins de courte durée et intermédiaires.

After this date, the Minister can certainly no longer claim to have been viewing the 50/57 allocation in terms of the long-term care context. The intermediate care beds are placed with the short-term care beds and the reason for the alteration of the permit is made clear. That this was a promise to make the required modification to the permit once the move to Montreal was made is evidenced by the Minister's response to the Center's request for its 1989-1991 permit. In a September 14, 1990

Après cette date, le ministre ne peut certainement plus dire qu'il situe la répartition 50/57 dans le contexte des soins de longue durée. Les lits destinés aux soins intermédiaires sont assimilés aux lits destinés aux soins de courte durée et la raison de la modification du permis est indiquée clairement. La réponse du ministre à la demande de permis du Centre pour la période 1989-1991 montre qu'il s'agissait d'une promesse d'apporter au permis la modification demandée après le déménage-

letter about this, the then Assistant Deputy Minister wrote:

[TRANSLATION] As soon as your services are relocated on Côte Saint-Luc in Montreal, we shall take the steps to modify your permit.

However, once the move to Montreal was made, in January 1991, and the Center brought its request for the modified permit for 1991-1993, in a letter dated October 3, 1991, the Minister refused, stating that reclassifying the 50 beds as short-term care beds would result in the hospital having to deal with more complex clinical problems using additional financial resources that the government could not provide and the Center would have to keep operating under the old permit.

105 It is difficult to determine precisely when the Minister abandoned the preference that the Center continue operating under its long-term care permit. It is possible that this was always the preference and the refusal to modify the Center's permit was motivated by that preference. However, this is not what was indicated to the Center in the Ministry's dealings with it. As my colleague Binnie J. points out, "if the successive Ministers had gone through the same cogitations and deliberations as they did between 1984 and 1991, but kept their thoughts to themselves, I think it unlikely the respondents would succeed in obtaining the order they seek" (para. 4). I agree with him that what is important here is the course of conduct between the parties and the evidence that documents this relationship. The 1989 letter acknowledges that the beds are to be short-term care beds and the permit must be correspondingly altered. The 1990 letter documents the promise. Over the course of those dealings, the various occupants of the office of the Minister and Ministry officials knew that the hospital's vocation as a long-term and short-term care provider was an important element of the Center's fund-raising campaign; 50 intermediary care beds were allocated — beds that are considered short-term care beds and were eventually acknowledged as such. These officials had knowledge of and

ment à Montréal. Dans la lettre du 14 septembre 1990 qu'il a fait parvenir au Centre à ce sujet, le sous-ministre adjoint précise :

Dès que vos services seront relocalisés sur Côte St-Luc à Montréal, nous devrons prendre les mesures pour modifier votre permis.

Après avoir déménagé à Montréal en janvier 1991, le Centre a présenté une demande de permis modifié pour la période 1991-1993. Toutefois, dans une lettre datée du 3 octobre 1991, le ministre a refusé le permis sollicité en disant que, si les 50 lits étaient reclassifiés en lits de courte durée, l'hôpital ferait face à des problèmes cliniques plus complexes qui nécessiteraient l'octroi de ressources financières additionnelles que le gouvernement n'était pas en mesure de fournir, ajoutant que le Centre devrait continuer de fonctionner sous le régime de son ancien permis.

Il est difficile de déterminer avec précision le moment où le ministre a abandonné la préférence que le Centre continue de fonctionner sous le régime de son permis d'établissement de soins de longue durée. Il se peut que cela ait toujours été la préférence et que ce soit ce qui a motivé le refus de modifier le permis du Centre. Ce n'est toutefois pas ce qu'on a indiqué au Centre lorsque le ministère a traité avec lui. Comme le souligne mon collègue le juge Binnie, « j'estime que les intimés n'obtiendraient probablement pas l'ordonnance qu'ils sollicitent si les ministres qui se sont succédé s'étaient livrés, sans exprimer leur pensée, aux cogitations et aux délibérations auxquelles ils se sont livrés entre 1984 et 1991 » (par. 4). Je conviens avec lui que ce qui importe en l'espèce est la ligne de conduite des parties et la preuve qui fait état de leur relation. Dans la lettre de 1989, on reconnaît que les lits sont des lits de courte durée et que le permis doit être modifié en conséquence. La lettre de 1990 fait état de la promesse. Tout au long de ces échanges, les ministres qui se sont succédé et les fonctionnaires du ministère savaient que la vocation du Centre en tant qu'établissement de soins de longue et de courte durée était un élément important de sa campagne de financement; 50 lits réservés aux soins de durée intermédiaire ont été alloués — lits qui sont considérés comme

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funded all of the Center's short-term care services, promoted the move to Montreal, and promised an alteration of the permit once the move was made. Most of these elements were in place even in 1984, but they were solidified over the years in which the relocation plans were taking shape and being encouraged, culminating in what is, in my opinion, the significant triggering event here, namely the move to Montreal in January 1991. Hence, I see the Minister's discretion under s. 138 as having been exercised at that date.

des lits destinés aux soins de courte durée et qui ont finalement été reconnus comme tels. Ces fonctionnaires étaient au fait de tous les services de courte durée du Centre et ils les ont financés; ils ont encouragé le déménagement à Montréal et ont promis que le permis serait modifié après ce déménagement. Telle était en grande partie la situation même en 1984, mais tout s'est concrétisé davantage pendant les années au cours desquelles les plans de relocalisation ont pris forme et ont été encouragés pour aboutir à ce qui est, selon moi, l'élément déclencheur en l'espèce : le déménagement à Montréal en janvier 1991. Par conséquent, j'estime qu'à cette date le ministre avait exercé son pouvoir discrétionnaire en vertu de l'art. 138.

The parties referred in their submissions to a number of decisions that have considered the level of deference to be attributed to a Minister's exercise of discretion, including this Court's recent decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. The level of deference given to such decisions is high. However, this is not a situation in which the exercise of the Minister's discretion is under review as it was in *Baker*. Here the Minister has exercised his discretion prior to the decision that is objected to. More specifically, the discretion has been exercised by January 1991 when the move to Montreal is made, and the decision that is objected to here is the October 3, 1991 refusal to issue the modified permit. Hence, what is at issue is the reversal of that exercise of discretion. In other words, the Minister's discretion has been "spent" or "exhausted" by the time the refusal is made.

106 Dans leurs plaidoiries, les parties ont mentionné un certain nombre de décisions portant sur le degré de retenue applicable à l'exercice du pouvoir discrétionnaire d'un ministre, dont l'arrêt récent de notre Cour *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817. Les décisions discrétionnaires d'un ministre doivent faire l'objet d'une grande retenue. Nous ne sommes cependant pas en présence d'une situation où, comme dans l'affaire *Baker*, c'est l'exercice du pouvoir discrétionnaire ministériel qui est examiné. En l'espèce, le ministre avait exercé son pouvoir discrétionnaire avant la décision contestée. En effet, ce pouvoir avait déjà été exercé au moment du déménagement à Montréal en janvier 1991, alors que la décision contestée en l'espèce est le refus, le 3 octobre 1991, de délivrer le permis modifié. C'est donc l'infirmation de l'exercice du pouvoir discrétionnaire du ministre qui est en cause. En d'autres termes, le ministre avait déjà « exercé » ou « épuisé » son pouvoir discrétionnaire au moment du refus.

However, the question remains as to whether the October 3, 1991 letter was a valid reversal of the exercise of that discretion. More specifically, we must ask whether, under some general discretionary power, the Minister was entitled to reverse that original exercise of discretion at that time, in that way.

107 Toutefois, il reste à déterminer si la lettre du 3 octobre 1991 a validement infirmé l'exercice de ce pouvoir discrétionnaire. Plus particulièrement, nous devons nous demander si, en vertu de quelque pouvoir discrétionnaire général, le ministre pouvait alors procéder ainsi pour infirmer l'exercice initial de sa discrétion.

C. *Was the Original Exercise of Discretion Validly Reversed?*

108 In my opinion, the October 3, 1991 refusal cannot be taken as a valid reversal of the Minister's prior exercise of his discretion for at least two reasons.

109 First, the issue of additional resources and funding had never been raised before by ministerial officials to the Center's executives. There was never in fact any request for additional services or money by the Center. Moreover, there was no indication that the Center would have to change any of its activities in order to satisfy the requirements of the permit it asked for, thereby requiring more funding. The budget reports submitted from 1974 to 1991 have always included short-term care services, e.g., an operating room, laboratories and radiology services. The Center's October 24, 1991 letter responding to the Minister's refusal pointed out that the Center has always responded to the needs of the patients within its budget and that it had no intention of asking for adjustments to its budget for care and services resulting from the reclassification. I would also point out that the idea that the move to Montreal would not result in any reduction or increase in programs or lead to an increased budget has always been at the Center of the negotiations between the parties; see the Minister's report, *supra*, at p. 11. The Minister cannot now invoke a vague and ungrounded funding concern as a reason for reversing a prior exercise of discretion in these circumstances.

110 Secondly, the Minister's behaviour since that October 3, 1991 refusal of the permit modification is inconsistent with finding that the exercise of discretion has in fact been genuinely reversed. I refer here to the Minister's December 3, 1991 letter written to the president of the board of directors of another Montreal hospital, Centre hospitalier des convalescents de Montréal. In this letter, the Minister explains that the palliative care program formerly run by this hospital will be transferred to the Center. As various elements of the evidence indi-

C. *L'exercice initial du pouvoir discrétionnaire a-t-il été validement infirmé?*

Je suis d'avis qu'on ne peut pas considérer que le refus du 3 octobre 1991 a infirmé validement l'exercice antérieur du pouvoir discrétionnaire du ministre, et ce, pour au moins deux raisons.

Premièrement, les fonctionnaires du ministère n'ont jamais soulevé la question des ressources et du financement supplémentaires auprès des administrateurs du Centre. En fait, le Centre n'a jamais sollicité des services ou des fonds supplémentaires. De plus, rien n'indiquait que, pour respecter les exigences du permis demandé, le Centre devrait modifier ses activités et aurait ainsi besoin de plus d'argent. Les rapports budgétaires déposés au cours de la période de 1974 à 1991 ont toujours fait état de services de courte durée comme, par exemple, une salle d'opération, des laboratoires et des services de radiologie. Dans sa lettre du 24 octobre 1991, le Centre réagit au refus du ministre en faisant remarquer qu'il a toujours répondu aux besoins des patients à l'intérieur de l'enveloppe budgétaire qui lui était allouée et qu'il n'a pas l'intention de demander des ajustements budgétaires pour les soins et services résultant de la reclassification. Je tiens aussi à souligner que l'idée que le déménagement à Montréal n'entraînerait aucune réduction ou augmentation des programmes ni aucune hausse budgétaire a toujours été au cœur des négociations entre les parties; voir le rapport du ministre, *op. cit.*, p. 11. Dans ces circonstances, le ministre ne peut pas invoquer maintenant une préoccupation vague et non fondée relative au financement pour infirmer un exercice antérieur de son pouvoir discrétionnaire.

Deuxièmement, le comportement adopté par le ministre depuis qu'il a refusé la modification du permis le 3 octobre 1991 ne permet pas de conclure qu'il a vraiment infirmé l'exercice de son pouvoir discrétionnaire. Je mentionne à cet égard la lettre du 3 décembre 1991 qu'il a fait parvenir à la présidente du conseil d'administration d'un autre hôpital montréalais, le Centre hospitalier des convalescents de Montréal. Dans cette lettre, le ministre explique que le programme de soins palliatifs auparavant offert par cet hôpital sera trans-

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cate (e.g., the affidavit of Howard Blatt) and the Minister himself admits in this letter when he says that the use of these beds [TRANSLATION] "is limited to a few weeks", palliative care beds are by definition short-term care beds. Indeed, I note in this respect that in the November 21, 1989 letter referred to above, the Center is actually told by the C.S.S.S.R.M.M. that the palliative care patients cannot be given long-term care beds and they must be considered to be short-term care bed occupants. In the December 3, 1991 letter, the Minister writes [TRANSLATION] "the replacement of these beds has been carried out by Mount Sinai Hospital". This confirmation that the Center will be running short-term care beds comes after the Minister's refusal to alter the Center's permit. In my view, it indicates that the Minister's behaviour is inconsistent with a reversal of his discretion to modify the Center's permit. It is, in effect, acting as if the original exercise of the discretion is what is in operation, i.e., the Center has short-term care beds that can be used for palliative care patients. The only logical inference to be drawn is that this situation is the one that the Minister believes to be in the public interest.

féré au Centre. Comme divers éléments de preuve l'indiquent (notamment l'affidavit de Howard Blatt) et comme le ministre lui-même l'admet dans cette lettre lorsqu'il dit que l'utilisation de ces lits « se limite à quelques semaines », les lits des unités de soins palliatifs sont, par définition, des lits de courte durée. Je souligne d'ailleurs à ce propos que, dans la lettre du 21 novembre 1989 susmentionnée, le Conseil de la santé et des services sociaux de la région de Montréal métropolitain informe le Centre que les bénéficiaires de soins palliatifs ne peuvent pas se voir attribuer des lits destinés aux soins de longue durée et qu'ils doivent être comptés comme des patients occupant des lits de courte durée. Dans la lettre du 3 décembre 1991, le ministre écrit que « le remplacement de ces lits a été assuré par l'Hôpital Mont-Sinaï ». Cette confirmation que le Centre exploitera des lits de courte durée suit le refus du ministre de modifier le permis du Centre. À mon avis, cela montre que le comportement du ministre ne permet pas de considérer qu'il a infirmé l'exercice de son pouvoir discrétionnaire de modifier le permis du Centre. Le ministre semble, en effet, agir conformément à l'exercice initial de son pouvoir discrétionnaire en ce sens que le Centre possède des lits de courte durée pouvant être occupés par des patients qui nécessitent des soins palliatifs. La seule déduction logique qui peut être faite est que cette situation est celle que le ministre estime être dans l'intérêt public.

Given the groundlessness of the Minister's refusal to alter the permit as promised and his subsequent behaviour inconsistent with the supposed reversal of the original exercise of his discretion, I cannot view that October 3, 1991 letter as a valid reversal of the discretion exercised when the Minister promised to the Center a modification of its permit to reflect reality once the move to Montreal was made.

111 Étant donné que le refus du ministre de respecter la promesse de modifier le permis n'est pas fondé et que le comportement qu'il a adopté par la suite est incompatible avec la prétendue infirmation de l'exercice initial de son pouvoir discrétionnaire, je ne peux pas considérer que, dans sa lettre du 3 octobre 1991, le ministre a infirmé validement l'exercice de son pouvoir discrétionnaire en promettant au Centre de modifier son permis pour qu'il soit conforme à la réalité, une fois qu'il aurait déménagé à Montréal.

In the case of *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, this Court recognized the ongoing nature of a Minister's discretionary

112 Dans l'arrêt *Comeau's Sea Foods Ltd. c. Canada (Ministre des Pêches et des Océans)*, [1997] 1 R.C.S. 12, notre Cour a reconnu le caractère constant du pouvoir discrétionnaire d'un

power, holding that the *Fisheries Act*'s conferral of "absolute discretion" to the Minister to issue or authorize to be issued a fishing licence included the power to revoke that authorization prior to the actual issuance of the licence. There Major J. stated, at para. 43:

> The power to issue the licence, once exercised in any single instance, is expended and may only be revised or revoked under the specific statutory conditions in s. 9. However, the power to authorize is a continuing power. . . . I do not think that the authorization to issue the licence conferred upon the appellant an irrevocable legal right to a licence. Until the licence is issued, there is no licence and therefore no permission to do what is otherwise prohibited, namely fish for lobster in the offshore. Unless and until the licence is actually issued, the Minister in furtherance of government policy may reevaluate or reconsider his initial decision to authorize the licence. Until the Minister actually issued the licence, he possessed a continuing power to reconsider his earlier decision to authorize and or issue the licence . . .

This case and its holding, in my mind, is readily distinguishable from the case at bar.

113 The *Fisheries Act*, R.S.C. 1985, c. F-14, used a two-stage process of authorizing and issuing licences. In *Comeau's Sea Foods*, the Ministry had telexed to the applicant a copy of the decision to authorize the licences. However, on the facts of that case, the applicant did not request that the actual licences be issued and the evidence was that they would have been had the request been made prior to a change in Department policy after which, given political pressures surrounding lobster fishing, specific clearance from the Assistant Deputy Minister was required. As Major J. put it at para. 50: "In most instances the issuance of the licence would be expected to follow its authorization in short order. Nonetheless, the time between the two does permit the Minister to assess his authorization in light of government policy or a change in circumstances." In this case, there was a legitimate change in government policy that led the Minister to reconsider issuance of the licences, thereby

ministre, statuant que le fait que la *Loi sur les pêches* prévoyait que le ministre pouvait « à discrétion » délivrer ou autoriser la délivrance d'un permis de pêche signifiait également qu'il pouvait révoquer cette autorisation avant la délivrance réelle du permis. Dans cet arrêt, le juge Major affirme, au par. 43 :

> Le pouvoir de délivrer un permis, une fois exercé dans une affaire, est épuisé et la délivrance ne peut être révisée ou révoquée qu'aux conditions particulières énoncées à l'art. 9. Toutefois, le pouvoir d'autoriser est un pouvoir constant [. . .] Je ne pense pas que l'autorisation de délivrer un permis ait conféré à l'appelante un droit irrévocable à un permis. Jusqu'à ce que le permis soit délivré, il n'y a pas de permis et, par conséquent, aucune permission de faire ce qui est par ailleurs interdit, à savoir pêcher le homard en haute mer. Tant et aussi longtemps que le permis n'est pas délivré, le ministre peut, aux fins d'appliquer la politique du gouvernement, réévaluer sa décision initiale d'autoriser le permis et revenir sur celle-ci. Jusqu'à ce qu'il ait effectivement délivré le permis, le ministre avait le pouvoir constant soit de revenir sur sa décision antérieure d'autoriser, soit de délivrer le permis . . .

J'estime que cette affaire — et la conclusion qui y est tirée — peut facilement être distinguée de la présente affaire.

La *Loi sur les pêches*, L.R.C. 1985, ch. F-14, établissait un processus en deux étapes consistant d'abord à autoriser et ensuite à délivrer les permis. Dans *Comeau's Sea Foods*, le ministère avait envoyé par télex à la requérante une copie de la décision d'autoriser la délivrance des permis. Les faits de cette affaire indiquent cependant que la requérante n'avait pas demandé que les permis autorisés soient délivrés, et la preuve révèle qu'ils l'auraient été si elle en avait fait la demande avant que le ministère change sa politique en exigeant désormais que la délivrance des permis soit assujettie à l'autorisation expresse du sous-ministre adjoint en raison des pressions politiques entourant la pêche du homard. Comme l'a précisé le juge Major, au par. 50 : « Dans la plupart des cas, on s'attendrait à ce que la délivrance d'un permis suive de près son autorisation. Toutefois, l'intervalle qui sépare les deux permet au ministre d'évaluer son autorisation en fonction de la politique du

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exercising his discretion within the period of time given to him under the statute to do so.

In the present case, the former law is not set up this way. As Major J. recognized in *Comeau's Sea Foods*, whether the power can be exercised once or more than once is a matter of interpretation (*supra*, at para. 44, citing *C.W.C. v. Canada (Attorney General)*, [1989] 1 F.C. 643 (T.D.), at p. 652). The legislation here does not use the authorizing/issuing steps. Section 138 governs the granting of permits or modifications to existing permits and s. 139.1 governs the renewal of permits. Hence, the Minister is not provided, as the Minister was provided under the *Fisheries Act*, with a period of time in which to change his or her mind. Moreover, even if such a power were to be imputed to the Minister on the basis of general discretionary powers, the refusal in this case was not a valid exercise of the Minister's discretion. The policy concern invoked in the October 3, 1991 refusal was not a fair or appropriate one given a situation in which the Minister continued to fund the short-term care services the Center provided and considered it in his dealings with the rest of the world as a provider of both long-term and short-term care services. A policy concern invoked in such circumstances must be legitimate. At the very least, it must correspond to the reality of the situation. The Minister cannot promise the Center to issue the modified permit when the move to Montreal is made, refuse to issue that permit, and then continue to treat the Center as if the permit had in fact been issued. Having decided that it was in the public interest for the Center to operate as a long-term and short-term care facility and having continued to see things this way even after the move, the Minister must issue the 1991-1993 permit.

gouvernement ou d'un changement de circonstances. » Dans cette affaire, un changement légitime de politique gouvernementale avait amené le ministre à réévaluer la délivrance des permis, et il avait ainsi exercé son pouvoir discrétionnaire dans le délai prescrit à cette fin par la loi en cause.

114 Dans la présente affaire, l'ancienne loi n'est pas conçue de la même manière. Comme le juge Major l'a reconnu dans l'arrêt *Comeau's Sea Foods*, la question de savoir si le pouvoir peut être exercé une seule ou plusieurs fois est une question d'interprétation (précité, par. 44, où il cite *S.T.C. c. Canada (Procureur général)*, [1989] 1 C.F. 643 (1re inst.), p. 652). La mesure législative dont il est question en l'espèce ne fait pas appel aux étapes de l'autorisation et de la délivrance. L'article 138 concerne la délivrance des permis ou les modifications apportées aux permis existants, alors que l'art. 139.1 porte sur le renouvellement des permis. Par conséquent, contrairement à ce qui se produit sous le régime de la *Loi sur les pêches*, le ministre ne dispose d'aucun délai pour changer d'idée. De plus, même si le ministre avait disposé d'un tel pouvoir sur la base de pouvoirs discrétionnaires généraux, il reste que le refus qu'il a prononcé en l'espèce ne constituait pas un exercice valide de son pouvoir discrétionnaire. La préoccupation d'intérêt général invoquée dans le refus du 3 octobre 1991 n'était ni équitable ni appropriée étant donné que le ministre continuait de financer les services de courte durée offerts par le Centre et que, dans ses rapports avec les autres, il considérait le Centre comme un établissement de soins de longue et de courte durée. Une préoccupation d'intérêt général invoquée dans de tels cas doit être légitime. Elle doit à tout le moins être conforme à la réalité. Le ministre ne peut pas promettre au Centre de délivrer le permis modifié après le déménagement à Montréal, refuser de délivrer le permis et ensuite continuer à traiter le Centre comme si le permis avait effectivement été délivré. Vu qu'il a décidé qu'il était dans l'intérêt public que le Centre offre des soins de longue et de courte durée et qu'il a continué d'avoir cette perception même après le déménagement, le ministre doit délivrer le permis pour la période 1991-1993.

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D. *What Are the Minister's Subsequent Obligations?*

115 As I have said above, the Minister must issue the 1991-1993 modified permit, recognizing the Center's vocation as a provider of both long-term and short-term care. This will bring the Center under s. 126 of the new law into the category of "an institution which operates both a residential and long-term care centre and a general and specialized hospital centre with 50 beds or more". As such, it is entitled to its own board of directors. The election of the prior unified board must, therefore, be cancelled.

116 If the Minister wants to change the category, class, kind or capacity of the permit (e.g., have the Center operate as a residential and long-term care centre only), this must in fact be reflected in the Center's authorized activities and the government's funding of those activities. If the Minister decides to take this course of action, the Minister must:

a. consult with the Center and give it an opportunity to make representations as s. 442.1 of the new law requires;

b. make sure that its consideration of what "the public interest warrants" under s. 442.1 of the new law is based on valid and legitimate policy concerns that are fairly invoked and based on the reality of the situation.

In other words, the government cannot invoke a vague funding concern as a reason for making the change to a long-term care permit and then continue to treat the Center as a mixed-care operation. Any change in the Center's permit status, and subsequent effect on its ability to have its own board of directors, must be justified by way of an actual change in government policy based on a decision

D. *Quelles sont les obligations subséquentes du ministre?*

Comme je l'ai dit précédemment, le ministre doit reconnaître la vocation du Centre en tant qu'établissement de soins de longue et de courte durée en délivrant le permis modifié pour la période 1991-1993. Le Centre sera ainsi considéré, en vertu de l'art. 126 de la nouvelle loi, comme « un établissement qui exploite à la fois un centre d'hébergement et de soins de longue durée et un centre hospitalier de soins généraux et spécialisés de 50 lits ou plus ». À ce titre, il aura droit à son propre conseil d'administration. L'élection du conseil d'administration unifié antérieur doit donc être annulée.

Si le ministre veut modifier la catégorie, la classe, le type ou la capacité indiqués au permis (de manière notamment à faire de l'établissement en cause un centre d'hébergement et de soins de longue durée seulement), cela devra effectivement se refléter dans les activités autorisées du Centre et dans le financement de ces activités par le gouvernement. Si le ministre choisit d'agir ainsi, il devra :

a. consulter le Centre et lui donner l'occasion de faire des représentations, conformément à l'art. 442.1 de la nouvelle loi;

b. veiller à ce que son examen de ce que « l'intérêt public [. . .] justifie » aux termes de l'art. 442.1 de la nouvelle loi soit fondé sur des préoccupations d'intérêt général valides et légitimes qui soient invoquées équitablement et qui soient conformes à la réalité.

En d'autres termes, le gouvernement ne peut pas invoquer une vague préoccupation relative au financement pour changer le permis en permis de soins de longue durée et pour ensuite continuer à traiter le Centre comme un établissement de soins mixtes. Toute modification de la nature du permis du Centre ainsi que tout effet subséquent sur sa capacité de posséder son propre conseil d'administration doivent être justifiés par un changement réel de politique gouvernementale faisant suite à une décision que ces soins de courte durée ne ser-

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that those short-term care services no longer serve their particular purpose or the public interest.

It is my view that where the Minister has failed to act in accordance with a prior exercise of discretion, the criteria for the issuance of an order of mandamus are met; see *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), aff'd [1994] 3 S.C.R. 1100. Although art. 100 of the *Code of Civil Procedure*, R.S.Q., c. C-25, provides that extraordinary remedies are not generally available against the Crown, this rule does not apply in circumstances where the Minister acts outside the limits of his competence, as in this case; see D. Ferland and B. Emery, *Précis de procédure civile du Québec* (3rd ed. 1997), vol. 1, at pp. 162-63; P. A. Gendreau et al., *L'injonction* (1998), at pp. 194-95; *Morin v. Driscoll College Inc.*, [1979] R.P. 198 (C.A.); *Procureur général de la province de Québec v. Laurendeau*, [1985] R.D.J. 513 (C.A.); *Charles Bentley Nursing Home Inc. v. Ministre des Affaires sociales*, [1978] C.S. 30.

V. Disposition

For these reasons, I would dismiss the appeal with costs and order the Minister to deliver the required permit pursuant to art. 844 of the *Code of Civil Procedure*.

Appeal dismissed with costs.

Solicitors for the appellant: Bernard, Roy & Associés, Montréal.

Solicitors for the respondents Mount Sinai Hospital Center and Elliot L. Bier et al.: Adessky, Poulin, Montréal.

vent plus ni leurs fins particulières ni l'intérêt public.

117 Je suis d'avis que, lorsque le ministre n'agit pas conformément à l'exercice antérieur de son pouvoir discrétionnaire, les conditions de délivrance d'une ordonnance de *mandamus* sont remplies; voir *Apotex Inc. c. Canada (Procureur général)*, [1994] 1 C.F. 742 (C.A.), conf. par [1994] 3 R.C.S. 1100. Même si l'art. 100 du *Code de procédure civile*, L.R.Q., ch. C-25, prévoit qu'en général il n'y a lieu à aucun recours extraordinaire contre l'État, cette règle ne s'applique pas dans les cas où un ministre outrepasse les limites de sa compétence comme c'est le cas en l'espèce; voir D. Ferland et B. Emery, *Précis de procédure civile du Québec* (3e éd. 1997), vol. 1, p. 162-163; P. A. Gendreau et autres, *L'injonction* (1998), par. 194-195; *Morin c. Driscoll College Inc.*, [1979] R.P. 198 (C.A.); *Procureur général de la province de Québec c. Laurendeau*, [1985] R.D.J. 513 (C.A.); *Charles Bentley Nursing Home Inc. c. Ministre des Affaires sociales*, [1978] C.S. 30.

V. Dispositif

118 Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens et d'ordonner au ministre de délivrer le permis sollicité, conformément à l'art. 844 du *Code de procédure civile.*

Pourvoi rejeté avec dépens.

Procureurs de l'appelant : Bernard, Roy & Associés, Montréal.

Procureurs des intimés le Centre hospitalier Mont-Sinaï et Elliot L. Bier et autres : Adessky, Poulin, Montréal.

2001 SCC 41 (CanLII)

1986 CanLII 4868 (MB QB)

RURAL MUNICIPALITY OF RITCHOT (plaintiff) v. SAMUEL MANDZIUK (defendant) and JOSEPH BRODEUR (third party)
(No. 84-01-02263)

INDEXED AS: RITCHOT, RURAL MUNICIPALITY OF v. MANDZIUK et al.

Manitoba Court of Queen's Bench
Barkman, J.
July 10, 1986.

1986 CanLII 4868 (MB QB)

Counsel:
Gavin Wood and Bruce H. Rutherford, for the plaintiff;
Paul Anderson, for the defendant;
Dennis H. Ringstrom, for the third party.

This case was heard before Barkman, J., of the Manitoba Court of Queen's Bench, who delivered the following judgment on July 10, 1986:

[1] Barkman, J.: This is an action by the plaintiff, the Rural Municipality of Ritchot, a municipal corporation, for injunctive relief against the defendant Samuel Mandziuk who operated, until 1983, a business on land situated in an area designated as "A" Rural District, such business use being contrary to the provisions of the Ritchot Planning Scheme 1966 B, which scheme was adopted by the plaintiff municipality under Bylaw No. 190 (Exhibit 3) on November 1, 1966. The defendant does not contest the fact that the business use is contrary to the provisions of the said Planning Scheme, but alleges that as a result of negligent misrepresentations by the secretary-treasurer of the plaintiff, delay by the plaintiff in enforcing its bylaws and Planning Scheme, and the plaintiff's conduct in allowing the defendant to carry on his business for nine years; the plaintiff is estopped from obtaining the injunctive relief

and in the alternative, if the plaintiff is not estopped from obtaining injunctive relief, then the defendant counterclaims against the plaintiff for damages and costs which will result due to the removal of his buildings, personal property and for loss of business profits.

[2] The defendant also issued a Third Party Notice against Joseph Brodeur, the secretary-treasurer of the plaintiff, claiming to be entitled to be indemnified by the third party for any damages suffered and costs incurred by the defendant as a result of the plaintiff's claim and his own costs incurred as a result of these proceedings.

[3] The parties, by agreement, filed:

> Exhibit 1 An Agreed Statement of Facts
>
> Exhibit 2 Agreed Documents
>
> Exhibit 3 1966 B Planning Scheme of the plaintiff without maps

[4] The defendant then applied to file an Amended Statement of Defence and Counterclaim. The plaintiff and the third party did not object and the amended document was filed by consent.

[5] The parties, by agreement, indicated for the record the court will be requested to deal only with injunctive relief and liability as between the parties, however, quantum of damages will be dealt with after liability has been established.

[6] In the afternoon of the fourth and last day of the trial, the defendant, by his counsel, informed the court that he is discontinuing his claim against the third party and that the third party has agreed to this discontinuance without costs being assessed against either the defendant or the third party in this regard.

[7] After the plaintiff and defendant had both completed the calling of evidence and closed their respective cases, the defendant made a further application to amend his Statement of Defence and Counterclaim. The proposed amendment to para. 24 was as follows:

> "24(c) Further and in the alternative the plaintiff was negligent in failing to notify the defendant that the defendant was in contravention of the plaintiff's zoning bylaws in a timely fashion and further in failing to take reasonable or reasonably prompt steps to enforce the plaintiff's zoning bylaws so as to prevent damages to the defendant. In the premises the plaintiff is liable to the defendant to so enforce its bylaws and is in breach of a duty of care to the defendant for which it is liable."

and also to add to para. 26, after striking out "as aforesaid", the following:

> "the failure to notify or enforce in respect of the breach of bylaws alleged by the plaintiff."

[8] This application to amend was denied after hearing argument. These amendments do not, in my opinion, add any new allegations to the allegations contained in the defendant's Statement of Defence and Counterclaim; namely paras. 24, 25 and 26. In my opinion the allegation of acquiescence by the plaintiff sufficiently covers the allegations in the proposed amendments.

[9] The facts of this case, as I find them, are dependent in some respect upon my assessment of the credibility of Joseph Brodeur and the defendant Samuel Mandziuk. After having had the opportunity of seeing both of these persons in the witness box and hearing their evidence, I am satisfied that where their evidence relative to the conversations between them as to the use of the site conflicts, I prefer the evidence of Joseph Brodeur, to the evidence of Samuel Mandziuk.

[10] The defendant, prior to 1974, operated a Piano Clinic in the Village of Ste. Agathe. The building in which

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this business was carried on was partially destroyed by fire. According to councillor Emanual Lemoine, the piano clinic business started to develop into a junk yard before it burned down. The defendant and the plaintiff had some problems in regard to this site which were eventually resolved, with some difficulty, when the defendant moved his business to its present location in 1975. Councillor Lemoine was pleased to get the business removed from the centre of the Village site to the present location at the outskirts of the Village since he had been receiving some complaints from residents regarding the junk accumulating on this site.

[11] Councillor Lemoine, in his evidence, also indicated that he was aware that problems would develop with the business at its present location, however, he did nothing before his term as councillor expired in 1980. His evidence is that prior to the defendant taking possession of the present site, he does not recall any vehicles or equipment at this location. He stated that the land was originally farmed by a previous owner, the building on the site was used as a hatchery and later the building was used as a second hand store.

[12] The defendant states that he completed the purchase of this property in 1975. He investigated the property in 1973 and 1974 because his site in the Village of Ste. Agathe was too small for the type of business that he wished to develop. He states that when he purchased the property, there were seven or eight wrecked cars, several refrigerators and a bedroom suite and the old building on the site. He states that the 500 to 1000 vehicles on the property in 1983 were all trade-ins on sales of pianos during the years 1975 to 1983. He says he made enquiries about the site at the Province of Manitoba Highways Branch and at the plaintiff's office in St. Adolphe in 1974. He says Joseph Brodeur, the secretary-treasurer of the plaintiff, showed him a map which indicated that five acres of the present site could be used for business purposes and the balance for agriculture. He understood from Mr. Brodeur that he would not require a building permit for the building and enclosed compound that he subsequently erected on the five acre portion of the site and that he could carry on his piano clinic and storage of used and wrecked vehicles on the five acre portion of the present site. All of this evidence of the defendant is denied by Joseph Brodeur, the secretary-treasurer of the plaintiff. As I stated above, I prefer Mr. Brodeur's evidence for the following reasons. Mr. Brodeur states that the municipal maps show the whole property in question as being zoned agricultural. Mr. Brodeur was involved with the difficulties in 1973 between the defendant and the plaintiff relating to the storage of wrecked vehicles and machinery on the site occupied by the defendant in the Village of Ste. Agathe. Mr. Brodeur does not recall talking to the defendant about these matters in 1973 and 1974 and due to the conflict between the parties at that time, I infer that he would likely recall any dealings he might have had with the defendant in regard to using the land in question for uses other than agricultural. The letter of the defendant (Exhibit 2(ix)) admits the defendant knew the land in question was zoned agricultural and no permit was required for buildings on property zoned agricultural but that if any buildings were to be used for any purpose other than agricultural, then "I must have that portion, part or whole rezoned". I am satisfied that if the defendant and Mr. Brodeur had any discussions relating to the property in question that the defendant had been advised that the property was zoned agricultural, that no permit was required for buildings on agricultural land and that if such buildings were to be used for purposes other than was allowed on agricultural zoned property, that the defendant would require rezoning.

[13] I am satisfied from the evidence

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of Councillor Lemoine that he definitely, and possibly the whole council, was aware of the defendant's use of the present site, but that the council of the plaintiff was not prepared until 1980 to confront the defendant with regard to his non-confirming use of the property. In 1980 Mr. Lemoine was replaced by Albert Bilodeau as councillor for the ward in which the site in question is located. Mr. Bilodeau gave evidence that in 1977-78 vehicles started arriving in greater numbers on the defendant's property. After being elected in 1980 he requested council, in 1981, to pass a resolution relating to the non-conforming use by the defendant. At the same time, he became aware of the pending expropriation by the Province of Manitoba of part of the defendant's property for the new right of way for P.T.H. #75 which might cause the removal of the defendant's building and wrecked vehicles from the site. There were some negotiations between the province, the plaintiff and the defendant which culminated only in the moving of many of the wrecked vehicles to other locations on the site. This result did not solve the non-conforming use of the property and therefore in March 1983 the plaintiff commenced proceedings under the provisions of its planning scheme by passing a resolution (Exhibit (2)(vii)) for a show cause hearing. This resolution and the notice of the show cause hearing was served on the defendant on March 23, 1983 (Exhibit 2(viii)). The defendant responded with his personal letter to the plaintiff above identified and thereafter counsel for the defendant responded by letter on the defendant's behalf.

[14] On April 20, 1983, the council of the plaintiff passed another resolution indicating that the defendant had not shown sufficient cause why the new building should not be removed or torn down and why the vehicles should not be removed from the site with an attached notice that the plaintiff intends to exercise its powers under the **Planning Act**, S.M. 1975, c. 29; C.C.S.M., c. P-80. There was further correspondence between counsel for the plaintiff and defendant without resolution of the problem. The plaintiff then commenced its action for injunctive relief and a claim for damages.

[15] The evidence relating to the fact that the defendant was assessed a business tax on five acres of his property consists of evidence by the defendant, Mr. Brodeur, Mr. Lemoine and Exhibits 2(i), (ii), (iii) and (iv). The evidence and these exhibits identify the business as a "second hand store and storage". This identification was carried forward from the time that a previous owner operated a second hand store on the property. The defendant, on the basis of this evidence, claimed his operation was temporarily permitted by the plaintiff in regard to the five acre parcel for which he had been assessed and he paid a business tax since purchasing the property (See Exhibit 2(x)).

[16] The defendant's evidence that all of the vehicles were obtained as trade-ins on his sales of pianos is difficult to accept especially when in his examination for discovery he estimated the number of vehicles at about 500, and at trial he estimated the number at about 1000, keeping in mind that he put his business on hold in the summer of 1983. This evidence of all the vehicles and parts resulting from trade-ins is even more difficult to believe when viewing the photographs in Exhibit 4, which photographs indicate to me that they depict the operation of an auto wrecking business especially the photographs showing the collections of batteries, alternators, tail pipes, etc. For these reasons and other reasons mentioned above, the credibility of the defendant, in my opinion, is greatly impaired.

[17] I therefore find that the defendant was carrying on a business in the nature of auto wrecking and the repair and servicing of pianos on the property in question and that the vehicles and equipment on the property were not obtained as trade-ins in the business of piano sales.

[18] I also find that the defendant

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erected a metal clad building and a fenced compound and used them for the purpose of a business of auto wrecking and storage of parts and accessories of automobiles contrary to the provisions of the Ritchot Planning Scheme 1966 B.

[19] I am satisfied that the evidence proves that the plaintiff was aware of the type of business the defendant was carrying on at the site in question and acquiesced in such use without any approval or disapproval indicated to the defendant until March 1983.

[20] The situation confronting the parties in March of 1983 therefore was as a direct result of the defendant carrying on his business on property zoned agricultural with the knowledge that his use was not in accordance with that zoning and the acquiescence of the plaintiff with knowledge of the type of business being carried on by the defendant. Is the plaintiff, under these circumstances, entitled to injunctive relief?

[21] Injunctive relief is an extraordinary remedy of an equitable nature and is granted at the discretion of the court. (See the **City of Toronto v. Rudd and Rudd**, [1952] O.R. 84, at p. 86 and **City of Toronto v. Polai** (1970), 8 D.L.R.(3d) 689.)

[22] The defendant argues that the real cause of the present situation is due to the plaintiff's acquiescence and delay. I disagree with this argument because I have found that the defendant was aware of the zoning of this property at the time he purchased it in 1975. The acquiescence and delay by the plaintiff only allowed to continue what the defendant knew was contrary to the zoning under the planning scheme.

[23] The acquiescence of the plaintiff in this case was passive and not active. The plaintiff did nothing to give the defendant the impression that it approbated the use of the property for business purposes. The plaintiff only delayed enforcement of the provisions of the planning scheme against the defendant.

[24] The authorities submitted by the defendant in support of his defence of estoppel due to acquiescence, namely;

(a) **City of Windsor v. C.P.R.** (1922), 52 O.L.R. 83

(b) **Pembroke v. Canada Central Railway** (1882), 3 O.R. 503, approved in **Re Sandwich and Sandwich** (1910), 2 O.W.N. 93

(c) **Alexander v. Huntsville** (1894), 24 O.R. 665

(d) **City of Ottawa v. Grand Trunk Railway** (1921), 50 O.L.R. 239

can all be distinguished from the case before me in that in each case there was some action by the party against which the court held that estoppel applied.

[25] I am satisfied that the acquiescence and delay of the plaintiff in this case does not give rise to the defence of estoppel. I am of the opinion that on the facts before me the court should follow the case of **Saanich v. Wright et al.** (1984), 54 B.C.L.R. 393.

[26] I have found that there was no misrepresentation by the plaintiff, its agents or employees in this case and therefore the defendant cannot claim damages on this ground.

[27] The defendant also claims damages based on a claim that the plaintiff owed him a duty of care and the acquiescence and delay in failing to notify the defendant that the said business use was in contravention of the plaintiff's zoning bylaw (planning scheme) and in accepting the business tax revenue.

[28] The business tax question I dealt with above and I am satisfied that the acceptance of such business tax revenue in no way related to the use of the property by the defendant.

[29] The question of whether the plaintiff owed the defendant a duty of

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care in this case does not arise in the circumstances of this case.

[30] The defendant referred the court to the case of **City of Kamloops v. Nielsen et al.**, [1984] 2 S.C.R. 2; 54 N.R. 1; 10 D.L.R.(4th) 641; [1984] 5 W.W.R. 1. That case deals with a building bylaw which provided for a scheme of inspections by the city's inspectors. The evidence proved that the city was aware of the defective construction and the court held that in those circumstances, the city was obliged to take care not to injure persons such as the plaintiffs who had purchased the property from a previous owner. In the case before me the defendant knew that the land was not zoned for his business use but was allowed to continue the use for apparently nine years. I am not aware of any law which requires the plaintiff to enforce its bylaws against a person with knowledge that he is in contravention of the bylaw.

[31] The question of acquiescence and delay creates more of a problem in my mind, especially since the plaintiff was aware of the contravention of its bylaw or planning scheme. I am of the opinion that the defendant is not entitled to damages in this regard because of his knowledge that the property was zoned agricultural. If he had wished to protect himself against the action now taken by the plaintiff, it was incumbent upon him to investigate the zoning restrictions fully and obtain some undertaking from the plaintiff to protect himself. He did not do so and therefore his counterclaim is dismissed.

[32] The terms of the mandatory injunction against the defendant, in my opinion, must reflect the practical situation. The delay and acquiescence of the plaintiff warrants the granting of time for the defendant to remove his vehicles, equipment and building from the premises. The delay was for nine years approximately and, therefore in my opinion, it would be proper to delay the effective date of the injunction to July 1, 1990, a period of four years.

[33] The plaintiff's delay and acquiescence in my opinion also disentitles the plaintiff to its costs. The mandatory injunction is therefore granted effective on July 1, 1990, without costs.

Order accordingly.

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IN THE MATTER OF	Application to Appeal a Stop Order dated February 19, 2026
APPELLANT	Nelson Commercial Real Estate Inc.
SUBJECT LANDS	5109 41 Street, Lloydminster Alberta
DOCUMENT	WRITTEN SUBMISSION OF NELSON COMMERCIAL REAL ESTATE
DATE OF SUBMISSION	Friday, May 1, 2026
DATE OF HEARING	Tuesday, May 26, 2026
NAME AND ADDRESS FOR FILING FOR PERSON FILING THE DOCUMENT	McLennan Ross LLP Barrister & Solicitors 600, 12220 Stony Plain Rd. Edmonton, AB T5N 3Y4 Attention: Cody Van de Veen Email: cody.vandeveen@mross.com Phone: (780) 482-9191 Fax: (587) 686-9726 File No: 20260832

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PART 1 - OVERVIEW

1. Nelson Commercial Real Estate Inc. (the "**Appellant**") disputes the stop order dated February 19, 2026 (the "**Stop Order**"), issued against lands located at 5109 41 Street (Plan 7622291, Block 13) (the "**Lands**") by the City of Lloydminster (the "**City**").

2. The City alleges that the Appellant is operating an indoor and outdoor storage facility and further alleges that this constitutes an unauthorized use of the Lands. To the Appellant's knowledge, the term 'storage facility' has not been defined by the City, and it does not appear to be defined in any iterations of the City's land use bylaws. Notwithstanding, the Appellant states that the current use of the Lands includes the storage of materials and equipment for the Appellant and for various tenants (the "**Current Use**").

3. The Appellant is the current registered owner of the Lands and has been since October 2012. The Appellant has continuously used and otherwise leased the lands to various tenants, all of which have operated industrial enterprises on the Lands that are consistent with the historical use of the Lands dating back to at least 1990. At all relevant times, the enterprises operating on the Lands have incorporated and relied upon on the storage of various materials and equipment inside a building on the Lands, and more generally, on the entire portions of Lands.

4. In addition to issuing the Stop Order, the City has refused to issue a business license for the Current Use that was applied for in or around November 2025 after various discussions with the City (the **"New Business License**"). Specifically, the City, via their legal counsel, advised the Appellant that the City Manager will not process the application for the New Business License without approvals under the 2025 Bylaw and that any lawful use of the Lands is limited to a truss manufacturing facility. Inexplicably, the City has taken this stance on the New Business License despite previously issuing business licenses for the tenants of the Lands since the Development Permit and the various reiterations of the land use bylaws since then.

5. The use of the Lands fully or substantially conforms with a historical development permit, authorizing a general industrial use in a light industrial zoning district. The Appellant respectfully requests that the City of Lloydminster Subdivision and Development Appeal Board (the "**SDAB**") revoke the Stop Order and declare that the Current Use constitutes a legal non-conforming use, so as the Current Use may continue and that the City can then proceed with issuing the New Business License.

6. The Appellant's submissions are based on:

    a. the Current Use is a legal non-conforming use as contemplated by the all versions of the City's land use bylaws and is expressly recognized as a legal

non-conforming use at law and under the *Municipal Government Act*, RSA 2000, c M-26 (the "***MGA***"), which is a complete defence to a stop order; or

b. in the alternative, if the Current Use is not deemed to be a legal non-conforming use, the City is estopped from enforcing the Stop Order due to the representations made to the Appellant, upon which the Appellant relied to their detriment.

PART 2 - FACTS

7. The Appellant is the current registered owner of the Lands, which are zoned as a 7.1 General Commercial (GC) District under the current land use bylaw LUB-05-2025 (the "**2025 Bylaw**"). The Lands are located in General Commercial District. Immediately surrounding the Lands are a variety of businesses and zoning districts, including:

a. a Real Canadian Superstore across 41 Street to the north, zoned Corridor Commercial;

b. various businesses across 51 Avenue to the east, zoned General Commercial;

c. the Libbie Young Centre zoned Community Services, along with various businesses zoned General Commercial, across 39 Street to the south; and

d. St. Mary's Elementary School abutting the Lands to the west, zoned Community Services.

TAB A - Aerial View of the Lands

8. The Lands contain an approximate 20,100 sq ft building near the centre portion of the lot (the "**Building**") surrounded by a concrete apron. The remainder of the lot is otherwise graveled and is used for the storage of various materials and equipment, as intended since the construction of the Building and the Development Permit. A communications tower is located on the very southwest corner of the Lands, and the Lands are entirely surrounded by a chain link fence.

9. On or about December 17, 1990 a development permit was issued for the Lands (the "**Development Permit**"), which authorized a general industrial use of the Lands by Nelson Lumber Company Ltd. ("**Nelson Lumber**").

TAB B: Administrative Report – P&D Committee

TAB C: The 1990 Development Permit

10. At the time of the Development Permit, the Lands were zoned M1 – Light Industrial District under Zoning Bylaw No. 31-87 (the "**1989 Bylaw**").

TAB D: Zoning Bylaw No. 31-87

11. Since the issuance of the Development Permit, and even prior to same, the Lands have supported various industrial enterprises which have involved storage of various materials and equipment inside the Building and across the entirety of the Lands. These enterprises have provided benefit and been an integral part of the community in the City. More specifically, following Nelson Lumber's use of the Lands, the Lands were used by an oilfield and energy fabricator and machine shop, Baker Hughes Canada Company ("**Baker Hughes**"), from approximately March 2011 to June 2020.

12. During Baker Hughes' occupation of the Lands, various zoning bylaws were in place. First, Zoning Bylaw No. 12-2001 (the "**2001 Bylaw**") classified the Lands as the M1 – Light Industrial zoning. Next, on August 25, 2016, Land Use Bylaw No. 05-2016 (the **"2016 Bylaw**") was proclaimed, and classified the Lands as 8.1 Light Industrial (I1) District. Under the 2001 Bylaw and the 2016 Bylaw, the respective zonings of the Lands authorized General Industrial Use as a discretionary use and as a permitted use, respectively.

TAB E: Zoning Bylaw No. 12-2001

TAB F: Land Use Bylaw No. 05-2016

13. The Appellant became the registered owner of the Lands during the Baker Hughes' occupation, on or around October 11, 2012. The principal behind the corporate Appellant, Scott Nelson ("**Scott**") was born and raised in the City, and Scott's father, Ray Nelson , ("**Ray**") was the principal behind Nelson Lumber, whom previously owned the Lands and various parcels surrounding the Lands. The Appellant's connection to the City, and specifically the area surrounding the Lands, is deep-rooted. Not only are the Lands located in close proximity to Ray Nelson Drive, the portion of Highway 16 / 44 Street named after Ray, but the Lands have supported and represent Ray and Scott's entrepreneurial endeavors, successes, and contributions in Lloydminster. The occupiers of the Lands, including the Appellant's Current Use, have and continue to provide notable benefit to the City and accords with the City's goals of business development and retention. With the Appellant's ties to Lloydminster, the Appellant saw the Lands as an exciting opportunity to support industrial business in the city and a way to preserve the continued use of the Lands for this purpose.

14. Since acquiring the Lands, the Appellant has maintained the real and reasonable expectation that the Lands would continue to support businesses that used the Lands for general industrial uses, and that such use would continue with support from the community and the governing bodies in the City.

15. When Baker Hughes tenancy on the Lands ended, the Appellant continued to fulfill this vision and leased the lands to a fabricator of oilfield equipment, Lufkin Industries. Lufkin's lease of the Lands continued through until 2024.

16. Contemporaneously with Lufkin's use of the Lands, the Appellant used the Lands for storing Nelson Commercial's property and equipment.

17. Prior to Lufkin's departure from the Lands, the Appellant also leased a portion of the Lands to Windsor Plywood to allow for storage on the Lands by Windsor Plywood. Windsor Plywood and the Appellant's use of the Lands has continued uninterrupted to the present day. In addition to the use by the Appellant and Windsor Plywood, the Appellant has additional tenants that use the Lands for storage of materials and equipment.

18. Following Lufkin's departure, the Appellant commenced their search to find a new tenant for the Lands. Given the location of the Building on the Lands and the layout of the lands generally, interested tenants for the Lands were those that operated businesses similar to the prior occupiers. While the Appellant's efforts to secure long-term tenants have been curtailed by the issuance of the Stop Order and this appeal, presently, the Lands support the Current Use.

TAB G: Photographs of the Lands

19. As the above demonstrates, the Lands have continuously supported and have been used by various industrial enterprises where the storage of materials and equipment inside and outside of the Building occurred and were integral to those operations.

20. Land Use Bylaw No. 05-2025 (the "**2025 Bylaw**") came into force on or around June 12, 2025 and zoned the Lands 7.1 General Commercial (GC) District (the "**GC District**"). For the first time, the zoning of the Lands did not include General Industrial Use as a discretionary use of the Lands. On this change of zoning, the City apparently now believes that they have a proper basis to raise issue with the Appellant's use of the Lands. However, as is further detailed herein and as is the subject matter of this Appeal, this change of zoning ought not apply retroactively to the Lands and ought not interfere with the Appellants historical and continuous use of the Lands, as a General Industrial Use inclusive of interior and exterior storage. This protection afforded to the Appellant is a fundamental private property right.

TAB H: 2025 Bylaw LUB-05-2025

21. On February 19, 2026, the City Issued the Stop Order, which now directs compliance by the Appellant by July 19, 2026 by way of either (i) ceasing to use the lands for the Current Use and removing all equipment, vehicles, materials and other items associated with the Current Use; or (ii) applying and obtaining an amendment to the

2025 Bylaw to provide for the Current Uses as a permitted or discretionary use along with a new development permit.

TAB I: February 19, 2026 Stop Order

22. The City has contemporaneously refused to issue the New Business License. Specifically, the City, via their legal counsel, advised the Appellant that the City Manager will not process the application for the New Business License without approvals under the 2025 Bylaw and that the only legal use of the Lands is for a truss manufacturing facility. Inexplicably, the City has taken this stance on the New Business License despite previously issuing business licenses for the Lands since the Development Permit and under all various reiterations of the land use bylaws since then. While the Appellant has requested disclosure of all business licenses issued for the Lands, the City has presently disclosed records evidencing the issuance of business licenses between 2013 and 2023, and otherwise advised that any additional business licenses that may have been issued are unavailable due to transitions in the software used by the City.

23. The Appellant raises issue with the Stop Order and respectfully advances their position that:

    a. the Current Use is a legal non-conforming use as contemplated by the all versions of the City's land use bylaws and is expressly recognized as a legal non-conforming use at law and under the *MGA*: or

    b. in the alternative, if the Current Use is not deemed to be a legal non-conforming use, the City is estopped from enforcing the Stop Order due to the representations made to the Appellant, upon which the Appellant has relied on to their detriment.

24. The Appellant filed the necessary application to appeal on March 11, 2026, pertaining to an appeal of the Stop Order.

Tab J: Application to Appeal

PART 3 – ISSUES & REQUESTED RELIEF

25. The issues that are determinative to this Appeal are:

    a. Are the Appellant's current use of the Lands permitted under the current 2025 Bylaw?

    b. If not, are the Appellant's Current Use of the Lands properly permitted under the 2025 Bylaw's express acceptance of legal non-conforming use and/or the express recognition of legal non-conforming use under the *MGA* and at law?; and

c. In the alternative, did the City represent that the Development Permit continued to apply to the historical uses of the Lands by the Appellant and if so, is the City now estopped from the Stop Order?

26. Upon the conclusion of this Appeal, the Appellant seeks relief from the SDAB via the issuing of an order that provides:

a. A declaration that the Stop Order is revoked;

b. A declaration that the Current Use of the Lands is a legal non-conforming use as expressly contemplated by the 2025 Bylaw and the *MGA* and that there are no contraventions of the 2025 Bylaw that ought to impede issuing the New Business License; and

c. Such further and other relief as may be requested or as this Board may deem just and appropriate in the circumstances.

PART 4 – ANALYSIS

A. Current Bylaw and Legal Use

27. In addressing the first issue determinative to this appeal, the Appellant concedes that the Current Use likely does not fall within the 2025 Bylaw's list of permitted or discretionary uses for a General Commercial district.

28. The 1989 Bylaw, 2001 Bylaw, 2016 Bylaw, and 2025 Bylaw (collectively "**All Bylaws**") contain a common definition for an activity of general industrial uses, which is a development used principally for one or more of a list of activities, including, the storage or transshipping of materials, goods and equipment (a **"General Industrial Use"**).

29. The General Industrial Use:

a. was a discretionary use of the Lands under the 1989 Bylaw and constituted the actual use of the lands by Nelson Lumber as expressly permitted via the Development Permit;

b. was a discretionary use of the Lands under the 2001 Bylaw and constituted the actual use of the Lands by Nelson Lumber and Baker Hughes;

c. was a permitted use of the Lands under the 2016 Bylaw and constituted the actual use of the Lands by Baker Hughes, Lufkin Industries, Windsor Plywood, and the Appellant; and

d. is, for the first time under All Bylaws, neither a permitted nor a discretionary use, but continues to constitute the actual use of the Lands by Windsor Plywood, the Appellant, and to support the Current Use.

30. Given that the General Commercial zoning of the 2025 Bylaw does not provide the General Industrial Use as a permitted or discretionary use of the Lands, the Current Use is likely not permitted under the 2025 Bylaw.

B. Legal Non-Conforming Use

31. If in fact the Current Use does not fall within the 2025 Bylaw's permitted or discretionary uses for General Commercial District, both section 5.2 of the 2025 Bylaw and section 643 of the *MGA* offer grandfathering protection to the Appellant for the Current Use via the prior and continuous use of the Lands.

Tab H: 2025 Bylaw LUB-05-2025, at ss 1.4, 5.2

Tab K: *Municipal Government Act*, RSA 2000, c M-26, at ss 616(r), 643

i) Non-Conforming Use in the Bylaw

32. Section 5.2.2 of the 2025 Bylaw expressly states that notwithstanding the other provisions of the Bylaw, any lawful use of lands which exist at the date of the approval of the 2025 Bylaw are to be allowed to continue as a non-conforming use, so long as the non-conforming use is not discontinued for at least 12 consecutive months.

33. The implication of this express acknowledgment of non-conforming use in the 2025 Bylaw, means that no contravention of the Appellant will be found and the Stop Order ought to be immediately revoked, if the Appellant's current uses were otherwise permitted via prior iterations of the City's land use bylaws.

34. Again, under the 1989 Bylaw, General Industrial Use was a discretionary use of the Lands zoned M1 – Light Industrial, and was expressly permitted by the Planning and Development Committee in place at the time.

35. The Appellant's Current Use, which is the subject of the Stop Order and this appeal, is lawful when read in the context of the 1989 Bylaw, and frankly the 2001 Bylaw and 2016 Bylaw. The Current Use, therefore, constitutes a legal non-conforming use under the 2025 Bylaw irrespective of the fact that the 2025 Bylaw changed the zoning of the Lands to General Commercial, which no longer permits a General Industrial Use as a permitted or discretionary use. After all, a use which does not conform to the requirements of the 2025 Bylaw, but legally existed under a previous bylaw is allowed to continue.

ii) Non-Conforming Use Under the MGA and at Law

36. While the Appellant respectfully submits that the conclusion reached in (i) above is determinative of this Appeal in favour of the Appellant, the Appellant is also entitled to the relief sought via the application of non-conforming use as afforded under the *MGA* and at law.

37. The Current Use is further deemed to be lawful if it can satisfy the requirements of section 643 of the *MGA*, which reads:

> ***Non-conforming use and non-conforming buildings***
>
> ***643(1****) If a development permit has been issued on or before the day on which a land use bylaw or a land use amendment bylaw comes into force in a municipality and the bylaw would make the development in respect of which the permit was issued a non conforming use or non conforming building, the development permit continues in effect in spite of the coming into force of the bylaw.*

38. The contemplation of a legal non-conforming use is not a concept exclusive to the *MGA*. Rather, the *MGA* serves as a codification of this well-entrenched property right. At law, acquired rights/non-conforming use serves as a way of preserving and grandfathering a landowner's prior use of their lands irrespective of a municipality's changes to their bylaws

39. The seminal case where the Supreme Court of Canada provides guidance on legal non-conforming use, for which the SDAB is bound to follow, is provided in *Saint-Romuald (Ville) v. Olivier,* 2001 SCC 57, 2 S.C.R. 898 ("***Olivier***"). This decision stands for the premise that, at law, property owners have a right not only to continue a legal non-conforming use, but also to reasonable flexibility and evolution in the use of their lands. A lawful use may be altered and remain protected, so long as no "extreme variation" is made. As has been discussed above and is further contemplated hereunder, the Appellant's use of the Lands has consistently, and continues to be, a General industrial Use with indoor and outdoor storage central to all use of the Lands.

40. In determining the degree of variation, the Supreme Court has provided direction in *Olivier* via a seven-part test to determine when a defence of a legal non-conforming right is justified:

> 1. It is firstly necessary to characterize the purpose of the preexisting use. The purpose for which the premises were used (i.e., "the use") is a function of the activities actually carried on at the site prior to the new by-law restrictions.
>
> 2. Where the current use is merely an intensification of the pre-existing activity, it will rarely be open to objection. However, where the intensification is such

> as to go beyond a matter of degree and constitutes, in terms of community impact, a difference in kind ... the protection may be lost.
>
> 3. To the extent a landowner expands its activities beyond those it engaged in before ... the added activities may be held to be too remote from the earlier activities to be protected under the non-conforming use. In such a case, the added activities are simply outside any fair definition of the pre-existing use and it is unnecessary to evaluate "neighbourhood effects".
>
> 4. To the extent activities are added, altered or modified within the scope of the original purpose (i.e., activities that are ancillary to, or closely related to, the pre-existing activities), the Court has to balance the landowner's interest against the community interest, taking into account the nature of the pre-existing use (e.g., the degree to which it clashes with surrounding land uses), the degree of remoteness (the closer to the original activity, the more unassailable the acquired right) and the new or aggravated neighbourhood effects (e.g., the addition of a rock crusher in a residential neighbourhood is likely to be more disruptive than the addition of a fax machine). The greater the disruption, the more tightly drawn will be the definition of the pre-existing use or acquired right. This approach does not rob the landowner of an entitlement. By definition, the limitation applies only to added, altered or modified activities.
>
> 5. Neighbourhood effects, unless obvious, should not be assumed but should be established by evidence if they are to be relied upon.
>
> 6. The resulting characterization of the acquired right (or legal non-conforming use) should not be so general as to liberate the owner from the constraints of what he actually did, and not be so narrow as to rob him of some flexibility in the reasonable evolution of prior activities. The degree of this flexibility may vary with the type of use. Here, for example, the pre-existing use is a nightclub business which in its nature requires renewal and change. That change, within reasonable limits, should be accommodated.
>
> 7. While the definition of the acquired right will always have an element of subjective judgment, the criteria mentioned above constitute an attempt to ground the Court's decision in the objective facts...
>
> **Tab L**: *Saint-Romuald (Ville) v. Olivier*, 2001 SCC 57, 2 S.C.R. 898, at para 39

41. *Olivier* stands for the premise that non-conforming rights can expand, evolve, or intensify, provided that the change is a reasonable modification of a pre-existing use and does not create a fundamentally different community via the land use.

42. While this direction from the Supreme Court is clear, actually compelling municipalities to recognize a landowner's non-conforming right to flexibility and evolution may be less straight forward. The Stop Order has the effect of attempting to curtail the Appellant's rights as a property owner to reasonable flexibility and evolution of their non-conforming uses, and the Appellant respectfully seeks the SDAB's acknowledgment of the Appellant's rights in this appeal.

43. In determining this appeal, and whether the Current Use is to be allowed to continue under the principle of a legal non-conforming use, the SDAB is to consider the above seven factors. The Appellant submits that the analysis of the principle of legal non-conforming use using the seven factors clearly demonstrates that the Current Use sufficiently meets the classification of a legal non-conforming use.

a) The first factor expressly acknowledges that the purpose of the pre-existing use is to be a characterization of the activities actually carried on the lands prior to the new restrictions. As outlined above, the original use, and all uses thereafter up to and including the Appellant's Current Use, includes robust and extensive storage components, both inside and outside of the Building. For instance, over the 13 plus years that Baker Hughes and Lufkin occupied the Lands, their lease expressly contemplated the use of the Lands for general industrial and manufacturing use, warehousing and related offices. Further, the very layout of the Lands and construction of the Building, supports the idea that the surrounding area outside of the building would be used for a matter that is consistent with the Current Use, and allow for the easy maneuverability and storage of items. Consideration of this factor supports that the Current Use, when considered in the context of the activities actually performed on the Lands historically, is consistent with the Development Permit and the historical activities on the Lands.

b) The second factor expressly acknowledges that any mere intensification of a pre-existing activity, in these circumstances the storage component of the use of the Lands, will rarely be open to objection, unless the intensification goes beyond a matter of degree and constitutes in terms of community impact, a use that no longer accords with the historical use. The storage on the Lands is hardly an intensification given the significant amount of storage that was required for the original use by Nelson Lumber and the subsequent uses by various tenants since the Development Permit. To the same effect, there has not been any extension of the storage to other parts of the Lands not previously used for same; the layout of the Lands has remained the same, and again, all exterior portions of the Lands have continuously accommodated storage.

TAB G: Photographs of the Lands

c) Factors three through five acknowledge that if a landowner expands activities beyond those it engaged before, the new activities could be too remote to be protected as non-conforming. But, to the extent activities are added, altered or modified within the scope of the original purpose (i.e activities that are ancillary to the pre-existing activities), a balance between the landowner's interest and the community interest, considering the nature of the pre-existing use, the degree of remoteness, and the new neighborhood effects, ought to be performed. Again, the use of the Lands for storage is not an expansion of any prior activities, rather it is a focus or concentration of this use. Storage is not a remote use of the Lands when compared against the initial industrial operations, the industrial and warehousing activities of Baker Hughes and Lufkin, and the further storage by the Appellant and by Windsor Plywood. However, even if the use was an expansion of activities, at worst, using the Lands for the Current Use is an alteration or modification of the original purpose, and an activity ancillary to the historic use. When this is the case, the landowner's real and reasonable expectations ought to be preserved. In fact and if anything, the Appellant's Current Use of the Lands provide lesser disturbances in the community compared to the historic uses of the Lands and there is no cogent evidence that the use is creating any undue additional or aggravated problems for the municipality or to neighbors.

d) The sixth factor is a balancing consideration, whereby it is acknowledged that resulting characterization of the acquired right should not be so general as to liberate the owner from constraints of the activities previously performed on the lands, but not so narrow to rob him of some flexibility in the reasonable evolution of prior activities. Changes within reasonable limits should be accommodated. It has always been the Appellant's real and reasonable expectation that they, as a commercial landlord of the Lands, could continue industrial use of the Lands that included fulsome storage on the Lands and that they would be afforded reasonable flexibility for such uses by themselves or as otherwise necessitated by their tenants. Again, these flexibilities in use that have been particularized for some thirty-plus years have included industrial storage.

e) The seventh and final factor expressly acknowledges that while the acquired right will always have a subjective element, the criteria is an attempt to ground a decision in objective facts. This means that decisions where facts are analogous, should tender consistent results. As is detailed further hereunder, storage of materials on facts similar to ours have been properly held to constitute a legal non-conforming use by different finders of fact.

44. In summation, when the seven factors of *Olivier* are considered and applied to our facts, the correct and reasonable determination is that the historical uses of the Lands

has and continues to be a General Industrial Use, inclusive of storage in the Building and outside on the Lands. The Current Use ought to be expressly acknowledged as a legal non-conforming use.

45. The Appellant respectfully submits that it is unreasonable that the City has taken the stance that it has on the Current Use of the Lands and issued the Stop Order, and a finding by the SDAB that the Current Use is not a legal non-conforming use would be inconsistent with the intent of All Bylaws, the *MGA*, and the direction provided by the Supreme Court of Canada.

46. Although the Lands are now zoned General Commercial, the Current Use of the Lands is appropriate for the surrounding and general integrated economy, and the location, scale and nature of the Current Use is consistent with the surrounding area and will continue to support residents and various businesses in Lloydminster.

Additional Law Supporting the Appellant's Position

47. The acceptance and express acknowledgment that the use of the Lands for the storage of materials and equipment constitutes legal non-conforming use is not an extraordinary request by the Appellant. To the contrary, it has been accepted that a landowner has the ability to continue to use lands for storage purposes when a historical development permit for an industrial use has been issued.

48. In *Forbes v. Caledon (Town of*), 2021 ONSC 1442, the Court accepted that a landowner's storage of various property and equipment on their lands constituted a legal non-conforming use given the existence of a historical development permit that authorized an earlier business which included regular storage of materials and equipment. In applying the relevant considerations from *Olivier*, the Court held that it was proper to declare that the legal non-conforming use for storage by the landowner, and by various tenants, could properly continue without interference by the city.

TAB M: *Forbes v. Caledon (Town of),* 2021 ONSC 1442

49. In conclusion, the Current Use of the Lands ought to be properly classified as a legal non-conforming use under the 2025 Bylaw, by the *MGA ,* and at law. The insistence by the City to have the Appellant pursue a rezoning of the Lands or to propose an amendment to the wording of the current zoning district will only result in greater impact and unnecessary time and costs. The Current Use is a reasonable legal non-conforming use, and any impact or interference caused by the Current Use is minimal or non-existent.

50. The Current Use is a modest and a reasonable flexibility of the historical use of the Lands, making it just and equitable for the SDAB to exercise their authority to revoke

the Stop Order and otherwise provide the relief sought by the Appellant, all of which is reasonable and consistent with All Bylaws, the *MGA*, and the direction provided by the Supreme Court of Canada.

C. Estoppel

51. Irrespective of the application of a legal non-conforming use, it is trite law that a municipality cannot be barred from carrying out its statutory duty; however, the exercise of power can be limited. The Alberta Court of Appeal has applied Supreme Court of Canada authority confirming that the law of promissory estoppel applies to a public body and a public body can be bound to exercise its power in accordance with prior representations.

TAB N:

Carleo Investments Ltd. v. Strathcona (County), 2014 ABCA 302 citing *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 40, 47-48 [2001] 2 SCR 281.

52. Since the Appellant's purchase of the Lands, and even prior to, the City has issued various business licenses for the General Industrial Use that has occurred on the Lands for no less than 36 years, representing that the developments on the lands were properly permitted via the Development Permit and could continue on the basis of a legal non-conforming use. Only now, has the City suddenly taken a position that the Lands could only be used for a truss manufacturing facility, and nothing else.

53. Prior to the 2025 Bylaw, which changed the General Industrial Use from a permitted use of the Lands to a use that is no longer listed as permitted or discretionary, it was reasonable and foreseeable that the Appellant, relying on the representations and conduct of the City, believed that they would be able to continue to use the Lands for a General Industrial Use indefinitely.

54. The Appellant's real and reasonable expectations, and reliance on the City's prior representations via their conduct, have now occurred to the Appellant's detriment and resulted in substantial prejudice, to the point where the City has now issued the Stop Order alleging that the Current Use of the Lands is not a legal non-conforming use.

55. Should the City's representations not been made and relied on by the Appellant, the Current Use could have been further permitted prior to the effective date of the 2025 Bylaw without scrutiny, as the Current Use was a **permitted use** (as opposed to a discretionary use) under the 2016 Bylaw. Pursuant to the 2016 Bylaw, and consistent with All Bylaws' approach to permitted uses, a development officer shall approve applications for proposed developments that conform with a bylaw.

TAB F: Land Use Bylaw No. 05-2016

56. In light of the principle of estoppel, the City has waived their ability to enforce Stop Order pursuant to the representations and conduct that were made and relied upon by the Appellant. The Appellant requests that the SDAB revoke the Stop Order and otherwise declare that the Current Use of the Lands can continue and constitute a legal non-conforming use.

D. Variance and Stay of Enforcement

57. Respectfully, there is no justification for the Appellant's reasonable operations and Current Use of the Lands to be hindered; however, we propose an alternative position in the event the SDAB makes such a finding.

58. If the SDAB determines that the Stop Order was issued correctly, the SDAB may stay the order to allow for compliance. For example, the Calgary SDAB stayed enforcement of a s. 645 order for a period upon the applicant's request to make a land use amendment application pursuant to non-compliance on the lands.

TAB O: *SDAB2011-0055 (Re),* 2011 CGYSDAB 55 at para 29.

59. In the event Stop Order is upheld, the Appellant requests that the order be varied or stayed, in order for the Appellant to take all measures necessary to bring the Lands into compliance. The Appellant seeks a reasonable stay of enforcement for a period of nine (9) months, in light of the practical challenges with compliance and to allow for the processing of any land use bylaw rezoning applications.

PART 5 – CONCLUSION

60. The City's issuance of the Stop Orders was inappropriate, in light of the Appellant's continued use of the Lands and the prior conduct and representations made by the City. All Bylaws, the application of the *MGA,* and the common law, necessitate that the Appellant's Current Use of the Lands be allowed to continue without interference from the City. In such circumstances, it is just and appropriate to revoke the Stop Order and provide the declarations sought by the Appellant.

61. The Appellant respectfully requests that the SDAB:

    a. find the Stop Order is revoked; and

    b. make a declaration that the Current Use of the Lands is a legal non-conforming use;

c. or, in the alternative, if the SDAB determines that the Appellant's operations are non-compliant:, that it

(i) vary the Stop Order to require the Lands to be brought into compliance within nine (9) months from the date of the SDAB's decision or;

(ii) stay enforcement of the Stop Orders for a period of nine (9) months from the date of the SDAB's decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Lloydminster, in the Province of Alberta, this 1st day of May, 2026.

MCLENNAN ROSS LLP

Per: [redacted]
_____
Cody Van de Veen, counsel for the Appellant, Nelson Commercial Real Estate Inc.

42 St
42 St
52 Ave
Real Canadian
Superstore 44th Street
St. Mary's
mentary School
47 St
41 St
51 Ave
40 St
40 St
51 Ave
39 St
39 St
39 St
51 Ave
BMO Bank o
CBI Health -
Lloydminster

ADMINISTRATIVE REPORT

TITLE: DISCRETIONARY USE NELSON LUMBER CO. LTD.

PREPARED BY: G. Willard	NO: PD-160-90-26100-22
DEPARTMENT: Planning and Development	DATE: December 3, 1990
CLEARANCES:	ATTACHMENTS: Proposed Site Plan

SUMMARY OF HISTORY/DISCUSSION/ALTERNATIVES/FUNDING & CONCLUSION:

- Permit applications have been received from Nelson Lumber Co. Ltd. to build a new Truss Factory at 51 Ave. and 41 St.

- This factory is to replace the existing one which will be removed to accommodate the future Superstore development.

- This property is presently zoned M1 - light industrial.

- This type of a use is considered to be a general industrial use which is a discretionary use in this zoning district.

RECOMMENDATION:

That the Planning and Development Committee recommend to Council to approve the request from Nelson Lumber Co. Ltd. to build a new Truss Factory on Pt. of Block 13, Plan 762-2291 (51 Ave. and 41 St.) as a discretionary use in the M1 - light industrial district.

CITY COMMISSIONER'S COMMENTS:

APPROVALS:

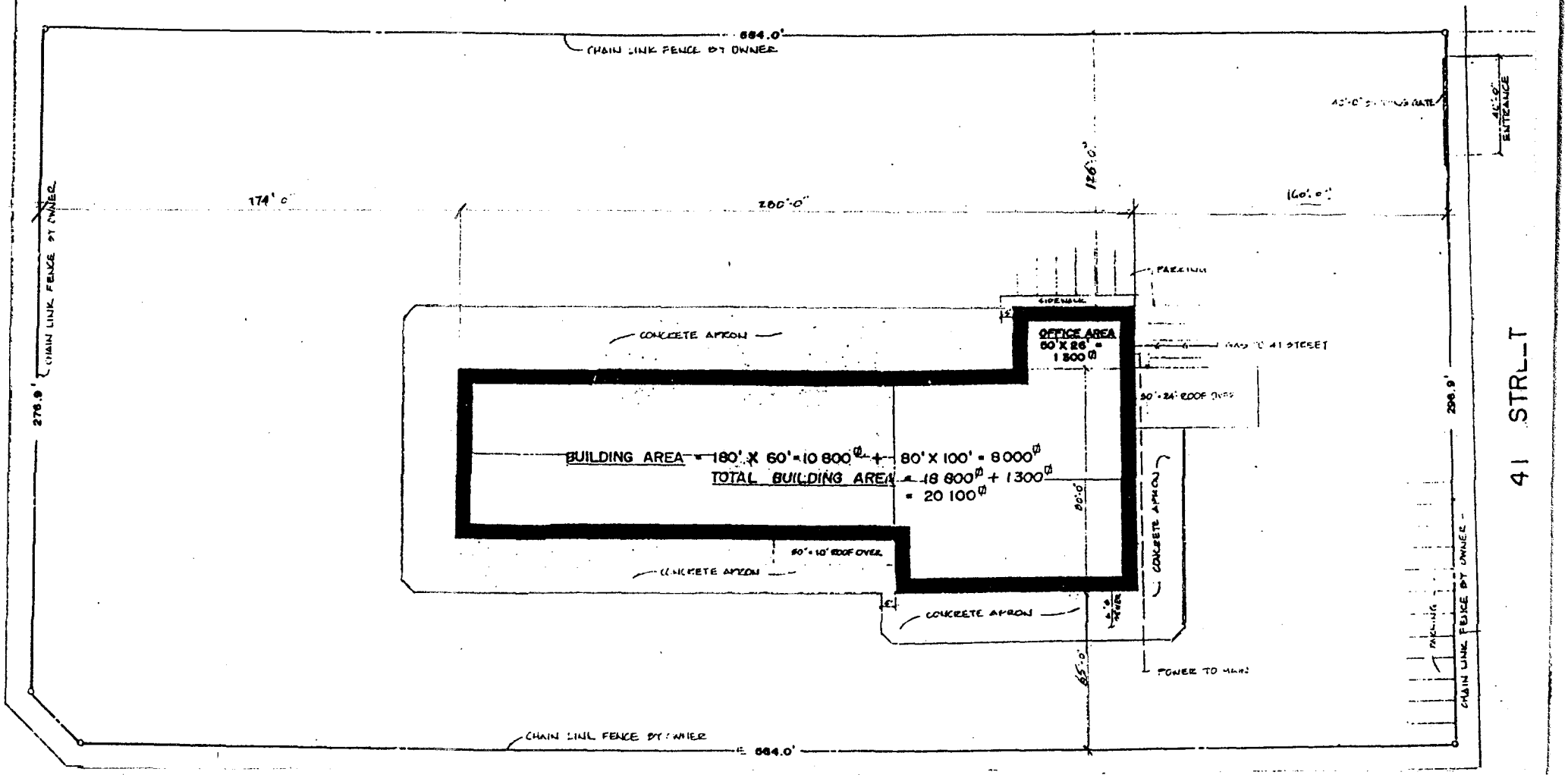
[redacted] 90.12.03

DEPARTMENT HEAD DATE CITY COMMISSIONER DATE

COMMITTEE RECOMMENDATION:

CITY COUNCIL: MOTION NO: _____ DATE: _____

ACTION: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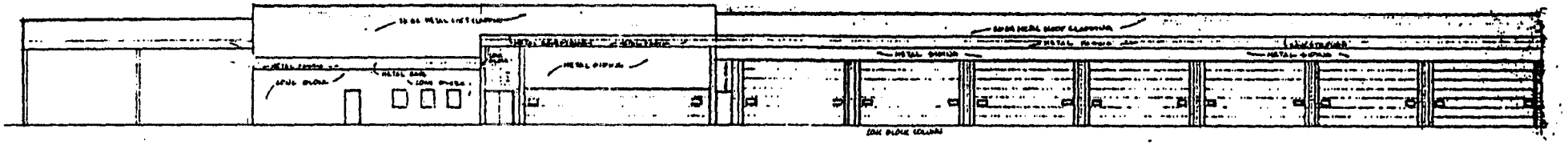
174' 0"
280'-0"
126'-0"
160'-0"
276.9'
CHAIN LINK FENCE BY OWNER
PARKING
SIDEWALK
CONCRETE APRON
OFFICE AREA
50'X 26' =
1 300 ft²
50'-24' ROOF OVER
BUILDING AREA = 180' X 60' = 10 800 ft² + 80' X 100' = 8 000 ft²
TOTAL BUILDING AREA = 18 800 ft² + 1300 ft²
= 20 100 ft²
80'-0"
50'-10' ROOF OVER
CONCRETE APRON
CONCRETE APRON
CONCRETE APRON
POWER TO MAIN
65'-0"
CHAIN LINK FENCE BY OWNER
CHAIN LINK FENCE BY OWNER
664.0'
296.9'
41 STREET
41 STRLT

51 AVENUE



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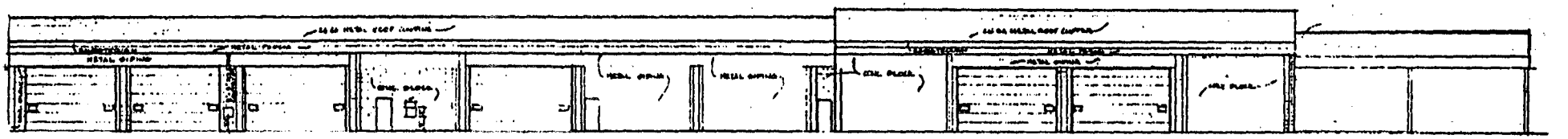

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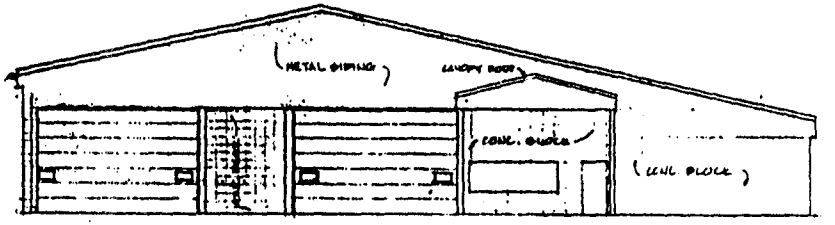

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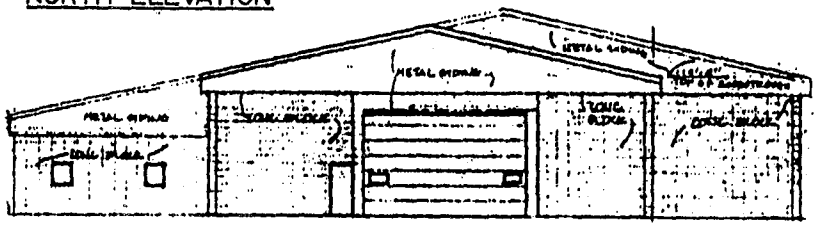

SOUTH ELEVATION

JOB 619

THE CITY OF LLOYDMINSTER
PLANNING AND DEVELOPMENT DEPARTMENT

DEVELOPMENT PERMIT APPLICATION

Please Type Or Print Firmly

This section to be completed by Applicant

1. APPLICANT: (Owner or authorized agent)

   Name NELSON LUMBER COMPANY LTD.

   Address BOX 620, LLOYDMINSTER, ALTA

   Phone No. 871-6300

2. REGISTERED OWNER: Name SAME AS ABOVE

   Address

   Phone No.

3. PROPERTY AFFECTED: Civic Address 5109 - 41 St

   Legal Description: Lot(s) Block 13 Plan 762-2291

4. PROPOSED USE(S) Truss Manufacturing Shop

   Estimated Commencement Date Nov. 27/90 Completion Date Feb. 20/91

5. INFORMATION REQUIREMENTS: The information listed on the back of this form shall be submitted with this application.

November 20, 1990
SIGNED OWNER OR AUTHORIZED AGENT — DATE

J. Winter, Construction Coordinator
Print Name And Title Or Position

This section to be completed by the Planning and Development Department.

DEVELOPMENT PERMIT

Permit Fee Nil
G.R. No. 12586

6. ZONE: M1

7. PROPOSED USE: Permitted Discretionary Yes

8. CONDITIONS OF APPROVAL:
   The proposed development shall meet the conditions set forth in Council's Resolution No. ,
   dated the 17th day of Dec , A.D., 19 90 , as described below or on the attached page:

This section to be signed by Applicant.

9. AGREEMENT TO CONDITIONS: I hereby acknowledge that I have read the DEVELOPMENT PERMIT APPLICATION and declare the information contained therein correct. I agree to comply with all THE CITY OF LLOYDMINSTER Bylaws and I furthermore agree to conform to the conditions set out in Item No. 8 above. THE ISSUANCE OF THIS DEVELOPMENT PERMIT DOES NOT PRECLUDE THE REQUIREMENT FOR A BUILDING PERMIT AS OUTLINED IN THE BUILDING BYLAW.

November 20, 1990
SIGNED OWNER OR AUTHORIZED AGENT — DATE

J. Winter, Construction Coordinator
Print Name And Title Or Position

This section to be completed by the Development Officer.

10. APPROVAL: This Development Permit is approved this 20th
    day of December , A.D., 19 90

[redacted]
DEVELOPMENT OFFICER

Part 1 White - Planning and Development Copy Part 2 Yellow - Applicant's Copy.

OFFICE CONSOLIDATION

OCTOBER 1989

Zoning Bylaw No. 31-87

Of The

City Of Lloydminster

With Amendments Up To And Including Bylaw #23-89

Persons using this consolidation are hereby informed that it has no legal sanction unless signed and sealed; that amendments have been embodied only for convenience of information and that reference should be made to the original bylaws for legal interpretation and application.

Lot line, zero

The legally defined limit of a lot for which there is no side yard requirement on one side of the lot only. On any lot, there may be only one (1) zero lot line.

Lot width

The horizontal measurement between the side lot lines measured from the front boundary of the lot, or the mean horizontal measurement on irregular-shaped lots;

Municipality

The City of Lloydminster;

Non-conforming building

A building that:

(a) is lawfully constructed or lawfully under construction, or in respect of which all required permits have been issued, at the date the Zoning Bylaw or any amendment to the Zoning Bylaw affecting the building or land on which the building is situated or will be situated becomes effective; and
(b) on the date the Zoning Bylaw or any amendment to a Zoning Bylaw becomes effective does not, or when constructed will not, comply with the Zoning Bylaw;

Non-conforming use

A lawful specific use:

(a) being made of land or a building or intended to be made of a building lawfully under construction, or in respect of which all required permits have been issued, at the date the Zoning Bylaw or any amendment to the Zoning Bylaw or any amendment to the Zoning Bylaw affecting the land or building becomes effective; and
(b) that on the date the Zoning Bylaw or any amendment to the Zoning Bylaw becomes effective does not, or in the case of a building under construction or in respect of which all required permits have been issued, will not, comply with the Zoning Bylaw;

Nuisance

Anything that in the opinion of Council interferes with the use or enjoyment of property, endangers personal health or safety, or is offensive to the senses;

Impact Utility Services, Minor

Means development for public utility infrastructural purposes which is likely to have some impact on the environment or adjacent land uses by virtue of its appearance, noise, size, traffic generation or operational characteristics. Typical uses in this class include vehicle, equipment and material storage yards for utilities and services; telephone exchanges; wire centres; switching centres; snow dumping sites; depots and transfer facilities; surface reservoirs or storm water lakes; water reservoirs hydrospheres; water treatment plants; power terminal and distributing substations; communication towers and gate stations for natural gas distribution.

Industrial Storage

Means development used exclusively for outdoor storage of goods and materials where such storage of goods and materials does not involve the erection of permanent structures or the material alteration of the existing state of the land. Typical uses include pipe yards, vehicle or heavy equipment storage, auto wrecking, buildings on skids or temporary foundations, storage of: aggregates, building supplies, construction equipment, farm machinery, unoccupied mobile homes, and oil and gas equipment. Industrial storage does not include general industrial uses, warehouse or wholesale sales and operations, industrial vehicle and equipment sales and rentals.

Industrial Uses, General

Means development used principally for one or more of the following activities:

a) the processing of raw materials;
b) the manufacturing or assembling of semi-finishing or furnished goods, products or equipment;
c) the cleaning, servicing, repairing or testing of materials, goods and equipment normally associated with industrial or commercial businesses or cleaning, servicing and repair operations to goods and equipment associated with personal or household use, where such operations have impacts that would make them incompatible in non-industrial districts;
d) the storage or transshipping of materials, goods and equipment;
e) the distribution and sale of materials, goods and equipment to institutions or industrial and commercial businesses for their direct use or to general retail stores or other sales use classes defined in this Bylaw for resale to individual consumers; or
f) the training of personnel in general industrial operations.

Any indoor display, office, technical or administrative support areas or any retail sale operations shall be accessory to the general industrial use activities identified above.

Section 22

M1 Light Industrial

1. Uses

Permitted	Discretionary
Agricultural sales and services	Amusement establishments, indoor
Ambulance stations	Amusement establishments, outdoor
Auctioneering establishments	Assembly halls
AutoBody repair and paint shops	Billboards
Automotive and minor recreation vehicles sales/rentals	General industrial uses
Automotive and equipment repair shops	Industrial storage
Broadcasting and television stations	Natural resource development
Business support services	Private clubs
Commercial schools	Professional offices
Contractor services, general	Religious assembly
Contractor services, limited	Temporary sales centre
Drive-in services	Veterinary services, major
Drive-through vehicle services	
Eating and drinking establishments, minor	
Equipment rentals	
Essential utility services	
Fleet services	
Government services	

Grain elevators

Greenhouse and plant nurseries

Household repair services

Kennels

Minor impact utility service

Parking structures and lots

Participant recreation services, indoor

Protective and emergency services

Public education services

Recycling depots

Service stations, major

Truck and mobile home sales/ rentals

Vehicle and equipment sales/ rentals industrial

Veterinary services, minor

Warehouse sales

Buildings and uses accessory to permitted and discretionary uses

2. Site requirements

(a) Minimum site

(i) The minimum site area shall be 420 square metres (4,521 square feet);
(ii) The minimum site frontage shall be 15.2 metres (50 feet).

(b) Minimum yard clearances

(i) Use	Front	Side	Rear
all uses	9.1m (29.8 ft.)	3m (9.8 ft.) or 50% of the building height whichever is greater	1.2m (3.9 ft.)

(ii) for lots having a depth of less than 38 metres (124.7 feet) the minimum front yard shall be not less than six (6) metres (19.7 feet);

(iii) side yards flanking a street shall be a minimum of 4.5 metres (14.8 feet);

(iv) where a site abuts a railway line, lane or utility lot, the minimum side yard shall be not less than 1.2 metres (3.9 feet);

(v) rear yards shall not be less than 4.6 metres (15.0 feet) where there is no lane;

(vi) rear yards shall not be less than 7.6 metres (24.9 feet) where the rear boundary abuts a residential district;

(vii) no rear yard is required where the rear boundary abuts a railway line;

(viii) where side or rear yards abut any district other than M1 or M2, or a public roadway other than a lane or a local road, the applicant shall provide screening at least two (2) metres (6.6 feet) in height;

(c) Maximum height

All uses except for grain elevators 15.25 metres (50 feet).

(d) The maximum site coverage shall be 40% of the site area.

(e) Industrial buildings may be constructed over more than one site (semi-detached) with a common fire-wall, provided each industry shall have separate, individual and direct access to grade and no common means of access with other uses.

(f) All uses are subject to Part G, Section 20, General Regulations for Industrial Districts.

(g) All driveways, parking areas and storage areas shall be paved with asphalt or concrete for a minimum distance of 15 metres (49.2 feet) from the front property line, plus 1.5 metres (4.9 feet) of concrete apron in from the existing curb and gutter.

3. Additional regulations for permitted and discretionary uses

   (a) Billboards shall be in accordance with the Sign Bylaw No. 34-86 as amended from time to time.

   (b) Service stations, drive-in services and drive-through services shall be developed in accordance with Part E, Section 3, 4 & 9.

4. Off-street parking, loading, parking areas and structures shall be developed in accordance with Part E, Section 10.

5. Landscaping

   In front yards, all areas not covered with driveways or parking shall be soft landscaped in accordance with Part F, Section 4.

LLOYDMINSTER
Canada's Border City

Zoning Bylaw

No. 12-2001

Consolidated August 30, 2012

Non-conforming use

A lawful specific use:

a) being made of land or a building or intended to be made of a building lawfully under construction, or in respect of which all required permits have been issued, at the date the Zoning Bylaw or any amendment to the Zoning Bylaw or any amendment to the Zoning Bylaw affecting the land or building becomes effective; and
b) that on the date the Zoning Bylaw or any amendment to the Zoning Bylaw becomes effective does not, or in the case of a building under construction or in respect of which all required permits have been issued, will not, comply with the Zoning Bylaw.

Nuisance

Anything that in the opinion of Council interferes with the use or enjoyment of property, endangers personal health or safety, or is offensive to the senses.

Offensive or Objectionable

When used with reference to any use or development of any land, building or structure, means a use or development which, from its nature or from the manner of carrying on same, creates or liable to create, by reason of noise, vibration, smoke, dust or other particulate matter, odor, toxic or noxious matter, radiation hazards, fire or explosive hazards, heat, humidity or glare, or unsightly storage of goods, wares, merchandise, salvage, junk, waste or other materials, a condition which, in the opinion of Council, may be or may become hazardous or injurious as regards health or safety or which adversely affects the amenities of the neighbourhood or interferes with or may interfere with normal enjoyment of any land, building or structure.

Parking space, off-street

An off-street area available for the parking of one motor vehicle.

Permitted uses

Uses which are unconditionally allowed in a particular district, provided that the use conforms to the regulations of the particular district to which the use applies and all other regulations of this Bylaw.

Principal building

A building which:
a) occupies the major or central portion of a site;
b) is the chief or main building on a site; or
c) constitutes, by reason of its use, the primary purpose for which the site is used.

Principal use

The main purpose for which a building or site is used.

Means development for public utility infrastructure purposes, which is likely to have some impact on the environment or adjacent land, uses by virtue of its appearance, noise, size, traffic generation or operational characteristics. Typical uses in this class include vehicle equipment and material storage yards for utilities and services, telephone exchanges, wire centers, switching centers, snow dumping sites, depots and transfer facilities, surface reservoirs or storm water lakes, water reservoirs hydrospheres, water treatment plants, power terminal and distributing substations, communication towers, and gate stations for natural gas distribution.

Industrial Storage

Means development used exclusively for outdoor storage of goods and materials where such storage of goods and materials does not involve the erection of permanent structures or the material alteration of the existing state of the land. Typical uses include pipe yards, vehicle or heavy equipment storage, auto wrecking, buildings on skids or temporary foundations, storage of: aggregates, building supplies, construction equipment, farm machinery, unoccupied mobile homes, and oil and gas equipment. Industrial storage does not include general industrial uses, warehouse or wholesale sales and operations, industrial vehicle and equipment sales and rentals.

Industrial Uses, General

Means development used principally for one or more of the following activities:

a) the processing of raw materials;
b) the manufacturing or assembling of semi-finished or finished goods, products or equipment;
c) the cleaning, servicing, repairing or testing of materials, goods and equipment normally associated with industrial or commercial businesses or cleaning, servicing and repair operations to goods and equipment associated with personal or household use, where such operations have impacts that would make them incompatible in non-industrial districts;
d) the storage or transshipping of materials, goods and equipment;
e) the distribution and sale of materials, goods and equipment to institutions or industrial and commercial businesses for their direct use or to general retail stores or other sales use classes defined in this Bylaw for resale to individual consumers; or
f) the training of personnel in general industrial operations.

Any indoors display, office, technical or administrative support areas or any retail sale operations shall be accessory to the general industrial use activities identified above.

Kennels

Means development used for the accommodation, boarding, and/or breeding of small animals and uses associated with the shelter and care of small animals, such as grooming, training, and exercising.

Leave strip

Means a specified area of land and vegetation without buildings immediately adjacent to a watercourse, measured from the normal high water mark, which is generally to remain in an

Section 4 - Non-conforming Uses and Non-conforming Buildings

1) Where at the date of approval of this Zoning Bylaw, a building is lawfully under construction or all required permits for the construction of a building have been issued, the building shall be deemed to be a building existing at the date, of the approval of this Bylaw; but the erection of any such building must be commenced within twelve (12) months after the date of the issue of the last permit relating thereto.

2) The lawful use of land or of a building or other structure existing at the date of the approval of this Zoning Bylaw that does not conform to this Bylaw may be continued; but if the non-conforming use is discontinued for a period of at least six (6) consecutive months the future use of the land, building or other structure shall be in conformity with this Bylaw.

3) a) The lawful use of a building existing at the time of the approval of this Zoning Bylaw that does not conform to this Bylaw may be extended throughout the building; but no structural alterations, except those required by statute or Bylaw shall be made in the building while the non-conforming use is continued.

   b) For the purposes of this Section, repairs, maintenance or installations that do not alter the size of the building or involve the rearrangement or replacement of structural supporting elements shall not be considered to be structural alterations.

4) If a building that does not conform to the provisions of this Zoning Bylaw is destroyed by fire or otherwise to an extent of fifty (50) percent or more of the value of the building, above its foundation it shall not be rebuilt or repaired except in conformity with the provisions of this Bylaw.

5) Where the use of a building existing at the time of the approval of this Zoning Bylaw conforms to this Bylaw but the building itself does not conform to the full requirements of this Bylaw, structural alterations and additions which conform to the requirements of this Bylaw may be made but the element of non-conformity shall not be increased by such alteration or additions.

6) A change of tenants or occupants of any land or building shall not be deemed to affect the use of the land or building.

7) No existing structure or site shall be deemed to be non-conforming by reason only of the conversion from the imperial system of measurement where such non-conformity is resultant solely from such change is reasonably equivalent to the metric standard herein established.

Section 5 - Non-Conforming Parcels

1) Parcels created prior to the adoption of this Bylaw, regardless of area or dimensions, may be used for any of the permitted uses of the zoning district in which they fall, subject to the limitations contained therein.

2) Where a lot is reduced in size as a result of taking for public use by the City of Lloydminster, Provincial or Federal Government, the Board of School Division, or a Public Utility by dedication, expropriation, or purchase, the lot and buildings and structures thereon are deemed to conform with the provisions of this Bylaw and the lot must be considered to exist as it did prior to the taking for the purpose of further development upon the lot under its existing zoning regulations, provided such taking:

Section 24 - M1 Light Industrial

The purpose of this zoning district is to provide areas for light industrial uses.

1) Uses:

a) Permitted

i) Agricultural - oriented sales and services
ii) Ambulance station
iii) Auctioneering establishment
iv) Auto body repair and paint shop
v) Automotive and equipment repair shop
vi) Automotive and minor recreation vehicles sales/rentals
vii) Broadcasting and television studio
viii) Buildings and uses accessory to permitted and discretionary uses
ix) Business support services
x) Commercial school
xi) Contractor services, general
xii) Contractor services, limited
xiii) Daytime child care services
xiv) Drive-in services
xv) Drive-through vehicle services
xvi) Eating and drinking establishment, minor
xvii) Equipment rental
xviii) Essential utility services
xix) Fleet services
xx) Government services
xxi) Grain elevator
xii) Greenhouse and plant nurseries
xiii) Household repair services
xiv) Impact utility services, minor
xv) Industrial storage
xvi) Kennel
xvii) Parking structure and lot
xviii) Participant recreation services, indoor
xix) Participant recreation services, outdoor
xx) Professional office
xxi) Protective and emergency services
Recycling depot, major
xxii) Recycling depot, minor
xxiii) Service station, major
xxiv) Truck and mobile home sales/rentals

b) Discretionary

i) Amusement establishment, indoor
ii) Amusement establishment, outdoor
iii) Assembly hall
iv) Billboard
v) Bulk fuel storage and distribution
vi) Impact utility service, major
vii) Industrial uses, general
viii) Natural resource development
ix) Private club
x) Secondhand store
xi) Temporary sales centre
xii) Adult entertainment
xiii) Eating and drinking establishment, major

Permitted

xxv) Vehicle and equipment
xxvi) sales/rentals industrial
xxvii) Veterinary services, major
xxxviii) Veterinary services, minor
xxix) Warehouse sales
xxx Warehousing

2) Site requirements:

a) Minimum site:

i) The minimum site area shall be 420 square metres;

ii) The minimum site frontage shall be 15.2 metres.

b) Minimum yard clearances:

i) All uses:

Front	Side	Rear
9.1 metres	3 metres or 50% of the building height whichever is greater	3 metres

ii) for lots having a depth of less than 38 metres the minimum front yard shall be not less than six (6) metres;

iii) side yards flanking a street shall be a minimum of 4.5 metres;

iv) where a site abuts a railway line, lane or utility lot, the minimum side yard shall be not less than 1.2 metres;

v) rear yards shall not be less than 3 metres or 50% of the building height which ever is greater where there is no lane;

vi) rear yards shall not be less than 7.6 metres where the rear boundary abuts a residential district;

vii) no rear yard is required where the rear boundary abuts a railway line;

viii) where side or rear yards abut any district other than M1 or M2, or a public roadway other than a lane or a local road, the applicant shall provide screening at least 2.5 metres in height.

c) Maximum height:

All uses shall have a maximum height of 15.25 metres, except for grain elevators that have no height limit.

d) The maximum site coverage shall be 40% of the site area.

e) Industrial buildings may be constructed over more than one site (semi-detached) with a common fire-wall, provided each industry shall have separate, individual and direct access to grade and no common means of access with other uses.

f) All driveways, parking areas and storage areas shall be paved with asphalt or concrete for a minimum distance of 15 metres from the front property line, plus 1.5 metres of concrete apron in from the existing curb and gutter.

3) Additional regulations for permitted and discretionary uses:

a) Billboards shall be in accordance with the Sign Bylaw as amended from time to time.

b) Service stations, drive-in services and drive-through services shall be developed in accordance with Part E, Section 3, 4 & 10.

c) Ambulance stations, and amusement establishments, indoor shall be developed and processed in accordance with Part E, Sections 1 and 13 respectively.

4) Off-street parking, loading, parking areas and structures shall be developed in accordance with Part E, Section 11.

5) Landscaping:

In front yards, all areas not covered with driveways or parking shall be soft landscaped in accordance with Part E, Section 16.

Schedule D

Zoning Bylaw Map

SCHEDULE "A" ATTACHED TO
BYLAW NO. 5-2016

LLOYDMINSTER

Land Use Bylaw No. 5 -2016

[redacted]
Mayor
[redacted]
City Clerk

1.5.6.54 **Temporary Development** means a Building or Use that may operate for a period of time determined by the Development Officer, after which time the Development Permit may be extended or re-issued at the discretion of the Development Officer.

1.5.6.55 **Temporary Storage** means a Development used exclusively for Temporary Storage of goods and materials, including outdoor storage, where such storage of goods and materials does not involve the erection of permanent Structures or the material alteration of the existing state of the land. A Development Permit may be extended or re-issued at the discretion of the Development Officer.

1.5.6.56 **Truck and Mobile Home Sales/Rentals** means Development used for the sale or rental of new or used trucks, motorhomes, Manufactured Homes, and automobiles together with incidental maintenance services and the sale of parts and accessories.

1.5.6.57 **Vehicle and Equipment Sales/Rentals, Industrial** means Development used for the sale or rental of heavy vehicles, machinery or mechanical equipment.

1.5.6.58 **Veterinary Services, Major** means Development used for the care and treatment of animals where the Veterinary Services primarily involve in-patient care and major medical procedures involving hospitalization for extended periods of time.

1.5.6.59 **Veterinary Services, Minor** means Development used for the care and treatment of small animals where the Veterinary Services primarily involve out-patient care and minor medical procedures involving hospitalization for fewer than four days. All animals shall be kept within an enclosed building.

1.5.6.60 **Warehouse Sales** means Development used for the wholesale or retail sale of a limited range of bulky goods from within an enclosed building where the size and nature of the principal goods being sold typically require large Floor Areas for direct display to the purchaser or consumer.

1.5.7 **Industrial Use Classes**

1.5.7.1 **Industrial Storage** means Development used exclusively for outdoor storage of goods and materials where such storage does not involve the erection of permanent Structures or the material alteration of the existing state of the land. Industrial Storage does not include General Industrial Uses, Warehouse Sales and Vehicle and Equipment Sales and Rentals.

1.5.7.2 **Industrial Uses, General** means Development used principally for, but not limited to, one or more of the following activities: the processing of raw materials; the manufacturing or assembling of semi-finished or finished goods, products or equipment; the cleaning, servicing, repairing or testing of materials, goods and equipment normally associated with industrial or commercial businesses, where such operations have impacts

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Mayor
[redacted]
City Clerk

that would make them incompatible in non-industrial Districts; the storage or transshipping of materials, goods and equipment; the distribution and sale of materials, goods and equipment to institutions or industrial and commercial businesses; or the training of personnel in general industrial operations. Any indoor display, office, technical or administrative support areas or any retail sale operations shall be Accessory to the General Industrial Use.

1.5.7.3 **Manufacturing Establishment** means Development used for small-scale On-site production, manufacturing, and assembly of semi-finished or finished goods, products or equipment. All On-site production is contained within the confines of the principle building or its Accessory Buildings.

1.5.7.4 **Warehousing** means Development used for the indoor storage and/or distribution of goods and merchandise, excluding any hazardous materials.

1.5.8 **Public Service Use Classes**

1.5.8.1 **Ambulance Station** means a Development in which vehicles equipped for transporting the injured or sick are stored and which may contain living quarters and offices.

1.5.8.2 **Cemetery** means Development of a parcel of land primarily used as landscaped open space for the entombment of the deceased, and may include, but not limited to, the following Accessory Uses; crematories, cinerarium, columbarium, and mausoleums.

1.5.8.3 **Communication Facility** means an Industry Canada regulated communication facility, including, but not limited to, radio, television, cellular telephone and microwave transmission towers and Accessory Structures.

1.5.8.4 **Community Hall** means any Building which is used by the public for the purpose of a communal activity.

1.5.8.5 **Exhibition and Convention Facilities** means a Development, which provides, but is not limited to, permanent facilities for meetings, seminars and conventions; product and trade fairs; circuses; and other exhibitions.

1.5.8.6 **Extended Medical Treatment Services** means Development providing room, board and surgical or other medical treatment for the sick, injured or infirm including outpatient service and Accessory staff residences.

1.5.8.7 **Government Services** means Development providing Municipal, Provincial or Federal government services to the public. This use class does not include Protective and Emergency Services, Minor or Major Impact Utility Services and Public Education Services.

2.11.2 The Development Officer shall refer to any abutting municipality for consideration and recommendation, any application that relates to lands abutting the municipal boundary.

2.11.3 After seven (7) days from the date of referral, pursuant to Sections 2.11.1 and 2.11.2, the application may be dealt with by the Development Officer whether or not comments have been received.

2.12 Decisions on Development Application

2.12.1 In making a decision on a Development Permit application for a Permitted Use, the Development Officer:

i. Shall approve the application, with or without conditions, if the proposed Development conforms with this Bylaw; or

ii. Shall refuse the application, and provide rationale for refusal, if the proposed Development does not conform to this Bylaw.

2.12.2 On receipt of an application for a Discretionary Use, the Development Officer:

i. May refuse the application regardless of whether it meets the requirements of this Bylaw, and provide rationale for refusal;

ii. May approve the application, with or without conditions, where the facts presented establish that the proposed Development:

a. Will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity or injurious to property, improvements or potential development in the vicinity; and

b. Complies with the applicable provisions of this Bylaw and will not be contrary to the Municipal Development Plan, or any other applicable Statutory Plan.

iii. Shall refuse the application if the proposed Development does not conform to this Bylaw.

2.12.3 The Development Officer shall refuse a Development Permit for any application which is not within the intent of this Bylaw or which falls outside the powers delegated to the Development Officer by this Bylaw.

2.12.4 The Development Officer shall refuse a Development Permit for a use that is not listed as a Permitted or Discretionary Use in the District in which the Building or land is located.

[redacted]
Mayor
[redacted]
City Clerk

3. Contravention and Enforcement

3.1 Non-conforming Buildings and Uses

3.1.1 Where at the date of approval of this Bylaw, a Building is lawfully under construction or all required permits for the construction of a Building have been issued, the Building shall be deemed to be a Building existing at the date of the approval of this Bylaw subject to the erection of any such Building being commenced within one (1) year after the date of the issue of the last permit relating thereto.

3.1.2 The lawful use of land or of a Building or other Structure existing at the date of the approval of this Bylaw that does not conform to this Bylaw may be continued; but if the Non-conforming Use is discontinued for a period of at least six (6) consecutive months, the future use of the land, Building or other Structure shall be in conformity with this Bylaw.

3.1.3 The lawful use of a Building existing at the time of the approval of this Bylaw that does not conform to this Bylaw may be extended throughout the Building; but no Structural Alterations except those required to make it a conforming Building shall be made in the Building while the Non-conforming Use is continued. For the purposes of this Section, repairs, maintenance or installations that do not alter the size of the Building or involve the rearrangement or replacement of structural supporting elements shall not be considered to be Structural Alterations.

3.1.4 If a Building that does not conform to the provisions of this Bylaw is destroyed by fire or other cause to an extent of seventy-five (75) percent or more of the market value of the Building, above its foundation, it shall not be rebuilt or repaired except in conformity with the provisions of this Bylaw.

3.1.5 Where the land use of a Building existing at the time of the approval of this Bylaw conforms to this Bylaw, but the Building itself does not conform to the Bylaw, Structural Alterations and additions which conform to the requirements of this Bylaw may be made but the element of non-conformity shall not be increased by such alteration or additions.

3.1.6 A Non-conforming Use of part of a parcel shall not be extended or transferred in whole or in part to any other part of the parcel, and no additional Buildings shall be erected upon the parcel while the Non-conforming Use continues.

3.1.7 A change of tenants or occupants of any land or Building shall not be deemed to affect the use of the land or Building.

3.1.8 When a Building is a Non-conforming Building solely by reason of its encroachment into a required Yard or Setback or inadequate parking the Development Officer may allow an extension of or an addition to the Building if such extension or addition will not in itself

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Mayor
[redacted]
City Clerk

constitute an encroachment into any required Yard, and if such extension or addition complies with the provisions of this Bylaw.

3.1.9 No existing Structure or Site shall be deemed to be Non-conforming by reason only of the conversion from the imperial system of measurement where such non-conformity is resultant solely from such change and is reasonably equivalent to the metric standard herein established.

3.2 Non-conforming Parcels

3.2.1 Parcels created prior to the adoption of this Bylaw, regardless of area or dimensions, may be used for any of the Permitted Uses of the Land Use District in which they fall, subject to the limitations contained therein.

3.2.2 Where a Lot is reduced in size as a result of taking land for public use by the City, Provincial or Federal Government, the Board of a School Division, or a Public Utility by dedication, expropriation, or purchase, the Lot and Buildings and Structures thereon are deemed to conform with the provisions of this Bylaw, and the Lot shall be considered to exist as it did prior to the taking of land for the purpose of further development upon the Lot under its existing regulations, provided such taking:

i. Does not reduce a minimum Front, Side or Rear Yard below 1.5 m unless this Bylaw does not require such Yard;

ii. The utility installation does not endanger the continuing use of the property as permitted by this Bylaw, as determined by the Development Officer; and

iii. Does not result in the Lot being rendered unsuitable for any of the Uses Permitted or Discretionary contained in the Land Use District which the Lot is located, as determined by the Development Officer.

3.3 Contravention

3.3.1 Every person or corporation who violates any of the provisions of this Bylaw or who suffers or permits any act or thing to be done in contravention or in violation of any of the provisions of this Bylaw, or who neglects to do or refrains from doing anything required to be done by any of the provisions of this Bylaw, or who does any act which violates any of the provisions of this Bylaw, or fails to comply with any order, notice, or direction given under this Bylaw is guilty of an offence against this Bylaw and is liable to the penalties hereby imposed.

3.3.2 The Development Officer may suspend or revoke a Development Permit where:

i. The applicant fails to comply with the conditions of issuance of a permit;

8. Industrial Districts

8.1 Light Industrial (I1) District

8.1.1 Purpose

The purpose of this District is to provide for light industrial developments that operate in such a manner that no Nuisance factor is created or apparent outside an enclosed building. Outdoor activities, such as but not limited to loading, service, and storage, that are Accessory to a Principal Use may occur providing the scale of such activities does not unduly conflict with the primary purpose of this District or dominate the use of the Site. This District is intended for Sites located on, or in proximity to, arterial or collector Roads and within an industrial area, or wherever required to implement the objectives of a plan.

8.1.2 Uses

8.1.2.1 Permitted Uses	8.1.2.2 Discretionary Uses
1. Accessory Building or Use 2. Automotive and Equipment Repair Shops 3. Automotive and Minor Recreation Vehicles Sales and Rentals 4. Broadcasting and Television Studio 5. Business Support Services 6. Contractor Service, General or Limited 7. Drive-in Services 8. Equipment Rental 9. Funeral Services 10. Government Services 11. Household Repair Services 12. Industrial Uses, General 13. Manufacturing Establishment 14. Office 15. Pet Care 16. Protective and Emergency Services 17. Recycling Depot, Minor 18. Service Station, Major or Minor 19. Solar Collectors 20. Specialty Food Services 21. Temporary Development 22. Utility Services, Minor 23. Veterinary Services, Minor 24. Warehousing 25. Warehouse Sales 26. A-Board Signs 27. Awning Signs 28. Banner Sign 29. Billboard Signs 30. Fascia Signs 31. Fence Signs 32. Freestanding Signs	1. Agricultural Oriented Sales and Service 2. Ambulance Station 3. Amusement Establishment, Indoor 4. Amusement Establishment, Outdoor 5. Auctioneering Establishment 6. Auto Body Repair and Paint Shop 7. Bulk Fuel Storage and Distribution 8. Communication Facility 9. Drive-through Vehicle Services 10. Fleet Services 11. Grain Elevator 12. Greenhouse and Plant Nurseries 13. Industrial Storage 14. Kennel 15. Medical Marihuana Production Facility 16. Lounges 17. Nightclubs 18. Parking Structures and Lots 19. Recycling Depot, Major 20. Temporary Sales Centre 21. Temporary Storage 22. Truck and Manufactured Homes Sales/Rentals 23. Utility Service, Major 24. Veterinary Services, Major

33. Hanging Signs 34. Portable Signs 35. Projecting Signs	

8.1.3 Development Regulations

1. In addition to the regulations contained in Section 4 and Section 5, the following regulations shall apply in this District.

2. The minimum Lot Width shall be 15.2 m.

3. The minimum Front Yard shall be 9.1 m, except where:

4. The minimum Side Yard shall be 3.0 m or 50% of the Building Height.

5. The minimum Rear Yard shall be 3 m.

    i. Where a Site abuts a residential District, the minimum Rear Yard shall not be less than 7.6 m.

6. The maximum Lot Coverage shall be 45%.

7. The maximum Height shall be 15.3 m.

8. Notwithstanding section 8.1.3.7, NW1-50-1-4 shall have a maximum Height of 5.2 m.

8.1.4 Additional Development Regulations

1. A Landscaped Front Yard, with a minimum width of 3.0 m, shall be provided when the Site is adjacent to a Road. A continuous screen of plant material, a minimum of 1.0 m in Height, shall be concentrated in the Yard directly Abutting the Lot line in accordance with Section 4.12. The provision of parking, loading or storage areas is not permissible within the 3.0 m Yard.

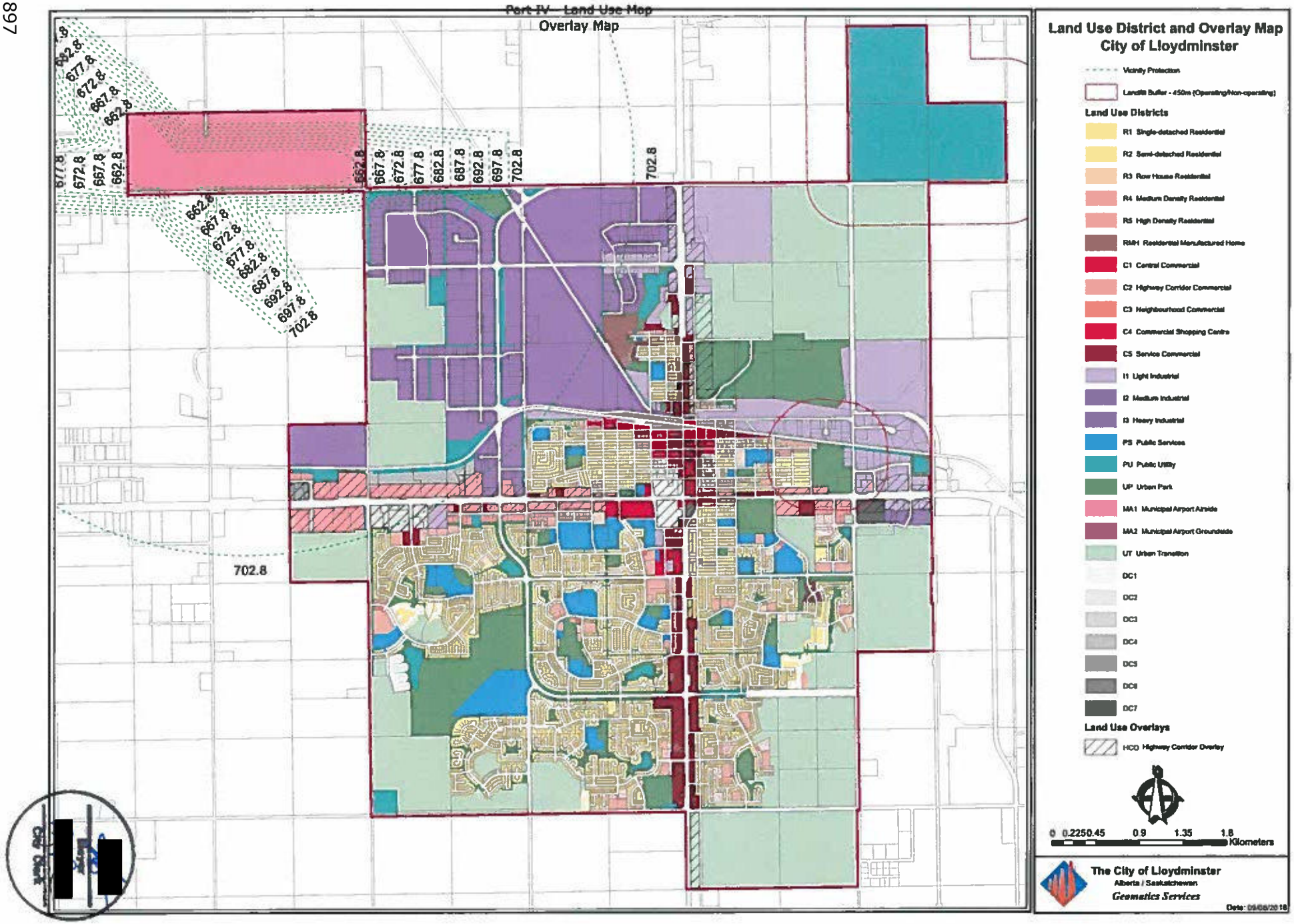
2. No parking, storage, trash collection, outdoor service or display area shall be permitted within a Landscaped Front Yard.

3. Visual Screening a minimum of 2.0 m high shall be provided by a solid fence or a combination of fence and soft Landscaping along all property lines, except for common flanking Front Yard boundaries, that are Abutting a residential District.

[redacted]
Mayor
[redacted]
City Clerk

Part IV – Land Use Map

Overlay Map



1975 - Nelson Lumber Ltd.

August 18, 2004

May 18, 2008

2011 (5 pictures):

2015 (3 pictures):

2022 (5 pictures):

2024 (2 pictures):

BYLAW NO. 05-2025

A BYLAW OF THE CITY OF LLOYDMINSTER IN THE PROVINCES OF ALBERTA AND SASKATCHEWAN TO ESTABLISH A LAND USE BYLAW FOR THE CITY OF LLOYDMINSTER

WHEREAS the Council of the City of Lloydminster deems it necessary to establish a Bylaw to deal with people, activities and things in, on or near a public place or place that is open to the public;

AND WHEREAS *The Lloydminster Charter* provides authority to City Council to pass bylaws for municipal purposes;

NOW THEREFORE, the Council of the City of Lloydminster, pursuant to the authority granted in Section 15 of *The Lloydminster Charter*, enacts as follows:

1. SHORT TITLE

1.1. This Bylaw shall be cited as the Land Use Bylaw.

2. APPOINTMENT, AUTHORITY AND DUTIES OF THE CITY MANAGER

2.1. Except where specific authority is reserved to Council, in the Bylaw the administration and enforcement of this Bylaw is hereby delegated to the City Manager.

2.2. Without restricting any other power, duty or function granted by this Bylaw, the City Manager may carry out anything required for the administration of this Bylaw, including but not limited to the following:

2.2.1. delegate any powers, duties or functions under this Bylaw to an employee of the City;

2.2.2. carry out any inspections that are reasonably required to determine compliance with this Bylaw;

2.2.3. establish any forms required for the administration of this Bylaw.

3. LAND USE BYLAW

3.1. The City of Lloydminster hereby adopts as a Land Use Bylaw the document contained in Schedule "A" and attached to this Bylaw entitled, "The City of Lloydminster Land Use Bylaw".

4. NUMBER AND GENDER REFERENCES

4.1. All references in this Bylaw will be read with such changes in number and gender as may be appropriate according to whether the reference is to a male or female person, or a corporation or partnership.

5. SEVERABILITY

5.1. Every provision of this Bylaw is independent of all other provisions and if any provision of this Bylaw is declared invalid for any reason by a court of competent jurisdiction, all other provisions of this Bylaw shall remain valid and enforceable.

_____
Mayor

_____
City Clerk

This Bylaw shall come into force and effect upon the final passing thereof.

The following bylaws and all amendments thereto are hereby repealed:

- Bylaw No. 5-2016

INTRODUCED AND READ a first time this 7th day of April, 2025, A.D.

PUBLIC HEARING held this 28th day of April, 2025, A.D.

READ a second time this 9th day of June, 2025, A.D.

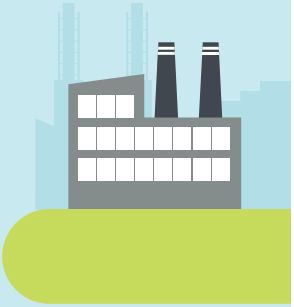
READ a third time this 9th day of June, 2025, A.D.

June 12, 2025	Gerald S. Aalbers (signed)
Date Signed	MAYOR
June 12, 2025	Marilyn Lavoie (signed)
Date Signed	CITY CLERK

Schedule "A"

LLOYDMINSTER

Land Use Bylaw



1. Introduction & Interpretation

1.1 Title

1.1.1 This Bylaw shall be referred to as the "**City of Lloydminster Land Use Bylaw**".

1.2 Purpose

1.2.1 The purpose of this Bylaw is to regulate the **use** and **development** of land and **buildings** within the boundaries of the **City**. Its intent is to achieve orderly and economical **development** of land and to maintain and improve the quality of the physical environment for overall greater public interest without infringing on the rights of any individual or organization.

1.2.2 Specifically, this Bylaw, in accordance with the *Municipal Government Act* (the **Act**), and to achieve the purpose detailed in *1.2.1*:

a. divides the **City** into **districts**,

b. prescribes and regulates the purposes for which land or **buildings** may be used, within each **district**,

c. establishes the role of the **Development Authority**, and

d. establishes the method and procedures for making decisions, notification, and issuance of **Development Permits**.

1.3 Application

1.3.1 The provisions of this Bylaw shall apply to all lands and **buildings** within the municipal boundaries of the **City** of Lloydminster.

1.4 Enactment & Transition

1.4.1 Subject only to the provisions in the **Act** regarding **legal non-conforming uses**, the provisions of this Bylaw come into effect upon the date it receives third and final reading from **City Council**.

1.4.2 The **City of Lloydminster Land Use Bylaw** 05-2016, as amended, is hereby repealed.

1.4.3 Applications submitted and deemed complete before adoption of this Bylaw shall be processed in accordance with **Land Use Bylaw** 05-2016 as amended. All other applications shall be processed in accordance with this Bylaw.

1.5 Compliance with Other Bylaws, Regulations & Legislation

1.5.1 Compliance with this Bylaw does not exempt any person from:

a. the requirements of any other applicable Federal, Provincial, or municipal legislation or policy,

4.4 Discretionary Use Conditions

4.4.1 In reviewing a **discretionary use** application, the **Development Authority** may prescribe such conditions as they deem appropriate, having regard to the regulations and provisions of this Bylaw and the provisions of any Statutory Plan including, but not limited to, the following:

a. requirement that accessibility and traffic patterns for persons and vehicles, are acceptable based on the type and volume of such traffic and that adequate off-street parking and loading where required, is provided and maintained,

b. safeguards to prevent noxious or offensive emissions such as noise, glare, smoke, dust and odour,

c. upgrades to **landscaping** or fencing and **screening**,

d. a limit to the hours of operation,

e. a limit to the number of patrons,

f. ensure grading and drainage of a **site** is adequate and does not negatively impact adjacent or **abutting** properties,

g. establishing a period of time during which a **development** may operate, or

h. any other reasonable matters the **Development Authority** considers appropriate.

5. Compliance & Enforcement

5.1 Ability to Enforce

5.1.1 The enforcement powers granted under this Bylaw are in addition to any enforcement powers the **City** or any of its officers may have under the **Charter**, the **Act**, another Bylaw or any other applicable legislation.

5.1.2 For the purposes of this Bylaw the **Development Authority** and the **Bylaw Enforcement Officer** may enforce the provisions of Part 17 of the **Act** and its regulations, this Bylaw, the conditions of a **Development Permit**, and the conditions of Subdivision Approval. Enforcement may be by way of written warning, Stop Order, or any other authorized action to ensure compliance.

5.2 Non-Conforming Buildings, Uses, or Parcels

5.2.1 Non-conforming **buildings**, **uses**, or parcels shall be regulated in accordance with Section 643 of the **Act**.

5.2.2 The lawful **use** of land or a parcel of land, a **building** or other **structure** existing at the date of the approval of this Bylaw that does not conform to this Bylaw may be continued; but if the non-conforming **use** is discontinued for a period of at least twelve (12) consecutive months, as determined by the **Development Authority**, the future **use** of the land, **building** or other **structure** shall be in conformity with this Bylaw.

5.2.3 When a **building** is non-conforming solely by reason of its encroachment into a required **yard** or **setback**, the **Development Authority** may allow an extension of, or an addition to, the **building** if such extension or addition will not increase the **development's** non-conformance and if such extension or addition complies with the provisions of this Bylaw.

5.2.4 No **structure** or **site** shall be deemed to be non-conforming by reason only of the conversion from the imperial system of measurement where such non-conformity is resultant solely from such change and is reasonably equivalent to the metric standard herein established.

5.3 Bylaw Contravention

5.3.1 A person, whether a **landowner**, corporation, or occupant of a **building**, **structure** or land is guilty of an offense and is liable to have penalties imposed when they cause, commence, or allow the commencement of any **development** that:

a. contravenes or does not comply with the provisions of this Bylaw,

b. requires a **Development Permit** which has not been issued, or has been considered void, suspended or cancelled,

c. that is contrary to a **Development Permit** that has been issued, or subdivision approval that has been given, or a condition of a **Development Permit** or approval, or

d. contravenes a Stop Order.

5.3.2 The **Development Authority** may suspend or revoke a **Development Permit** where:

a. the **applicant** fails to comply with the conditions within a permit,

b. any person undertakes, causes or permits any **development** on a **site** contrary to the terms or conditions of a permit, or

c. the **development** does not comply with a **Development Agreement**.

5.3.3 Any person who undertakes, causes, or permits any **development** on a **site** without a **Development Permit**, or after a permit has been suspended or revoked, shall discontinue such **development** forthwith upon notice in writing issued by the **Development Authority** and shall not resume such **development** unless a permit has been issued or the permit reinstated.

5.3.4 If it appears that a **Development Permit** has been obtained by misrepresentation, the **Development Authority** may suspend, revoke or modify the **Development Permit**.

5.4 Notice of Contravention

5.4.1 Where there is a violation to this Bylaw, the **Development Authority** may first notify the **landowner**, the person or corporation in possession of or occupying the land or **development**, and the person responsible for the Bylaw violation or

Home Based Business	Secondary **use** of a portion of a **dwelling** to conduct a business or occupation. This **use** includes: a. **Home Based Business, Limited** which allows for a home **office** by a full-time occupant of the **dwelling**. b. **Home Based Business, Minor** which allows for the operation of a business by a full-time occupant of the **dwelling**, which includes a limited number of business-associated visits to the residence. c. **Home Based Business, Major** which allows for the operation of a business by a full-time occupant of the **dwelling**, which includes a limited number of business-associated visits to the residence, up to one (1) additional non-resident employee, and limited use of a **rear yard** or **accessory building**.
Hotel	**Development** including a motel used for the provision of rooms or suites for **temporary** sleeping accommodation. **Hotels** may include **accessory retail stores**, **drinking or eating establishments**, **personal service shops**, and cleaning, concierge, meeting rooms, or other guest services.

I

Illumination	Lighting by artificial means.
Industrial Uses, General	**Development** used principally for, but not limited to, one (1) or more of the following activities: a. processing of raw materials, b. manufacturing or assembling of semi-finished or finished goods, products or equipment, c. cleaning, servicing, repairing or testing of materials, goods and equipment normally associated with industrial or commercial businesses, d. storage or transshipping of materials, goods and equipment, or e. distribution and sale of materials, goods and equipment to institutions or industrial and commercial businesses. Any indoor display, **office**, technical or administrative support areas or any retail sale operations shall be **accessory** to the **general industrial use**.
Intermunicipal Development Plan (IDP)	**City** of Lloydminster *Intermunicipal Development Plan* as amended.

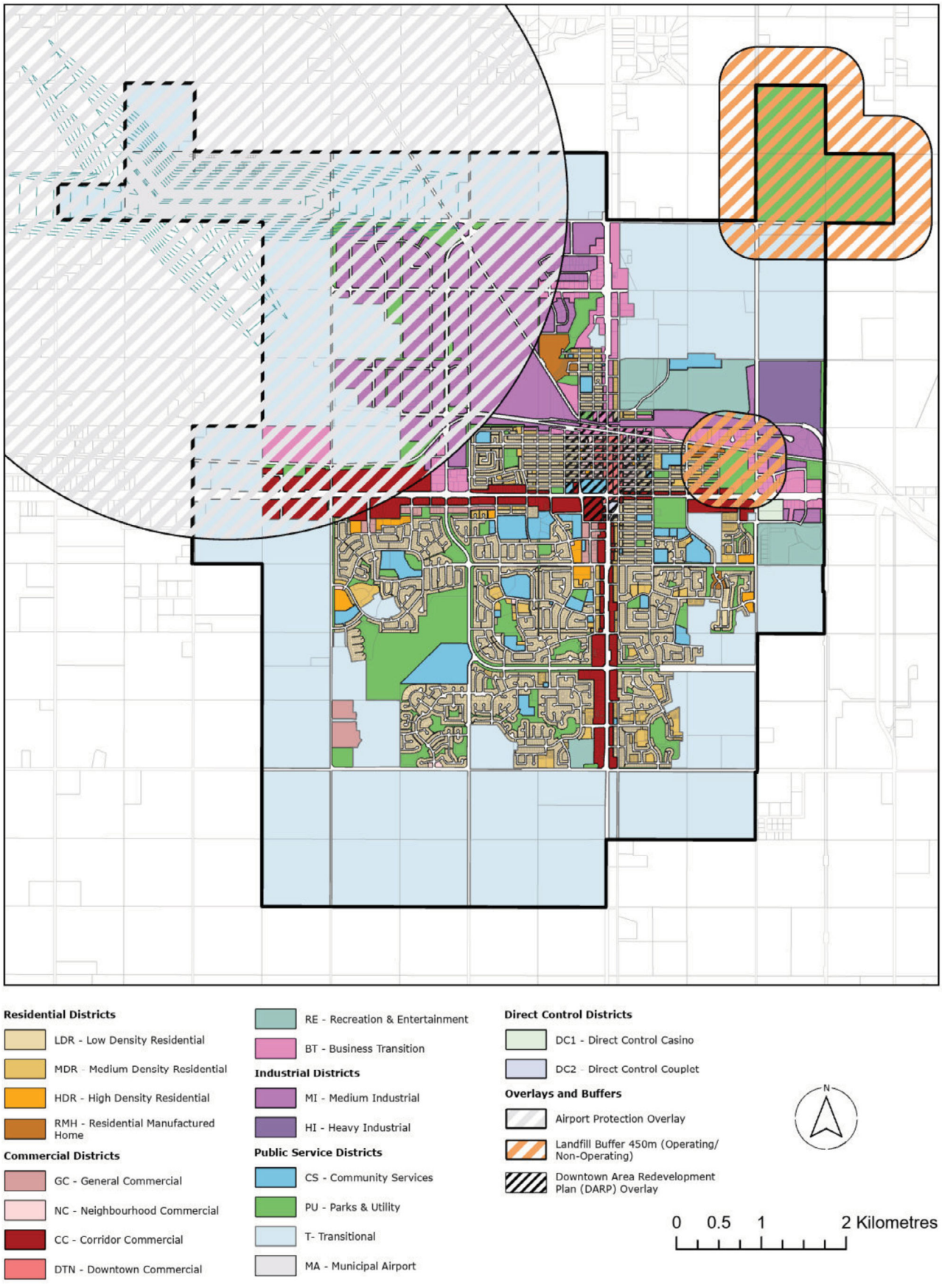
K

Kennels	**Development** used for the accommodation or breeding of household pets and **uses** associated with the shelter and care of household pets, such as grooming, training, and exercising.

L

Landowner	Person, corporation, or otherwise who is documented on the Provincial Registry Title or the **City's** tax roll as the owner of a property.
Landscaping	Modification and enhancement of a **site** through the use of any or all of the following elements: a. soft **landscaping** consisting of vegetation and xeriscaping such as trees, shrubs, hedges, grass, and ground cover, and b. hard **landscaping** consisting of non-vegetative elements such as fencing, architectural **screening** elements, decorative **hard-surfacing** or features of wood, concrete, stone, brick, steel, or other durable, long-lasting materials.
Landscaping, Xeriscaping	**Landscaping** using native plants, soil grading, and mulching that takes full advantage of rainfall retention and reduces or eliminates the need for supplemental water from irrigation.
Land Use District and Overlay Map	Map delineating the boundaries of the **districts** as set out in this Bylaw and marked by the **Land Use District and Overlay Map** (**Figure 3, Map 3**) in *Section 12* of this Bylaw.
Lane	Public roadway that is primarily intended to give **access** to the rear of **buildings** or **lots**.
Legal Non-Conforming	A **use** which does not conform to the requirements of this Bylaw, but legally existed under a previous Bylaw and is allowed to continue. Such **uses** are subject to the provisions of the **Act** regarding these **uses**.
Livestock	Cattle, horses, sheep, pigs, goats, chickens or other animals commonly kept on a farm for agricultural purposes.
Live/Work Unit	Unit that contains one (1) **dwelling**, in addition to dedicated floor space for the purpose of conducting work. The work component may or may not be separate and distinct from the **dwelling**.
Lloydminster Land Use Bylaw	Land Use Bylaw, as used in the *Municipal Government Act, RSA 2000, c.26*, as amended.

Map 3: Land Use District and Overlay Map



LLOYDMINSTER

February 19, 2026

Nelson Commercial Real Estate Inc.
600, 12220 Stony Plain Road
Edmonton Alberta T5N 3Y4

RE: STOP ORDER
5109 41 Street (Plan 7622291, Block 13) (the "Lands")

The Development Authority for the City of Lloydminster (the "City") hereby issues a **STOP ORDER** with respect to the Lands under the authority of Section 645 of the *Municipal Government Act,* RSA 2000, c M-26 (the "MGA") and the City of Lloydminster Land Use Bylaw (No. 05-2025).

Section 683 of the MGA and Section 3.1.1 of the Land Use Bylaw prohibit development without a permit. Development includes a change in the use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the use of the land or building (MGA, Section 616(b)(iii)).

The following development permits have been issued for the Lands:

- On December 17, 1990, a Development Permit was issued for a Truss Manufacturing Facility.
- On September 9, 2019, a Development Permit was issued for a Communications Tower.

An indoor storage facility and an outdoor storage facility are being operated on the Lands (the "Unauthorized Use"). A development permit has not been issued for the Unauthorized Use. The Lands are in breach of the requirements of the MGA and the Land Use Bylaw (the "Applicable Requirements").

YOU ARE HEREBY ORDERED to take the following steps to bring the Lands into compliance with the Applicable Requirements no later than July 19, 2026:

- Cease the use of the Lands for the Unauthorized Use and remove all equipment, vehicles, materials and other items associated with the Unauthorized Use from the Lands, OR;
- Apply for and obtain the following:
    - An amendment to the Land Use Bylaw to provide for the Unauthorized Use as a permitted or discretionary use for the Lands, AND;
    - A Development Permit for the Unauthorized Use.

Decisions on applications for amendments to the Land Use Bylaw must be made by City Council following advertising and a public hearing. Decisions on development

permit applications are made by the Development Authority and may be subject to appeal to the City's Subdivision and Development Appeal Board.

Please be advised that the City of Lloydminster has the authority, under Section 646 of the MGA, to:

- Enter on to the Lands and take any action necessary to carry out the Stop Order if the Stop Order is not complied with, and;
- Register a caveat against title to the Lands in respect of the Stop Order under the *Land Titles Act*.

The City may add the costs and expenses of carrying out a Stop Order to the tax roll for the Lands in accordance with Section 512(1)(h) of the Lloydminster Charter.

You can appeal this Stop Order to the City's Subdivision and Development Appeal Board in accordance with Section 685(1)(c) of the MGA. To commence an appeal you must file a notice of the appeal, containing reasons, and pay the appeal fee in the amount of $400.00 established by the Fees and Charges Bylaw (No. 06-2025), within 21 days of the date of this Stop Order.

A copy of the Application to Appeal is attached, and must be submitted to the attention of the City Clerk by email or delivery as follows:

4420 50 Avenue
Lloydminster AB/SK
T9V 0W2
cityclerk@lloydminster.ca

Payment of the fee may be made by cheque or money order, or by credit card by calling 780-875-6184 ext. 2129.

If you are submitting an Application to Appeal by mail it is your responsibility to ensure that sufficient time is allowed for mailing and delivery of the Application to Appeal to the City Clerk.

CITY OF LLOYDMINSTER

[redacted]

Per: Dion Pollard
City Manager

Subdivision and Development Appeal Board
Application to Appeal

LLOYDMINSTER

Submission Date	Date:	**OFFICE USE ONLY**
APPEAL PROPERTY INFORMATION	Municipal Address: Municipal Tax Roll #: Zoning: Legal Description: Lot: Block: Legal Plan: Permit Number Being Appealed:	**RECEIVED DATE:** **SDAB APPEAL #** **APPLICATION #:** **PERMIT #:** **PERMIT FEE:** **RECEIPT #:**
APPELLANT INFORMATION	Appellant Name: Address: Postal Code: Phone: Email:	**APPEAL HEARING DATE:** **DECISION ISSUED DATE:** **APPEAL GRANTED:** ☐ Yes ☐ No **CONDITIONS ON APPEAL:** ☐ Yes ☐ No

APPEAL AGAINST (Each appeal requires an application)

☐ Development Permit	☐ Subdivision Application	☐ Notice of Contravention
☐ Approval ☐ Conditions of Approval ☐ Refusal	☐ Approval ☐ Conditions of Approval ☐ Refusal	☐ Stop Order

REASONS FOR APPEAL (Sections 678 and 686 of the Municipal Government Act (MGA) require that written Notice of Appeal must contain specific reasons for the appeal.)

I do hereby appeal the decision of the Subdivision/Development Authority for the following reasons (Attach separate page if required):

Signature of Appellant / Agent | **Date of Signature**

APPEAL BOARD DECISION

Collection and Use of Personal Information: The personal information being collected on this form is for the purposes of processing and acting upon this application in accordance with the Municipal Government Act, and is protected by the privacy provisions of the Freedom of Information and Protection of Privacy Act (FOIP). The City will not share your personal information for purposes outside of those stated without your permission in writing, unless there is a specific exemption stated in the Municipal Government Act.

IMPORTANT NOTICE: THIS APPLICATION **DOES NOT PERMIT YOU TO COMMENCE CONSTRUCTION** UNTIL SUCH TIME A DEVELOPMENT PERMIT HAS BEEN ISSUED BY THE DEVELOPMENT AUTHORITY AND ALL OTHER PERMITS (IF REQUIRED) ARE APPROVED. IF A DECISION HAS NOT BEEN ISSUED WITHIN 40 DAYS OF THE DATE THE APPLICATION IS DEEMED COMPLETE, YOU HAVE THE RIGHT TO FILE AN APPEAL TO THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD. APPEALS TO THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD CAN ALSO BE FILED IN REGARDS TO PERMIT REFUSALS AND/OR CONDITIONS WITHIN 21 DAYS OF A DECISION.

Subdivision and Development Appeal Board
Application to Appeal

LLOYDMINSTER

Submission Date	Date: MARCH 10, 2026	**OFFICE USE ONLY**
APPEAL PROPERTY INFORMATION	Municipal Address: 5109 - 41 STREET, SOUTHRIDGE Municipal Tax Roll #: 22127342000 Zoning: GC Legal Description: Lot: Block: 13 Legal Plan: 7622291 Permit Number Being Appealed: Stop Order & DP 12586	RECEIVED DATE: SDAB APPEAL # APPLICATION #: PERMIT #: PERMIT FEE: RECEIPT #:
APPELLANT INFORMATION	Appellant Name: NELSON COMMERCIAL REAL ESTATE INC. Address: 600, 12220 STONY PLAIN ROAD EDMONTON Postal Code: T5N3Y4 Phone: 780-482-9200 Email: cody.vandeveen@mross.com	APPEAL HEARING DATE: DECISION ISSUED DATE: APPEAL GRANTED: ☐ Yes ☐ No CONDITIONS ON APPEAL: ☐ Yes ☐ No

APPEAL AGAINST (Each appeal requires an application)

☐ Development Permit	☐ Subdivision Application	☒ Notice of Contravention
☐ Approval ☐ Conditions of Approval ☐ Refusal	☐ Approval ☐ Conditions of Approval ☐ Refusal	☒ Stop Order

REASONS FOR APPEAL (Sections 678 and 686 of the Municipal Government Act (MGA) require that written Notice of Appeal must contain specific reasons for the appeal.)

I do hereby appeal the decision of the Subdivision/Development Authority for the following reasons (Attach separate page if required):

i) The use of the Lands is valid, as it is consistent with any permits issued and the City's Land Use Bylaw 05-2025;

ii) If non-compliance is found, the alleged unauthorized use is a legal-non conforming use and can continue, notwithstanding, that it may no longer comply with current land use or zoning rules. A legal non-conforming use is a complete defence to the stop order; and

iii) Such further and other grounds as may be advised upon disclosure of all relevant and material records from the City. The Appellant shall provide additional and fulsome submissions prior to the hearing of this appeal.

[redacted] — Signature of Appellant / Agent

MARCH 10, 2026 — Date of Signature

APPEAL BOARD DECISION

Collection and Use of Personal Information: The personal information being collected on this form is for the purposes of processing and acting upon this application in accordance with the Municipal Government Act, and is protected by the privacy provisions of the Freedom of Information and Protection of Privacy Act (FOIP). The City will not share your personal information for purposes outside of those stated without your permission in writing, unless there is a specific exemption stated in the Municipal Government Act.

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Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of December 18, 2025

Office Consolidation

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(i) a quarter section,

(ii) a river lot shown on an official plan, as defined in the *Surveys Act,* that is filed or lodged in a land titles office,

(iii) a settlement lot shown on an official plan, as defined in the *Surveys Act*, that is filed or lodged in a land titles office,

(iv) a part of a parcel of land described in a certificate of title if the boundaries of the part are described in the certificate of title other than by reference to a legal subdivision, or

(v) a part of a parcel of land described in a certificate of title if the boundaries of the part are described in a certificate of title by reference to a plan of subdivision;

(m.1) "mediation" means a process involving a neutral person as a mediator who assists the parties to a matter that may be appealed under this Part and any other person brought in with the agreement of the parties to reach their own mutually acceptable settlement of the matter by structuring negotiations, facilitating communication and identifying the issues and interests of the parties;

(n) "municipal planning commission" means a municipal planning commission established under Division 3;

(o) "municipal reserve" means the land designated as municipal reserve under Division 8;

(p) "municipal and school reserve" means the land designated as municipal and school reserve under Division 8;

(q) "non-conforming building" means a building

(i) that is lawfully constructed or lawfully under construction at the date a land use bylaw affecting the building or the land on which the building is situated becomes effective, and

(ii) that on the date the land use bylaw becomes effective does not, or when constructed will not, comply with the land use bylaw;

(r) "non-conforming use" means a lawful specific use

(i) being made of land or a building or intended to be made of a building lawfully under construction at the date a

land use bylaw affecting the land or building becomes effective, and

(ii) that on the date the land use bylaw becomes effective does not, or in the case of a building under construction will not, comply with the land use bylaw;

(r.1) "non-profit", in respect of a day care, senior citizens or special needs facility, means that the facility is owned or operated by a corporation or other entity established under a law of Canada or Alberta for a purpose other than to make a profit;

(r.2) "off-site levy" means a levy referred to in subsection 648(1.1)(a);

(s) "parcel of land" means the aggregate of the one or more areas of land described in a certificate of title or described in a certificate of title by reference to a plan filed or registered in a land titles office;

(t) "*Planning Act*" means the *Planning Act*, RSA 1980 cP-9;

(u) "plan of subdivision" means a plan of survey prepared in accordance with the *Land Titles Act* for the purpose of effecting a subdivision;

(v) "public utility" means a public utility as defined in section 1(1)(y), excluding residential and commercial street lighting, and includes telecommunications;

(w) "public utility lot" means land required to be given under Division 8 for public utilities;

(x) "redevelopment area" means an area of land that is the subject of an area redevelopment plan;

(y) "Registrar" means Registrar as defined in the *Land Titles Act*;

(z) "reserve land" means environmental reserve, conservation reserve, municipal reserve, community services reserve, school reserve or municipal and school reserve;

(aa) "road" means road as defined in section 1(1), but does not include highway as defined in this Part;

(bb) "school board" means the board of trustees of a school division;

(3) A decision of a development authority on an application for a development permit must be in writing, and a copy of the decision, together with a written notice specifying the date on which the written decision was given and containing any other information required by the regulations, must be given or sent to the applicant on the same day the written decision is given.

(4) If a development authority refuses an application for a development permit, the development authority must issue to the applicant a notice, in the form and manner provided for in the land use bylaw, that the application has been refused and provide the reasons for the refusal.

(5) Despite subsections (1) and (2), a development authority must not issue a development permit if the proposed development does not comply with the applicable requirements of regulations under the *Gaming, Liquor and Cannabis Act* respecting the location of premises described in a cannabis licence and distances between those premises and other premises.

RSA 2000 cM-26 s642;2016 cs24 s102;2017 c13 s1(58) ; 2017 c21 s28;2018 c11 s13;2020 c39 s10(31)

Non-conforming use and non-conforming buildings

643(1) If a development permit has been issued on or before the day on which a land use bylaw or a land use amendment bylaw comes into force in a municipality and the bylaw would make the development in respect of which the permit was issued a non-conforming use or non-conforming building, the development permit continues in effect in spite of the coming into force of the bylaw.

(2) A non-conforming use of land or a building may be continued but if that use is discontinued for a period of 6 consecutive months or more, any future use of the land or building must conform with the land use bylaw then in effect.

(3) A non-conforming use of part of a building may be extended throughout the building but the building, whether or not it is a non-conforming building, may not be enlarged or added to and no structural alterations may be made to it or in it.

(4) A non-conforming use of part of a lot may not be extended or transferred in whole or in part to any other part of the lot and no additional buildings may be constructed on the lot while the non-conforming use continues.

(5) A non-conforming building may continue to be used but the building may not be enlarged, added to, rebuilt or structurally altered except

(a) to make it a conforming building,

(b) for routine maintenance of the building, if the development authority considers it necessary, or

(c) in accordance with a land use bylaw that provides minor variance powers to the development authority for the purposes of this section.

(6) If a non-conforming building is damaged or destroyed to the extent of more than 75% of the value of the building above its foundation, the building may not be repaired or rebuilt except in accordance with the land use bylaw.

(7) The land use or the use of a building is not affected by a change of ownership or tenancy of the land or building.

1995 c24 s95

Acquisition of land designated for public use

644(1) If land is designated under a land use bylaw for use or intended use as a municipal public building, school facility, park or recreation facility and the municipality does not own the land, the municipality must within 6 months from the date the land is designated do one of the following:

(a) acquire the land or require the land to be provided as reserve land;

(b) commence proceedings to acquire the land or to require the land to be provided as reserve land and then acquire that land within a reasonable time;

(c) amend the land use bylaw to designate the land for another use or intended use.

(2) Subsection (1) does not apply if the Crown in right of Canada, the Crown in right of Alberta, an irrigation district, a board of a drainage district or a local authority, within 6 months from the date the land is designated under that subsection,

(a) acquires that land, or

(b) commences proceedings to acquire that land or requires that land to be provided as reserve land and then acquires it within a reasonable time.

(3) Subsection (1) does not apply to land designated by the municipality as conservation reserve.

RSA 2000 cM-26 s644;2016 cs24 s103

City of Saint-Romuald *Appellant*

v.

Claudette Olivier, Louise Bolduc, Roger Bolduc, all three carrying on business as "Les Immeubles Jancloroc enr.", and 9010-4407 Québec Inc. *Respondents*

INDEXED AS: SAINT-ROMUALD (CITY) *v.* OLIVIER

Neutral citation: 2001 SCC 57.

File No.: 27210.

2000: December 5; 2001: September 27.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Municipal law — Zoning by-laws — Scope of acquired rights — Legal non-conforming use — Definition of purpose of a pre-existing use — Variation, extension or alteration of a use — Nightclub substituting nude dancers for western signers — Whether change in form of entertainment constitutes illegal replacement of original non-conforming use with other non-conforming use — Whether change in form of entertainment amounts to forfeiture of acquired right to operate nightclub.

The individual respondents are owners of a building located within the territory of the appellant City where country and western entertainment had been presented since 1990. In 1991, a new zoning by-law came into force under which uses "restaurant or bar with entertainment" and "restaurant or bar with erotic entertainment or films" are not permitted although they are not expressly prohibited. The by-law also provides that a non-conforming use protected by acquired rights may not be replaced by another non-conforming use. In 1994, the respondent corporation bought out the business and began operating a bar which presented entertainment involving nude dancers. The appellant tried to obtain an order requiring the cessation of what it regarded as the unlawful replacement of one non-conforming use by another. The Superior Court dismissed the appellant's application on the ground that the

Ville de Saint-Romuald *Appelante*

c.

Claudette Olivier, Louise Bolduc, Roger Bolduc, tous trois faisant affaires sous la raison sociale « Les Immeubles Jancloroc enr. », et 9010-4407 Québec Inc. *Intimés*

RÉPERTORIÉ : SAINT-ROMUALD (VILLE) *c.* OLIVIER

Référence neutre : 2001 CSC 57.

N° du greffe : 27210.

2000 : 5 décembre; 2001 : 27 septembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major, Bastarache, Binnie et Arbour.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit municipal — Règlements de zonage — Portée des droits acquis — Usage dérogatoire légal — Définition de l'objet de l'usage préexistant — Changement, extension ou modification de l'usage — Remplacement par le cabaret des chanteurs de musique western par des danseuses nues — Le changement de la forme de divertissement offert constitue-t-il un remplacement illégal de l'usage dérogatoire original par un autre usage dérogatoire? — Le changement de la forme de divertissement offert équivaut-il à une renonciation au droit acquis d'exploiter le cabaret?

Les particuliers intimés sont propriétaires d'un bâtiment sur le territoire de la ville appelante, où sont présentés, depuis 1990, des spectacles de type « western ». En 1991, un nouveau règlement de zonage entre en vigueur par lequel les usages « restaurant ou bar avec spectacles » ainsi que « restaurant ou bar avec spectacles ou films érotiques » ne sont pas permis sans pour autant qu'ils soient expressément interdits. Ce même règlement énonce également qu'un usage dérogatoire protégé par droits acquis ne peut être remplacé par un autre usage dérogatoire. En 1994, la société intimée rachète le fonds de ce commerce et y commence l'exploitation d'un bar présentant des spectacles de danseuses nues. L'appelante tente d'obtenir une ordonnance à l'encontre de ce qu'elle considérait être le remplacement illégal d'un usage dérogatoire par un autre. La Cour supérieure rejette la requête de l'appelante considérant

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cessation of a non-conforming use. Appeal dismissed, L'Heureux-Dubé, Gonthier and Bastarache JJ. dissenting.

Jacques Tremblay and *Bertrand Gobeil*, for the appellant.

François Marchand, for the respondents.

The judgment of McLachlin C.J. and Major, Binnie and Arbour JJ. was delivered by

1 BINNIE J. — The Court's objective on this appeal is to find the proper balance between an individual's right to the continued use and enjoyment of his or her property and the power of the community, expressed through the local municipality, to enhance, by changing the land use regulations, the amenities of surrounding and other affected landowners. As the case arises in Quebec, the specific issue raised is the limitation of previously acquired rights under the *Civil Code*. However, as this is a *public* law matter, the principles of land use regulation applicable in the common law provinces concerning legal non-conforming uses are also relevant.

2 The facts are straightforward. The respondents' country and western cabaret was renamed *L'Extase* ("Ecstasy") and the singing cowboys and cowgirls were replaced by nude dancers. Business improved. The bar was said to be [TRANSLATION] "very busy". The police increased surveillance, but their heightened interest seemed related to a concern over potential impaired drivers (a concern they have with other bars and nightclubs as well) and the opportunity to look for people against whom warrants were outstanding or who were thought to be in breach of court orders. The evidence was that there was no problem of discipline within the bar itself. Further, there was no evidence that nude floor shows attract more clients in trouble with the law than regular bars or that

rejeté, les juges L'Heureux-Dubé, Gonthier et Bastarache sont dissidents.

Jacques Tremblay et *Bertrand Gobeil*, pour l'appelante.

François Marchand, pour les intimés.

Version française du jugement du juge en chef McLachlin et des juges Major, Binnie et Arbour rendu par

LE JUGE BINNIE — Dans le présent pourvoi, notre Cour a pour objectif de trouver le juste équilibre entre le droit d'une personne de continuer à utiliser sa propriété et à en jouir et le pouvoir de la collectivité, qui s'exprime par l'entremise de la municipalité locale, d'améliorer les agréments dont bénéficient les propriétaires voisins et les autres propriétaires fonciers touchés en modifiant les règlements régissant l'aménagement du territoire. L'affaire ayant pris naissance au Québec, la question qu'elle soulève plus précisément est celle de la limitation des droits acquis sous le régime du *Code civil*. Toutefois, puisqu'il s'agit d'une affaire de droit *public*, les principes de réglementation de l'aménagement du territoire, applicables dans les provinces de common law relativement aux usages dérogatoires légaux, sont également pertinents.

Les faits sont simples. Le cabaret de type country et western des intimés a été rebaptisé *L'Extase* et les chanteurs et chanteuses de musique western ont été remplacés par des danseuses nues. Les affaires sont devenues plus florissantes. On a dit que le bar était « très fréquenté ». Les policiers ont augmenté la surveillance, mais leur intérêt accru semblait lié à la crainte que des personnes conduisent en état d'ébriété (crainte qu'ils ont aussi à l'égard des autres bars et cabarets) et à la possibilité de repérer des personnes visées par un mandat ou soupçonnées de contrevenir à une ordonnance judiciaire. Selon la preuve, aucun problème de discipline ne se posait à l'intérieur même du bar. En outre, aucun élément de preuve n'a établi que les spectacles de danseuses nues attirent davantage de

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L'Extase in fact attracted a more problematic clientele than it did when it was a country and western bar.

clients ayant des démêlés avec la justice que les bars ordinaires, ni que *L'Extase* attirait effectivement une clientèle plus problématique qu'à l'époque où il était un bar country et western.

My colleague Gonthier J. takes the view that by changing the form of entertainment the respondents forfeited their acquired right to operate the nightclub. With respect, I believe such a result would tilt the balance too far in favour of the municipality. I agree with the conclusion of the unanimous Quebec Court of Appeal and would dismiss the appeal.

3 Mon collègue le juge Gonthier se dit d'avis que les intimés ont renoncé à leur droit acquis d'exploiter le cabaret en changeant la forme de divertissement offert. Avec égards, j'estime que ce résultat crée un déséquilibre en faveur de la municipalité. Je suis d'accord avec la conclusion unanime de la Cour d'appel du Québec, et je suis d'avis de rejeter le pourvoi.

I. The Issue

The facts and applicable enactments are outlined in my colleague's reasons for judgment. I fully agree with his rejection of the "categorical" approach. This is the theory under which an owner, whose use of land does not conform to a new by-law, nevertheless has an "acquired right" to expand, alter or modify an existing use to include anything and everything permitted on that land under the "use category" defined in the prior law (if indeed there was a prior law). While the "categorical" approach may produce a fair result on the facts of this case, it does so only because the categories of use created by the prior by-law were quite narrow. The word "*cabaret*", which was the operative "use" category in the previous by-law, is quite precisely defined in *Le Grand Robert de la langue française* (2nd ed. 1986), vol. 2, at p. 242, *inter alia*, as:

I. La question en litige

4 Mon collègue expose les faits et les dispositions applicables dans les motifs de son jugement. Je suis entièrement d'accord avec lui pour rejeter l'approche « catégorielle ». Il s'agit de la théorie selon laquelle le propriétaire d'un terrain dont l'usage n'est pas conforme au nouveau règlement a néanmoins le « droit acquis » d'étendre ou de modifier l'usage existant en y incluant tout ce qui était permis sur ce terrain selon la « catégorie d'usages » définie dans les dispositions antérieures (si des dispositions antérieures existent effectivement). L'approche « catégorielle » donne peut-être un résultat équitable lorsqu'on l'applique aux faits visés par le présent pourvoi, mais c'est seulement parce que les catégories d'usages créées par le règlement antérieur étaient fort étroites. Le mot « cabaret », qui constituait la catégorie d'« usages » applicable dans le règlement antérieur, est défini très précisément dans *Le Grand Robert de la langue française* (2e éd. 1986), t. 2, p. 242, notamment comme suit :

[TRANSLATION]

2. Establishment presenting satirical, musical or other types of entertainment where patrons may drink, dine or dance. **Café concert; nightclub**.

2. Établissement où l'on présente un spectacle satirique, musical, etc., et où les clients peuvent consommer des boissons, souper, danser. **Café-concert; boîte** (de nuit).

and in *Grand Larousse de la langue française* (1971), vol. 1, at p. 551:

Dans le *Grand Larousse de la langue française* (1971), t. 1, p. 551, nous trouvons la définition suivante :

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facilities for public lectures. Although the rationale is not articulated in his reasons, it is apparent that the activities he upheld created fewer adverse neighbourhood effects than those he found to be prohibited, and were, indeed, not the subject of public complaint.

la recherche et des installations de conférences. Bien qu'il n'ait pas expliqué son raisonnement dans ses motifs, il a manifestement confirmé des activités qui entraînaient moins d'effets néfastes sur le voisinage que celles qu'il a jugées inadmissibles et dont le public ne s'était effectivement pas plaint.

C. *Summary of Approach*

C. *Résumé de la démarche*

39 I therefore approach the issue of limitations on the respondents' acquired right as follows:

Voici donc la façon dont j'aborderai la question des limitations au droit acquis des intimés :

1. It is firstly necessary to characterize the purpose of the pre-existing use (*Central Jewish Institute*, *supra*). The purpose for which the premises were used (i.e., "the use") is a function of the activities actually carried on at the site prior to the new by-law restrictions.

1. Il faut d'abord qualifier la fin visée par l'usage préexistant (*Central Jewish Institute*, précité). La fin à laquelle les lieux ont été utilisés (c.-à-d. « l'usage ») est déterminée par la nature des activités réellement exercées sur le site avant l'entrée en vigueur des restrictions édictées dans le nouveau règlement.

2. Where the current use is merely an intensification of the pre-existing activity, it will rarely be open to objection. However, where the intensification is such as to go beyond a matter of degree and constitutes, in terms of community impact, a difference in kind (as in the hypothetical case of the pig farm discussed above), the protection may be lost.

2. Lorsque l'usage actuel correspond simplement à une intensification de l'activité préexistante, il pourra rarement être contesté. Toutefois, il se peut qu'il ne soit plus protégé si l'intensification est telle qu'elle n'est plus une question de degré, mais qu'elle entraîne, quant à ses effets sur la collectivité, un changement dans le genre d'activité exercée (comme dans le cas hypothétique de l'élevage de porcs analysé précédemment).

3. To the extent a landowner expands its activities beyond those it engaged in before (as where a custom picture-framing shop attempted to add a landscaping business in *Nepean (City) v. D'Angelo* (1998), 49 M.P.L.R. (2d) 243 (Ont. Ct. (Gen. Div.)), the added activities may be held to be too remote from the earlier activities to be protected under the non-conforming use. In such a case, the added activities are simply outside any fair definition of the pre-existing use and it is unnecessary to evaluate "neighbourhood effects".

3. Dans la mesure où le propriétaire foncier étend ses activités au-delà de celles auxquelles il se livrait auparavant (comme lorsqu'un atelier d'encadrement sur commande a tenté d'ajouter une activité d'aménagement paysager dans *Nepean (City) c. D'Angelo* (1998), 49 M.P.L.R. (2d) 243 (C. Ont. (Div. gén.))), les activités ajoutées peuvent être jugées trop éloignées des activités antérieures pour être protégées par l'usage dérogatoire. Dans un tel cas, les activités ajoutées ne sont tout simplement pas incluses dans quelque définition équitable que ce soit de l'usage préexistant et il n'est pas nécessaire d'évaluer les « effets sur le voisinage ».

4. To the extent activities are added, altered or modified *within* the scope of the original purpose (i.e., activities that are ancillary to, or

4. Dans la mesure où des activités sont ajoutées ou modifiées *dans les limites* des fins originales (c.-à-d. des activités accessoires ou étroitement

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closely related to, the pre-existing activities), the Court has to balance the landowner's interest against the community interest, taking into account the nature of the pre-existing use (e.g., the degree to which it clashes with surrounding land uses), the degree of remoteness (the closer to the original activity, the more unassailable the acquired right) and the new or aggravated neighbourhood effects (e.g., the addition of a rock crusher in a residential neighbourhood is likely to be more disruptive than the addition of a fax machine). The greater the disruption, the more tightly drawn will be the definition of the pre-existing use or acquired right. This approach does not rob the landowner of an entitlement. By definition, the limitation applies only to added, altered or modified activities.

5. Neighbourhood effects, unless obvious, should not be assumed but should be established by evidence if they are to be relied upon.

6. The resulting characterization of the acquired right (or legal non-conforming use) should not be so general as to liberate the owner from the constraints of what he actually did, and not be so narrow as to rob him of some flexibility in the reasonable evolution of prior activities. The degree of this flexibility may vary with the type of use. Here, for example, the pre-existing use is a nightclub business which in its nature requires renewal and change. That change, within reasonable limits, should be accommodated.

7. While the definition of the acquired right will always have an element of subjective judgment, the criteria mentioned above constitute an attempt to ground the Court's decision in the objective facts. The outcome of the characterization analysis should not turn on personal value judgments, such as whether nude dancing is more or less deplorable than cowboy singing. I am unable, with respect, to accept as legally relevant my colleague's observation that "[w]hereas erotic entertainment seeks to sexually arouse the audience by the stripping and

liées aux activités préexistantes), notre Cour doit soupeser l'intérêt du propriétaire foncier en regard de l'intérêt de la collectivité en tenant compte de la nature de l'usage préexistant (p. ex. la mesure dans laquelle celui-ci est incompatible avec l'usage des terrains voisins), du degré de proximité (plus la nouvelle activité se rapproche de l'activité originale, moins le droit acquis est contestable) et des nouveaux effets ou de l'aggravation des effets sur le voisinage (p. ex. l'ajout d'un concasseur de pierres dans un quartier résidentiel risque de déranger davantage le voisinage que l'ajout d'un télécopieur). Plus la perturbation est grande, plus la définition de l'usage préexistant ou du droit acquis sera restrictive. Cette démarche ne prive le propriétaire foncier d'aucun droit. Par définition, la limitation ne s'applique qu'aux activités ajoutées ou modifiées.

5. À moins qu'ils ne soient évidents, les effets sur le voisinage ne doivent pas être présumés; la partie qui les invoque doit en faire la preuve.

6. La qualification résultante du droit acquis (ou de l'usage dérogatoire légal) ne doit pas être générale au point de libérer le propriétaire des contraintes découlant de ce qu'il a fait réellement, ni être restrictive au point de le priver d'une certaine souplesse dans l'évolution raisonnable de ses activités antérieures. Le degré de souplesse peut varier selon le type d'usage. En l'espèce, par exemple, l'usage préexistant est l'exploitation d'un cabaret qui, de par sa nature, requiert du renouveau et du changement. Dans des limites raisonnables, il faut permettre ce changement.

7. Même si la définition des droits acquis comportera toujours un élément subjectif, les critères susmentionnés constituent une tentative d'asseoir la décision de notre Cour sur des faits objectifs. L'issue de l'analyse visant à qualifier l'usage ne doit pas reposer sur des jugements de valeur personnels, comme la question de savoir si les spectacles de danseuses nues sont plus ou moins déplorables que les spectacles de chanteurs de musique western. Malgré le respect que je lui porte, je suis incapable de considérer comme pertinente sur le plan du droit l'observa-

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suggestive behaviour engaged in by the performers, country and western shows seek to entertain by providing a showcase for the special talents of singers, musicians and dancers" (para. 76). Serious music is also commonly thought to arouse the passions profoundly, but in terms of acquired rights, music stores should not be differentiated by whether they offer Muzak or Mozart.

tion de mon collègue selon laquelle « [a]lors que les spectacles érotiques cherchent à attiser l'excitation sexuelle des spectateurs par la dénudation et le comportement suggestif des exécutantes, les spectacles westerns cherchent à divertir en mettant en valeur les talents particuliers de chanteurs, musiciens ou danseurs » (par. 76). L'idée que la musique sérieuse soulève les passions profondes est aussi très répandue, mais, en ce qui a trait aux droits acquis, il ne faut pas différencier les magasins de musique selon qu'ils offrent de la musique d'ambiance ou de la musique classique.

VI. Application to the Facts

VI. L'application aux faits

40 As stated earlier, I believe the respondents' pre-existing use can appropriately be characterized as the commercial offering of a combination of food, drink, ambiance and lawful entertainment to the public.

Comme je l'ai mentionné précédemment, j'estime qu'on peut qualifier à bon droit l'usage préexistant des lieux par les intimés en ces termes : ils offrent au public une combinaison de nourriture, de boissons, d'ambiance et de divertissement légal.

41 The switch to a different form of entertainment, as in the change from western-style concerts to nude dancers, is within this general nightclub purpose. The substitution of nude dancers is no more remote in law than would be the substitution of karaoke singing. My colleague Gonthier J. takes the view that nude dancing raises "considerations of a moral nature" (para. 77) that presumably would not be raised by karaoke singing, but in my view, with respect, it is not our function to create a moral hierarchy of different forms of entertainment. Objectively speaking, there is no problem of remoteness. There is no replacement of one use by a different use.

Le passage à une forme différente de divertissement, comme le passage de concerts de style western à des spectacles de danseuses nues, se situe dans les limites des fins générales auxquelles les lieux sont utilisés, savoir l'exploitation d'un cabaret. Le passage aux spectacles de danseuses nues n'est pas plus éloigné de ces fins, en droit, que le passage aux karaokés. Mon collègue le juge Gonthier estime que les spectacles de danseuses nues soulèvent « des considérations d'ordre moral » (par. 77) qui ne se poseraient vraisemblablement pas dans le cas des karaokés, mais, à mon humble avis, il ne nous appartient pas de créer une hiérarchie morale des différentes formes de divertissement. Sur le plan objectif, aucun problème ne se pose quant au degré de proximité. Aucun usage n'est remplacé par un usage différent.

42 While it appears that the substitution of nude dancing has improved the business, the municipality does not rely on an *intensification* of the existing use as a disqualification.

Bien qu'il semble que les affaires soient plus florissantes depuis l'avènement des spectacles de danseuses nues, la municipalité n'invoque pas une *intensification* de l'usage existant de nature à écarter l'application du droit acquis.

43 There is no serious evidence of adverse neighbourhood effects. My colleague Gonthier J.

Aucun élément de preuve sérieux n'établit l'existence d'effets néfastes sur le voisinage. Mon

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relies on the comment of Constable Gelly about increased police surveillance, but the municipality made no effort to demonstrate a link between criminal elements and nude dancing. The police themselves did not make much of a point of added surveillance and the trial judge went out of his way to say that there was no problem of discipline within the premises. In my view, if the appellant's case were to rest on adverse neighbourhood effects, a better evidentiary base ought to have been provided.

collègue le juge Gonthier se fonde sur le commentaire de l'agent Gelly sur l'accroissement de la surveillance policière, mais la municipalité n'a pas tenté de démontrer l'existence d'un lien entre les éléments criminels et les spectacles de danseuses nues. Les policiers eux-mêmes n'ont pas insisté sur l'accroissement de la surveillance, et le juge de première instance a pris la peine de dire qu'aucun problème de discipline ne se posait dans les lieux. J'estime que si l'appelante voulait fonder ses prétentions sur les effets néfastes sur le voisinage, elle devait produire une preuve plus étoffée pour les étayer.

In terms of "added" activities, my colleague Gonthier J. points out that the respondents created five private viewing booths in which a customer and the dancer were distanced from the general audience. This, he points out, is a form of private entertainment. The uncontradicted evidence, however, was that there was no sexual touching and that nothing occurred in the booth that did not occur in the general viewing area. Admission to the booths was open to any member of the public. Morality apart, I do not see how this changes the legal nature of the use, any more than would be the case if an ordinary restaurant sought to upgrade its facilities by offering private dining-rooms.

44 En ce qui a trait aux activités « ajoutées », mon collègue le juge Gonthier souligne que les intimés ont installé cinq isoloirs dans lesquels le client et la danseuse se trouvaient à l'écart de l'ensemble des spectateurs. Il s'agit, souligne-t-il, d'une forme de divertissement privé. La preuve non contredite a toutefois révélé qu'il ne s'y produisait aucun contact de nature sexuelle et qu'il ne se passait rien de plus dans l'isoloir que dans la salle de spectacle. Les isoloirs étaient accessibles à tout membre du public. Abstraction faite des questions de moralité, je ne vois pas en quoi cela change davantage la nature juridique de l'usage que si nous étions en présence d'un restaurant qui cherche à améliorer ses installations en offrant des salles à manger privées.

VII. Conclusion

VII. Conclusion

In my view, the change in entertainment offered by the respondents did not constitute the illegal replacement of the original non-conforming use with a different and therefore unprotected non-conforming use.

45 Je suis d'avis que le changement dans le divertissement offert par les intimés ne constituait pas un remplacement illégal de l'usage dérogatoire original par un usage dérogatoire différent et, partant, non protégé.

If nude dancing is thought to be objectionable on moral or other grounds, the topic could be further considered by legislators rather than by judicial curtailment of acquired rights.

46 Si on estime que les spectacles de danseuses nues sont répréhensibles pour des motifs d'ordre moral ou pour d'autres motifs, il appartient aux législateurs d'étudier la question et non aux tribunaux de la régler en restreignant les droits acquis.

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47 I would therefore dismiss the appeal with costs to the respondents.

English version of the reasons of L'Heureux-Dubé, Gonthier and Bastarache JJ. delivered by

GONTHIER J. (dissenting) —

I. Introduction

48 This appeal deals primarily with the extent of the protection conferred by acquired rights in Quebec municipal law. The issue to be determined is the limits of the protection where the use initially exercised has been transformed. Specifically, the Court must decide in the instant case whether acquired rights continue to exist when a bar that had been presenting country and western entertainment subsequently becomes a bar that presents erotic entertainment.

II. Facts

49 The respondents Claudette Olivier, Louise Bolduc and Roger Bolduc are owners of a building located within the territory of the appellant City of Saint-Romuald. Since 1990, several tenants in succession have operated a bar in the building, presenting country and western entertainment. At the time, the City's zoning by-law (C-600) permitted the operation of [TRANSLATION] "cabarets" in the zone where the building is located. However, a new zoning by-law, No. 273-90, came into force on May 22, 1991. Like a number of other by-laws of its type, it sets out the authorized and prohibited uses for a given zone, using a grid known as the [TRANSLATION] "specifications grid" (s. 7). Different uses are first divided into "groups" and then into "classes". Uses are allocated to the various classes [TRANSLATION] "based on common characteristics of land occupation relating to volume, nuisance, compatibility, use and aesthetics" (s. 16). This type of classification enables the City to authorize or to prohibit an entire class of uses or a specific use, at its option. To this end, ss. 9 to 11 of the by-law state:

Je suis donc d'avis de rejeter le pourvoi avec dépens en faveur des intimés.

Les motifs des juges L'Heureux-Dubé, Gonthier et Bastarache ont été rendus par

LE JUGE GONTHIER (dissident) —

I. Introduction

Le présent pourvoi porte principalement sur l'étendue de la protection conférée par droits acquis en droit municipal québécois. Il s'agit de déterminer les limites de cette protection dans les cas où il y a transformation de l'usage initialement effectué. Dans le cas qui nous concerne, il nous faut plus précisément décider si les droits acquis subsistent lorsqu'un bar présentant des spectacles de type « western » est subséquemment transformé en un bar présentant des spectacles érotiques.

II. Faits

Les intimés Claudette Olivier, Louise Bolduc et Roger Bolduc sont propriétaires d'un bâtiment situé sur le territoire de l'appelante Ville de Saint-Romuald. À partir de 1990, plusieurs locataires y ont successivement exploité un bar où étaient présentés des spectacles de type « western ». À l'époque, le règlement de zonage (C-600) de la Ville permettait que soient exploités des « cabarets » dans la zone où se situe le bâtiment. Un nouveau règlement de zonage, portant le numéro 273-90, est cependant entré en vigueur le 22 mai 1991. Comme plusieurs autres règlements du même genre, celui-ci fixe les usages permis ou interdits pour une zone donnée à l'aide d'une grille appelée « grille des spécifications » (art. 7). Différents usages sont divisés une première fois en « groupes » et une seconde fois en « classes ». La distribution au sein de ces classes a été effectuée « selon des caractéristiques communes d'occupation du sol portant sur la volumétrie, la nuisance, la compatibilité, l'usage et l'esthétique » (art. 16). Une telle classification permet donc à la Ville d'autoriser ou d'interdire, au choix, une classe entière d'usages ou un usage spécifique. À cet effet, les art. 9 à 11 du règlement énoncent :

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CITATION: Forbes v. Caledon (Town of), 2021 ONSC 1442
COURT FILE NO.: CV-19-00629562-0000
DATE: 20210225

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *PLANNING ACT,* R.S.O. 1990, c. P.13

BETWEEN:	)	
	)	
STEPHEN BRUCE FORBES	)	*Bernie Romano*, *Saveria Romano* and *Jordan Nussbaum* for the Applicant
Applicant	)	
	)	
- and -	)	
	)	
	)	
THE CORPORATION OF THE TOWN OF CALEDON	)	*Melissa Winch*, *Raivo Uukkivi* and *Marisa Keating* for the Respondent
Respondent	)	
	)	
	)	
	)	**HEARD**: January 19, 2021

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In this déjà vu Application, the Applicant Stephen Bruce Forbes sues the Respondent the Corporation of the Town of Caledon for the following relief:

> a. An Order declaring that Ontario Court of Appeal decision *Forbes v. Caledon (Town)* shall enure to the benefit of the transferees, lessees, invitees, or tenants with respect to the lands municipally described as 8576 Mayfield Road, Bolton, Ontario and legally described as Part I, Concession 6, in the Township of Albion, in the Town of Caledon, and that therefore, the following non-conforming uses will continue with respect to the Subject Property:
>
> i. For the outdoor storage of vehicles, machinery, and equipment;
>
> ii. For business operation;
>
> iii. For the storage of heavy trucks;

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iv. For such further and other uses as may be ancillary to the business use of the subject lands set out in paragraphs (i) to (iii) above.

b. An Order affirming that, pursuant to the Ontario Court of Appeal decision *Forbes v. Caledon (Town),* the Town of Caledon continues to be restrained from interfering with the said uses of the Subject Property by Mr. Forbes or his transferees, lessees, invitees or tenants;

c. A declaration that the legal non-conforming use of the Subject Property shall enure to the benefit of Mr. Forbes and his successors, assignees, and transferees in title;

d. An Order entitling the Applicant to register on title to the Subject Property: (a) the judgment of Price J. dated February 6, 2009 in Court File No. CV-07-03562; (b) the Endorsement of Gillese, Juriansz and LaForme JJ.A. of the Ontario Court of Appeal dated August 5, 2009; (c) and the judgment in this Application.

[2] For the following reasons, I make the following Order:

1. IT IS ORDERED AND DECLARED THAT the owners, transferees, lessees, invitees, or tenants of the lands municipally described as 8576 Mayfield Road, Bolton, Ontario and legally described as Part I, Concession 6, in the Township of Albion, in the Town of Caledon (the "subject lands") are not prohibited from using the subject lands for the following uses so long as the uses continue:

(a) the outdoor storage of vehicles, machinery, and equipment, including the temporary storage and impounding of motor vehicles taken from a collision scene or otherwise towed or conveyed and awaiting repair or demolition, retrieval, or disposal;

(b) business operation;

(c) the storage of heavy trucks;

(d) such further and other uses as may be ancillary to the business use of the subject lands set out in (a) to (c) above.

2. IT IS FURTHER ORDERED AND ADJUDGED THAT the owners, transferees, lessees, invitees, or tenants of the subject lands have not been prohibited from using the subject lands for the aforesaid uses from February 6, 2009 to the date of this Order.

B. Legal Background

[3] The dispute in the immediate case is about the zoning law associated with legal non-conforming uses. Before turning to the facts, it is therefore helpful to begin these Reasons with a summary of the legal background.

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[4] Pursuant to s. 34 (1) para. 1 of the *Planning Act*,[1] a municipality may enact zoning by-laws that restrict a landowner's use of land. Section 34 (1), paragraph 1 states:

> 34. (1) Zoning by-laws may be passed by the council of local municipalities:
>
> *Restricting use of land*
>
> 1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting any defined highway or part of a highway.

[5] When a zoning by-law is changed, s. 34 (9) of the *Planning Act* provides for the continuation of uses that were lawfully established under the prior zoning by-law so long as and as long as the uses are a continuation of lawful pre-existing uses. Section 34 (9) states:

> 34 (9) No by-law passed under this section applies,
>
> (a) to prevent the use of any land, building, or structure for any purpose prohibited by the by-law, if such land, building or structure was lawfully used for such purpose on the day of passing of the by-law, so long as it continues to be used for that purpose.
>
> […]

[6] The rationale of the legal non-conforming use doctrine rests on the principle that zoning by-laws should not deny landowners their right to use their property in the manner they did before new restrictions are introduced, and the question of whether new restrictions interfere with prior existing uses can only be determined on a case-by-case basis.[2]

[7] A legal non-conforming use is an existing land use that is not permitted under the current zoning by-law but is permitted to continue because it was lawful under the previous zoning.[3] What is protected by the legal non-conforming use doctrine is the *status quo* and not a category of uses into which the existing use can metamorphize.[4] For the use to be a lawful non-conforming use: (a) the property must have been in lawful use for a certain purpose at the date of the passing of the zoning; and, (b) the property must continue to be used for that purpose.[5] Whether the use has been interrupted or abandoned is a question of the facts of the particular case.[6]

[8] The onus is upon the landowner relying on a legal non-conforming use to prove on a balance of probabilities that the use of the lands at the time of the enactment of the zoning by-law was a continuation of prior lawful use.[7] To determine whether there is a legal non-conforming use

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[1] R.S.O. 1990, c. P. 13.
[2] *Ottawa (City of) v Capital Parking Inc*. (2002), 59 O.R. (3d) 327 (C.A.).
[3] *Ottawa (City of) v Capital Parking Inc*. (2002), 59 O.R. (3d) 327 (C.A.).
[4] *Rotstein v. Oro-Medonte (Township),* [2002] O.J. No. 4990 (S.C.J).
[5] *Rock Solid Holdings Inc. v. Lakehead Rural Planning Board*, 2017 ONSC 6564; *Uxbridge (Town) v. Talbot*, 2014 ONSC 1276; *Feather v. Bradford West Gwillimbury (Town)*, 2010 ONCA 440; *O'Sullivan Funeral Home Ltd. v. Sault Ste. Marie (City)*, [1961] O.R. 413 at para. 13 (H.C.J.).
[6] *Rock Solid Holdings Inc. v. Lakehead Rural Planning Board*, 2017 ONSC 6564; *Elbasiouni v. Brampton (City)*, 2016 ONSC 8216; *O'Sullivan Funeral Home Ltd. v. Sault Ste. Marie (City)*, [1961] O.R. 413 at para. 13 (H.C.J.).
[7] *Rock Solid Holdings Inc. v. Lakehead Rural Planning Board*, 2017 ONSC 6564; *The Municipality of West Nipissing v. Lafond,* 2017 ONSC 3097; *Elbasiouni v. Brampton (City)*, 2016 ONSC 8216; *Rotstein v. Oro-*

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of the lands, the examination is of the actual facts on the day of the passing of the by-law rather than a consideration of what use could or might have been made.[8] The claimant of a legal non-conforming use need not establish a fully developed use as long as the use was minimally established before the passage of the by-law.[9] Any doubt as to prior use should be resolved in favour of the owner.[10]

[9] Under the doctrine of legal non-confirming uses, the zoned land may be continued to be used as it was used when a new by-law is passed. Under the doctrine of legal non-conforming uses, the precise pre-existing use cannot be intensified unless the intensification is not of such a degree as to create an altogether different use.[11] The landowner overreaches the existing legal non-conforming permitted use if: (a) the scale or intensity of the use or modification of the use brings about a change of use; (b) the addition of new uses or modifications of old uses is remote from the existing uses; or (c) the new or modified uses can be shown to create undue additional or aggravated problems for the municipality, the local authorities, or the neighbours of the property.[12]

[10] The introduction of a new activity is not necessarily the introduction of a new use and the use of a property must be examined collectively and not divided into parts.[13] A legal non-conforming use has continued if there is an intention to continue the use and the actual use continues so far as possible in all the circumstances of the case.[14] Where an owner merely expands a pre-existing use or engages in a different activity which is within the generic description of the pre-existing use, the legal non-conforming use protection will not be lost.[15]

[11] The benefit of a legal non-conforming use runs with the land which is to say that successors in title can lawfully continue to use the property in accordance with the legal non-conforming use doctrine.[16] A legal non-conforming use runs with the land and not with the owner, and thus a legal

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Medonte (Township), [2002] O.J. No. 4990 (S.C.J); *Emily v. Johnson* (1981), 37 O.R. (2d) 623 (H.C.J.), affd (1981), [1983] O.J. No. 1462 (C.A.); *City of Toronto v. San Joaquin Investments* (1978), 18 O.R. (2d) 730 (H.C.J.), affd (1979) 26 O.R. (2d) 775 (C.A.), leave to appeal to SCC refused, [1980] 1 S.C.R. xiii.

[8] *Saint-Romuald (Ville) v. Olivier*, 2001 SCC 57; *Heutinck v. Oakland (Township)* (1997), 42 M.P.L.R. (2d) 258 (C.A.); *Re Universal Terminals Ltd. and Matilda (Township)* (1986), 54 O.R. (2d) 745 (Div. Ct.)

[9] *Saint-Romuald (Ville) v. Olivier*, 2001 SCC 57; *Centre for Rational Leaming Inc. (c.o.b. Haydon Youth Services) v. Kearney (Town),* [2001] O.J. No. 4434 (S.C.J.); *Alfred and Plantagenet (Township) v. Peladeau* (2000), 17 M.P.L.R. (3d) 237 (Ont. S.C.J.); *R. v. Barry Humphreys Enterprises Ltd.* (1977), 15 O.R. (2d) 548 (Div. Ct.); *Whitchurch (Township) v. McGuffin*, [1970] 2 O.R. 181 (H.C.J.), [1971] 2 O.R. 92n (C.A.); *Central Jewish Institute v. Toronto (City)*, [1948] S.C.R. 101; *Board of Trustees of Roman Catholic Separate Schools of Toronto v. City of Toronto*, [1924] S.C.R. 368.

[10] *Centre for Rational Leaming Inc. (c.o.b. Haydon Youth Services) v. Kearney (Town),* [2001] O.J. No. 4434 (S.C.J.); *Town of Richmond Hill v. Miller Paving Ltd.* (1978), 22 O.R. (2d) 779 at p. 782 (H.C.J.).

[11] *Rock Solid Holdings Inc. v. Lakehead Rural Planning Board*, 2017 ONSC 6564; *Saint-Romuald (Ville) v. Olivier*, 2001 SCC 57.

[12] *Rock Solid Holdings Inc. v. Lakehead Rural Planning Board*, 2017 ONSC 6564; *Saint-Romuald (Ville) v. Olivier*, 2001 SCC 57.

[13] *R. v. Nimak Investment Ltd.*, [1965] 1 O.R. 96 (H.C.J.), affd. [1965] 2 O.R. 182 n. (C.A.); *R. v. Rutherford's Dairy Ltd.*, [1961] O.W.N. 146 (H.C.J), affd. [1961] O.W.N. 274; *R. ex rel Skimminings v. Cappy*, [1952] O.W.N. 146 (H.C.J.), affd. [1953] 1 D.L.R. 28 (C.A.); *Toronto (City) v. Potts Pattern Works Ltd.*, [1943] O.W.N. 615 (H.C.J.)

[14] *Haldimand-Norfolk (Regional Municipality) v. Fagundes* (2000), 11 M.P.L.R. (3d) 1 (C.A.).

[15] *Uxbridge (Town) v. Talbot*, 2014 ONSC 1276; *Glenelg (Township) v. Davis*, [1991] O.J. No. 76 (Gen. Div.), affd. [1992] O.J. No. 1316 (C.A.).

[16] *Re Hartley and Toronto (City)* (1925), 56 O.L.R. 433 at para. 7 (C.A.).

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non-conforming use may be continued from owner to successors.[17]

C. Overview

[12] The factual background to this déjà vu Application can be summarized by the following narrative:

> a. The Forbes family owns a property in the Town of Caledon on Mayfield Road. For some time before 2009, the family used the property for its landscaping and construction business, which involved the outdoor storage of equipment, heavy equipment, trucks, and vehicles.
>
> b. In 2009, prompted by difficulties in selling the Mayfield Road property, the Forbes family sued the Town. The litigation was about whether the uses being made of the property conformed with the zoning by-laws of the Town.
>
> c. In a decision affirmed by the Court of Appeal, Justice Price by Order dated February 26, 2009 adjudged that the Forbes had the right to use the Mayfield Road property for the following purposes: (a) for the outdoor storage of vehicles, machinery, and equipment; (b) for business operation; (c) for the storage of heavy trucks; and (d) for such further and other uses as may be ancillary to the business use of the subject lands set out in (a) to (c).
>
> d. The effect of Justice Price's order was to recognize the uses being made of the Mayfield Road property as legal non-conforming uses in accordance with the *Planning Act*.
>
> e. The Mayfield Road property is now owned by Stephen Bruce Forbes, the son of George and Doreen Forbes, and déjà vu, prompted again by difficulties in selling the Mayfield Road property, the dispute about the uses being made of the subject lands between the Forbes family and the Town has resumed.
>
> f. In part to facilitate his efforts to sell the property with its legal non-conforming uses, Mr. Forbes seeks, in effect, an updating of the Order made by Justice Price in 2009.
>
> g. Mr. Forbes submits that he is entitled to this Order because the *status quo* about the uses being made on the property has not changed since 2009 and he submits that the Town is, once again, interfering with his efforts to market the Mayfield Road property. He says that the Town is motivated to have the Mayfield Road property comply with the current industrial zoning for its location and it wishes to have the legal non-conforming uses disappear as discontinued.
>
> h. Save for the matter of a Motor Vehicle Compound use that was introduced in 2015, the Town concedes that the *status quo* of uses of the property has continued since 2009. The Town submits that a Motor Vehicle Compound use is not outside storage, which is a legal non-conforming use, but rather it is parking, which the Town submits has already been found to be an unlawful non-conforming use for the Mayfield Road property.

[13] This déjà vu dispute is peculiar because to a large extent it is a dispute in the minds of

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[17] *R. v. Fulton*, [1968] 1 O.R. 342 at para. 13 (C.A.); *R. ex rel Skimminings v. Cappy*, [1952] O.W.N. 146 (H.C.J.), affd. [1953] 1 D.L.R. 28 (C.A.); *Conception Bay South (Town) v. Jefford*, (1998) N.J. No. 196 (Nfld. S.C.).

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litigants that do not trust one another and that do not listen or understand one another.

[14] Outside the minds of the litigants, in the physical world, the evidence establishes save for the matter of the Motor Vehicle Compound use that was introduced in 2015, there has been no change in the uses being made of the subject lands from 2009 to 2021, and in the physical world, there is no dispute and apart from the Motor Vehicle Compound use, the Town concedes that Mr. Forbes and his tenants have been permitted to use the subject lands as they have been using them before 2009 and to date.

[15] However, in the non-physical world, there is a dispute about the parties' respective understanding of the law of non-conforming uses. The dispute is about what the disputants think that their opponent is thinking about what legal non-conforming uses can be made of the subject lands - in the future.

[16] The Town thinks that Mr. Forbes mistakenly thinks that he can sell the subject lands for uses that are not continuations of the lawful non-conforming uses recognized in Justice Price's 2009 Order so long as the use involves some aspect of outdoor storage. Thus, the Town believes that Mr. Forbes thinks that he can use or sell the subject lands for a Commercial Parking Lot or for a Transportation Depot, which would be non-compliant uses for the zone in which the subject lands are found under the current zoning by-law.

[17] For his part, Mr. Forbes thinks that the Town mistakenly thinks that it can claw back what it lost in zoning control when in a decision affirmed by the Court of Appeal, Justice Price defined the lawful non-conforming uses being made of the subject lands in 2009. Thus, Mr. Forbes thinks that the Town is wrong in not confirming to prospective purchasers of the subject lands that the present use of the lands can lawfully be continued. Mr. Forbes thinks that the Town is breaching the injunction granted by Justice Price in 2009 and that the injunction should be reiterated in 2021.

[18] Alas, in this déjà vu dispute, both parties are mistaken in their own thinking and in their thinking about what their opponent is thinking about the future uses that can be made by purchasers of the subject lands. In the immediate case, both parties in different ways are mistaken about how the law associated with lawful non-conforming uses applies to the circumstances of the immediate case. In any event, the court does not make declarations about hypotheticals of what uses can or cannot be lawfully made of lands in the future.

[19] As I shall explain below, in the immediate case, Mr. Forbes is entitled to no more than the declarations as set out above. In the immediate case, there is no basis to enjoin the town or to, in effect, mandamus the Town to give assurances to Mr. Forbes' prospective purchasers of the subject lands about what uses they may make of the subject lands in the future. In the immediate case, there is no reason to declare what is the settled law that legal non-conforming uses run with the land so long as the uses have been continued, and in the immediate case, whether the Orders of Justice Price, the Court of Appeal, and the Order on this Application are registerable is a matter to be determined by the officials of the Land Titles system under the *Land Titles Act*.[18]

D. Evidentiary and Procedural Background

[20] On October 22, 2019, Mr. Forbes commenced this Application against the Town of Caledon.

[18] R.S.O. 1990, c. L.5.

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[21] On November 4, 2019, the parties appeared in Civil Practice Court for scheduling of the Application. After hearing from the parties, Justice Archibald stated that the matter of whether the decision of the Court of Appeal would enure to the benefit of a successor in title of the Mayfield Road property was a matter for the Court of Appeal to determine.

[22] On December 20, 2019, the parties attended in Court of Appeal motions chambers and Justice Miller made the following endorsement:

> 1. Neither a single judge of this court nor a panel has the jurisdiction to order the remedy that is sought. The parties agree that the Superior Court of Justice is the proper forum to adjudicate Mr. Stephen Forbes' rights with regard to the non-conforming use of the lands. It would be helpful to the resolution of the issues, if the Town were to provide to Mr. Forbes its position on whether the non-conforming use has continued uninterrupted from the 2009 decision of this Court until now, and whether the non-conforming use would necessarily be ended by a sale of the property.
>
> 2. The motion is dismissed for want of jurisdiction, without prejudice to Mr. Forbes' continuing his application for declaratory relief in the Superior Court.
>
> 3. There is no order as to costs.

[23] The Application returned to the Superior Court of Justice, and Mr. Forbes supported the Application with the following evidence:

> a. affidavits from Mr. Forbes dated November 19, 2019, February 7, 2020 and September 21, 2020 and the transcript of Mr. Forbes' cross-examination dated July 17, 2008, in the 2007 Application brought by his parents;
>
> b. an affidavit from Peter Newsome dated February 7, 2020 and the transcript of Mr. Newsome's cross-examination dated December 13, 2008, in the 2007 Application brought by Mr. Forbes' parents; and,
>
> c. an affidavit from Ronald Harvie Lilly dated October 30, 2020.

[24] Mr. Newsome is a certified public accountant and Mr. Forbes' accountant. Mr. Newsome deposed that Mr. Forbes had continuously used the Mayfield Road property for the same purposes after 2009 as before 2009. He deposed that the continued business uses included outside storage, parking of commercial trucks and equipment and other related business uses.

[25] Mr. Lilly is a licensed tow truck driver operating Git-R-Done Towing, who for five years had been using the Mayfield Road property as a storage facility for his tow trucks and towed vehicles for the Town of Caledon, the OPP, and insurance companies.

[26] The Town resisted the Application and relied on the following evidence:

> a. the affidavit of Daniel Walton dated June 30, 2020;
>
> b. the affidavits of Cindy Pillsworth dated July 6, 2020 and November 6, 2020; and,
>
> c. the affidavit of Dain Watson dated November 6, 2020.

[27] Mr. Walton is a By-law enforcement officer. He was cross-examined on November 26, 2020.

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[28] Ms. Pillsworth is the Zoning Administrator/Secretary-Treasurer of the Committee of Adjustment for the Town. She was cross-examined on November 26, 2020.

[29] Mr. Watson is the Coordinator of Regulatory Services at the Town of Caledon. He was cross-examined on November 26, 2020.

E. Facts

[30] Mr. Forbes is the owner of 8576 Mayfield Road, Bolton Ontario, legally described as Part I, Concession 6, in the Township of Albion in the Town of Caledon. He inherited the property on April 13, 2017, when his father George Ian Forbes passed away.

[31] Beginning in 1974, Mr. Forbes' father and mother, George and Doreen Forbes, rented the Mayfield Road property, and in 1986, they purchased the property. The Forbes used the property for the outside storage of machinery and equipment including vehicles and heavy trucks for a construction, landscaping, and fencing business.

[32] In 1987, the Town of Caledon enacted By-law 87-250, a land use by-law designating the Mayfield Road property as within an agricultural zone.

[33] In 2005, the Town charged the Forbes with violating s. 67 of the *Planning Act*.[19] The Town alleged that: (1) they had wrongfully permitted the outdoor storage of vehicles, machinery, and equipment; (2) they had wrongfully allowed a business operation; and (3) they had wrongfully permitted the storage of heavy trucks. After the Forbes defended the charges, the Town withdrew them, and the family continued to use the property as they had in the past.

[34] On April 18, 2006, the Town of Caledon enacted a new zoning by-law, Comprehensive Zoning By-law 2006-50, which came into force on October 19, 2006. The zoning by-law defines a "use" as "the purpose for which any portion of a lot, building or structure is designed, arranged, intended, occupied or maintained …". The zoning by-law defines categories of uses. Outdoor storage was not a defined use category under the zoning by-law. With the enactment of the by-law the use being made by the Forbes of the Mayfield Road property became a legal non-conforming use in accordance with s. 34 (9) of the *Planning Act*.[20]

[35] Under Comprehensive Zoning By-law 2006-50 the Mayfield Road property was in an MP or "Prestige Industrial" zone. Section 4.21.1 of By-law 2006-50 provides for legal non-conforming uses as follows:

> 4.21.1 Nothing in this By-law shall prevent the use of any lot, building or structure for any purpose prohibited by the By-law if such lot, building or structure was lawfully used for such purpose on the effective date of this By-law and for so long as it continues to be used for that purpose.

[36] In 2007, George and Doreen Forbes entered into an Agreement of Purchase and Sale to sell the Mayfield Road property, but they lost the sale when the Town refused to confirm that it consented to the continued use of the lands for outside storage or machinery and equipment and for commercial activities.

[37] In 2007, after the sale was not completed, the Forbes brought an Application for a

[19] R.S.O. 1990, c. P. 13
[20] R.S.O. 1990, c. P. 13

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declaration as to the lawfulness of their continued use of the lands and to enjoin the Town from interfering with the use.

[38] On the Application, in a decision released on February 26, 2009, Justice Price held that since October 17, 1988, the Forbes family had continuously used the Mayfield Road property for outside storage of equipment and vehicles.[21] Justice Price's Order dated February 26, 2009, stated:

> 1. THIS COURT ORDERS AND ADJUDGES THAT the Applicants shall have the right to use the property municipally described as 8576 Mayfield Road, Bolton, Ontario and legally described as: Part Lot 1, Concession 6, in the Township of Caledon ("subject lands") for the following purposes;
>
> i. For the outdoor storage of vehicles, machinery, and equipment;
>
> ii. For business operation;
>
> iii For the storage of heavy trucks;
>
> iv. For such further and other uses as may be ancillary to the business use of the subject lands set out in paragraphs (i) to (iii) above.
>
> 2 THIS COURT ORDERS AND ADJUDGES THAT The Corporation of the Town of Caledon is hereby restrained from interfering with the said uses of the subject lands by the Applicants or their lessees, invitees or tenants.
>
> […]

[39] The Town appealed, but on August 5, 2009, the Court of Appeal dismissed the appeal.[22]

[40] In respect of the uses that were being made of the Mayfield Road property in 2009, Justice Price made the following findings of fact:

> a. The Mayfield Road property was used for the outside storage of equipment, vehicles and equipment from October 17, 1988 to February 6, 2009.
>
> b. There is a difference between storage, which implies a degree of permanence, and parking, which is temporary, and the vehicles on Mayfield Road were being stored and not simply parked.
>
> c. The vehicles on Mayfield Road were tractor trailers designed to transport goods during longer trips that require longer intervals between trips as distinct from passenger automobiles.
>
> d. The Forbes were in the business and known to be in the business of renting space for storage of vehicles, machinery, and equipment.
>
> e. The goods left at Mayfield Road were left for a week at a time along with the cranes and trucks needed to store or transport the goods.
>
> f. The Forbes operated seeding and landscaping businesses that were seasonal in nature and that might reasonably affect the length of intervals between the use of the

[21] *Forbes v. Caledon (Town)*, [2009] O.J. No. 928 (S.C.J.).
[22] *Forbes v. Caledon (Town)*, 2009 ONCA 605.

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trucks associated with the businesses.

g. Mayfield Road was dedicated to commercial use as storage area to the extent that the Forbes found a market for such use or had need of it for storage in connection with their own business or seeding and landscaping.

h. While the use of the Mayfield Road property for storage of vehicles appears to have intensified, the use existed continuously along with the storage of other things such as machinery, equipment, or other goods which had lessened proportionately.

[41] Mr. Forbes deposed that after the Court of Appeal dismissed the appeal, he has continued to use the Mayfield Road property in the same manner as it was used in the past as found by Justice Price. Mr. Forbes deposed that there were ongoing commercial and business activities, including the parking of trucks, machinery, heavy industrial equipment, and outside storage. This evidence was confirmed by Mr. Newsome.

[42] The uses of the property were largely made by tenants and between 2010 and 2018. Mr. Forbes' annual rental incomes ranged from a low of approximately $106,000 to a high of approximately $204,000. The average annual rental income was approximately $154,000.

[43] In 2015, the Town undertook a review and update of the zoning by-law, with the result that the Forbes Property is currently zoned Prestige Industrial (MP). This Prestige Industrial (MP) zoning permits many new uses as of right at the Forbes Property that were not permitted in 2009. It is undisputed that the zoning by-law does not permit outdoor storage at the Forbes Property, which is the legal non-conforming use recognized by Justice Price's 2009 Order.

[44] Also, in 2015, the Mayfield Road property began to be used as a Motor Vehicle Compound, as defined in the current zoning by-law, as "a lot containing a building or portion of a lot containing a building, which premises are used for the temporary storage and impounding of motor vehicles taken from a collision scene or otherwise towed or conveyed and awaiting repair or demolition, retrieval or disposal." The Mayfield Road property is not in a zone that would permit the use of a Motor Vehicle Compound. The parties differ on whether a Motor Vehicle Compound is a continuation of the legal non-conforming use or an illegal non-conforming use.

[45] Mr. Forbes deposed that in recent years on two occasions, he entered into two conditional agreements of purchase and sale to sell the Mayfield Road property. The agreements were conditional upon receiving approval from the Town of Caledon that the Town will permit the continued non-conforming use of the property. He said he lost the sales because the Town refused to provide confirmation to the purchasers of the continuation of the benefit of the legal non-conforming use.

[46] The evidence, however, is that the Town has never denied the existence of the 2009 Order. It responds to zoning inquiries about the Mayfield Road property by providing a copy of the court Order. It advises individuals to obtain independent legal advice about the interpretation of the Order.

[47] The Town offered to provide a legal non-conforming letter to Mr. Forbes, confirming that the use of the Mayfield Road property has continued as outdoor storage, including for the storage of heavy trucks, vehicles, machinery and equipment. The Town met with a potential purchaser to review its intended use of the Forbes Property, and the Town provided a potential purchaser with the Town's opinion if the purchaser's proposed use was permitted under the 2009 court Order.

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F. The Dispute about the Legal Non-Conforming Uses

[48] As foreshadowed in the Overview above, the dispute between the parties is driven in part by the paranoic thinking of both parties. Mr. Forbes believes that the Town is intentionally being obstructive because it desires that the uses being made of the Mayfield Road property conform with the current zoning and it is anxious to have it established that some of the uses recognized by Justice Price's Order have been discontinued. For its part, the Town believes that Mr. Forbes' design is to have the Town permit an unlawful intensification of the legal non-conforming uses.

[49] Many of the problems of misunderstanding arising in the immediate case are problems of semantics and of the parties not understanding one another. In this regard, the Town seems insistent on ignoring that since save for possibly the matter of the Motor Vehicle Compound and the matter of the Commercial Parking Lot, there has been no intensification or change of use and the uses being made on the property have continued.

[50] The point to emphasize is that there has already been a finding by Justice Price and the Court of Appeal that the uses being made on the property - however they might be labelled - are lawful non-conforming uses that existed before the enactment of By-law 2006-50. The issue then becomes whether the current uses are a continuation of the legal non-conforming uses and save for the matter of the Motor Vehicle Compound, that is the situation at the Mayfield Road property. Justice Price and the Court of Appeal, of course, could not make a ruling about whether a use introduced in 2015 is a continuation of the legal non-conforming use.

[51] I shall, however, decide Mr. Forbes' Application without speculating about the motives of the parties and simply in accordance with their respective legal rights.

[52] In this regard, the evidence establishes that with the possible exception of the matter of the Motor Vehicle Compound, the land use *status quo* has been maintained since Justice Price's 2009 Order, and thus, Mr. Forbes largely succeeds in having Justice Price's Order updated.

[53] Save for the matter of the Motor Vehicle Compound, the Town actually does not oppose an Order that updates Justice Price's Order, and it offered to settle by a consent order to that effect. However, it wished to add a term of the updating Order that:

> None of the above shall permit a Commercial Parking Lot as defined in Zoning by-law No. 2006-50 or any parking for hire of any commercial motor vehicles including heavy trucks or a Transportation Depot as defined in Zoning by-law No. 2006-50.

[54] The Town, however, is not entitled to this stipulation for two reasons.

[55] First, since the Town concedes that save for the matter of the Motor Vehicle Compound, the current uses of the land are a continuation of the uses of the land that were recognized under Justice Price's Order in 2009, then if it happened that those uses were a Commercial Parking Lot as defined in Zoning By-law No. 2006-50 or were parking for hire of any commercial motor vehicles including heavy trucks or a Transportation Depot as defining in Zoning By-law No. 2006-50, then, nevertheless, they would still be legal non-conforming uses so long as Mr. Forbes has not unlawfully intensified the use, which cannot be the case because save for the matter of the Motor Vehicle Compound, the Town concedes that the current use being made of the property is a lawful non-conforming use.

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[56] In the immediate Application, the Town concedes that the *status quo* has not changed save possibly with respect to the Motor Vehicle Compound. In other words, if Mr. Forbes was using the Mayfield Road property for a Commercial Parking Lot, for parking for hire of commercial motor vehicles, or for a Transport Depot as defined in Zoning By-law No. 2006-50, he would have the defence that the use was a continuation of a lawful non-conforming use as described in Justice Price's Order.

[57] The purpose of the legal non-conforming uses doctrine is precisely to permit the continuation of uses that may be prohibited under Zoning By-law 2006-50, and thus in the circumstances of the immediate case, it would not be true to add a proviso to the Order that stipulated, for example, "none of the above shall permit a Commercial Parking Lot as defined in Zoning By-law No. 2006-50".

[58] The second reason why the Town is not entitled to the requested proviso to the Court's Order is that the Town has not proven that Mr. Forbes is using the Mayfield Road property for a Commercial Parking Lot, for parking for hire of commercial motor vehicles, or for a Transport Depot as defined in Zoning By-law No. 2006-50. Indeed, the evidence simply is that Mr. Forbes only made inquiries about these uses for his property. And as I have said, the evidence is that the *status quo* of the uses made of the Mayfield Road property have not changed since 2009 save possibly with respect to the Motor Vehicle Compound.

[59] This brings me to the matter of the Motor Vehicle Compound. The Town's position is that parking is a new use that is not permitted by the 2009 Court Order. It submits that a Motor Vehicle Compound is a use aligned with parking and is not a use permitted on the Mayfield Road property because a Motor Vehicle Compound was not in existence at the property before the passage of the zoning by-law and a Motor Vehicle Compound is not a use found to exist at the time of the passing of the by-law.

[60] Mr. Forbes' counterargument is that the so-called Motor Vehicle Compound is just another type of outside storage of vehicles, which is a permitted legal non-conforming use declared to exist under the Court's 2009 Order.

[61] Put simply, I agree with Mr. Forbes' argument. The evidence of what is occurring on the property, confirmed by aerial photographs, supports Mr. Forbes' argument and it does not support the Town's argument.

[62] The Town is incorrect in its interpretation of Justice Price's Reasons for Decision. Justice Price was designating or describing the non-conforming use of the property, and he was not deciding that parking was not a permitted use on the property. Apart from a zoning designation, parking was an activity that was occurring on the property and certainly it was not a prohibited use made at the property. Justice Price designated the use of the property as outdoor storage because he recognized that the type of parking associated with outdoor storage was of a different duration than the parking associated with say a parking lot. Therefore, he concluded that he should designate the use of the property as for (a) the outdoor storage of vehicles, machinery, and equipment; (b) business operation; and (c) for the storage of heavy trucks.

[63] Pausing here in the discussion, an analogy is helpful in understanding the subtleties of determining what is a legal non-conforming use. Visualize: a garage use would involve the garage being used as indoor storage for tools, indoor parking for vehicles, or indoor storage for a summer vehicle that was not used in the winter. All that Justice Price decided in 2009 was that the

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combination of uses for the Mayfield Road property as a use was best described as for the outdoor storage of vehicles, machinery, and equipment, for business operations and for the storage of heavy trucks.

[64] Those being the legal non-conforming uses for the Mayfield Road property, the evidence establishes that a temporary storage and impounding of motor vehicles taken from a collision scene or otherwise towed or conveyed and awaiting repair or demolition, retrieval or disposal is a continuation of the existing non-conforming uses and neither a new use nor an intensification of the use being made of the property.

[65] Despite the Town's witnesses' arguments to the contrary, while a Motor Vehicle Compound on the Mayfield Road property would be a non-complaint use with the current zoning, it is a legal non-conforming use for the Mayfield Road property. I disagree that a Motor Vehicle Compound is more closely connected to a parking lot, but be that as it may, the real issue in the immediate case is whether the use being made on the property is a continuation of the uses found to be a legal non-conforming use and the evidence establishes that to be the situation.

[66] For these reasons, I grant the declarations found in paragraph 2 of these Reasons for Decision.

G. The Dispute About Whether Legal Non-Conforming Uses Run with the Land

[67] Mr. Forbes also seeks an Order declaring that the Ontario Court of Appeal's decision in *Forbes v. Caledon (Town)*, shall enure to the benefit of the transferees, lessees, invitees or tenants of the Mayfield Road property.

[68] The Town concedes that legal non-conforming uses, so long as they are continuous, run with the land. This is a settled legal principle, and no declaratory Order is necessary.

H. The Dispute About the Continuation of an Injunction against the Town

[69] Mr. Forbes seeks an Order affirming that, pursuant to the Ontario Court of Appeal decision *Forbes v. Caledon (Town)*, the Town of Caledon continues to be restrained from interfering with the said uses of the Subject Property by Mr. Forbes or his transferees, lessees, invitees, or tenants.

[70] Mr. Forbes' request is misconceived. Injunctions are a manifestation of a court of equity's *in personam* jurisdiction, and assuming that Mr. Forbes stands in the shoes of his parents who were the Applicants in 2009, his rights would be to enforce that injunction by enforcement proceedings not by an Application for a continuation of the injunction or for a new injunction. In any event, as I shall explain momentarily, the Town has not contravened the 2009 injunction Order, so Mr. Forbes is not entitled to an injunction order.

[71] In the circumstances of the immediate case, there is no entitlement to an injunction. The Town has not interfered with the uses being made of his property. The Town is under no obligation to confirm to Mr. Forbes' prospective purchasers that their intended uses of the property would be lawful or to facilitate Mr. Forbes' efforts to market the Mayfield Road property.

[72] The evidence shows that the Town has appropriately responded to inquiries. The Town also offers a program or service where it will confirm the legal non-conforming uses for the property. Mr. Forbes has not availed himself of that service because of its expense and because he believes that he must resort to the Court in any event. That is entirely Mr. Forbes' choice, but I

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find no fault in how the Town has responded in the immediate case including in its defence of Mr. Forbes' Application.

[73] It appears that the Town does what municipalities typically do, which, at best, is to have its zoning department confirm that the current uses – not necessarily commensurate with the purchaser's intended uses – may be lawfully continued. That appears to have been done in the immediate case, and, once again, the parties do not appear to be listening to what the other is communicating. In short, there is no need or basis to continue the existing injunction or to grant a new one against the municipality.

I. The Registration of the Court Orders

[74] Mr. Forbes seeks an Order entitling him to register on the title to the Mayfield Road property: (a) the judgment of Price. J. dated February 6, 2009 in Court File No. CV-07-03562; (b) the Endorsement of Gillese, Juriansz and LaForme, JJ.A. of the Ontario Court of Appeal dated August 5, 2009; and (c) and the judgment in this Application.

[75] The matter of what documents, court or otherwise, is a matter to be resolved, at least in the first instance, with the officials that manage the *Land Titles Act,* and, if the Court has the jurisdiction to order documents to be registered, of which I am far from certain, I would not exercise that jurisdiction pre-emptively. Mr. Forbes' request is therefore refused without prejudice to it being renewed in a new Application.

J. Conclusion

[76] For the above reasons, I grant the declarations found in paragraph 2 of these Reasons for Decision.

[77] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Forbes' submissions within twenty days from the release of these Reasons for Decision, followed by the Town's submissions within a further twenty days.

Perell, J.

Released: February 25, 2021

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CITATION: Forbes v. Caledon (Town of), 2021 ONSC 1442
COURT FILE NO.: CV-19-00629562-0000
DATE: 20210225

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

STEPHEN BRUCE FORBES

Applicant

- and -

THE CORPORATION OF THE TOWN OF CALEDON

Respondent

REASONS FOR DECISION

PERELL J.

Released: February 25, 2021

In the Court of Appeal of Alberta

Citation: Carleo Investments Ltd. v. Strathcona (County), 2014 ABCA 302

Date: 20140916
Docket: 1403-0101-AC
Registry: Edmonton

2014 ABCA 302 (CanLII)

Between:

Carleo Investments Ltd.

Applicant

- and -

Strathcona County and Strathcona County Subdivision and Development Appeal Board

Respondents

Reasons for Decision of
The Honourable Mr. Justice Russell Brown

Application for Leave to Appeal

2014 ABCA 302 (CanLII)

Reasons for Decision of
The Honourable Mr. Justice Russell Brown

I. Introduction

[1] The applicant Carleo Investments Ltd ("Carleo") applies for leave to appeal a decision of the Strathcona County Subdivision and Development Appeal Board (the "SDAB"). The SDAB upheld the decision of the respondent Strathcona County's development officer to issue a Stop Order under section 645 of the *Municipal Government Act*, RSA 2000, c M-26 (the "*Act*"),[1] ordering Carleo to clear certain items (various construction materials and a wash trailer) from its property on the ground that outdoor storage was unauthorized by a development permit.

II. Background

[2] The property in question is a 3.15 hectare parcel of land zoned "AG Agriculture: General" under the *Land Use Bylaw* 8-2001 (the "Bylaw") for Strathcona County (the "County"). It has a residence and several accessory buildings. In May 2009, the County granted Carleo a development permit to construct an "Accessory Development-Storage Building/Shop …." It is common ground between Carleo and the County that the purpose of the shop is indoor storage, although they are not agreed as to precisely what can be stored there.

[3] Having received complaints from a neighbour about outdoor storage on the subject land, the County conducted several site inspections between October 2011 and February 2014, culminating in its issuance of a Stop Order on February 14, 2014. Carleo appealed the Stop Order to the SDAB, which heard the appeal on March 14, 2014, and issued written reasons substantially dismissing the appeal (but extending the time for Carleo to comply with the Stop Order) on March 27, 2014. In essence, the SDAB upheld the Stop Order because the Bylaw prohibits any development that is not authorized by a development permit, and Carleo had not obtained a development permit to store material outdoors. In addition, the SDAB reasoned that "outdoor storage" (which is defined in the Bylaw) is neither a permitted use or a discretionary use under the Bylaw for land zoned "AG Agriculture: General", so the County could not have approved it in any event.

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[1] Section 645 provides that if a development authority finds that a development, land use or building use does not comply with the *Act*, a land use bylaw, a development permit or subdivision approval, the development authority may order the person in possession or the person responsible to stop the development or use, demolish, remove or replace the development, or carry out any other actions required to bring the development, land use or building use into compliance.

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III. Alleged Errors

[4] Carleo says the SDAB erred in the following ways:

1. by failing to take into account the uncontroverted evidence before it that similarly zoned properties in [the County], including properties proximate to the applicant's property, are used for the storage of materials and equipment without objection from Strathcona County;

2. by ignoring the discriminatory nature of the enforcement against [Carleo] of the prohibition against storage of materials and equipment on [Carleo's] site which is allowed without objection by the County on lands located in the County with the same or similar zoning; and

3. [by] misapplying [the Bylaw] definition of "outdoor storage".

[5] These alleged errors, taken together with Carleo's submissions, raise the following questions on appeal:

1. Did Carleo hold a development permit authorizing outdoor storage, since the 2009 development permit authorized outdoor storage in addition to storage of items inside the shop?

2. Was the County (or its County's development officer) estopped from enforcing the prohibition on outdoor storage? and

3. Did the SDAB fail to consider relevant evidence?

IV. Test for Leave to Appeal

[6] Section 688(3) of the *Act* provides that this Court may grant leave to appeal if it is of the opinion that the appeal involves (1) a question of law (2) of sufficient importance to merit a further appeal that (3) has a reasonable chance of success.

[7] Carleo argues that the requirement that the question of law be "of sufficient importance to merit a further appeal" should be interpreted so that, assuming a reasonable chance of success, "leave should always be granted where the alleged error is material to the decision": Frederick A Laux QC, *Planning Law and Practice in Alberta*, 3d ed (Juriliber, updated to March 2013) at 16-21. The County views that interpretation as effectively lowering the bar for obtaining leave to appeal from decisions of subdivision and development appeal boards below that intended by the statutory language "of sufficient importance." Instead, the County says that "sufficient importance" should be read as referring to general importance, more specifically, importance "for

jurisprudential purposes" such that "[t]here should be something unsettled about the question, or the decision should have wide ranging implications."

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[8] Neither party suggests that this matter is significant from a jurisprudential standpoint. But what does it mean for a decision to have "wide ranging implications"? Is it sufficient that it affect some other owners of identically or similarly zoned property in a single community? Or, must *all* such property owners in the community be shown to be affected? Or, does the potential impact of the decision have to be felt province-wide? And, how deeply must they be affected?

[9] This ambiguity of the term "wide ranging implications" (or any other term denoting general importance beyond the parties themselves) highlights the ambiguity of the underlying term "sufficient importance" which the Legislature chose to use when section 688(3) was enacted at the time of the 1995 statutory revisions. I do not see in that language anything that absolutely precludes this Court from granting leave to appeal where the decision affects only the parties themselves.

[10] As a general rule, applicants for leave to appeal from a subdivision and development approval board should be prepared to show that the decision has implications which go beyond the dispute between the parties. The wider and more deeply those implications are felt, the greater it will tend to support a submission that the prospective appeal is of "sufficient importance". That does not mean, however, that an appeal which matters to no-one other than the parties themselves can never be "sufficiently important" within the meaning of section 688(3), although this will usually militate against granting leave to appeal. Doing justice between parties is always "of importance". This is particularly so where, as is the case with applications under section 688(3), every decision sought to be appealed from has restricted someone's rights, and often extremely valuable rights, in property. Whether doing justice between the parties is "of *sufficient* importance" to merit an appeal from a body which the Legislature clearly intended by enacting section 688(3) to usually be the "court of last resort" in such matters will depend on factors including the effect of the decision on the applicant (ie is someone losing their livelihood or substantially all their rights to use their property, or is someone having to scale back the plans for a backyard pool by a metre?); and the merits of the proposed appeal. As to the merits, while section 688(3) already requires that the appeal have a reasonable chance of success, it makes sense that the more meritorious that prospective appeal appears to the chambers justice, the more important it is that an appeal panel consider whether an injustice occurred. (See the Hon Roger P Kerans & Kim M Willey, *Standards of Review Employed by Appellate Courts*, 2d ed (Juriliber, 2006) at 351-52.)

V. Analysis

a. *Whether Carleo held a development permit for outdoor storage*

[11] Whether the SDAB erred by holding that Carleo did not hold a development permit authorizing outdoor storage, raises two issues. First, whether the development authority in this case could approve outdoor storage on the subject land by issuing a development permit for it

("Issue #1"). Second, whether the development authority in this case actually approved outdoor storage when it granted the 2009 development permit to build the shop for indoor storage ("Issue #2").

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[12] In my view, Issue #1 raises two questions of law of sufficient importance to merit a further appeal. The first question is whether categories of "permitted" and "discretionary" uses exhaust the uses that a development authority can permit. Carleo argues that a development authority may approve a use that is not expressly listed as a "permitted" or "discretionary" use in the relevant land use bylaw, if the use is accessory to some other use. I am unaware of a panel of this Court having considered this question before. Answering it would involve interpreting sections 640(2)(b)[2] and 642[3] of the *Act*, which would obviously have a bearing on future cases.

[13] The second question is when a use can be said to be "accessory" to another use.[4] This also arises because "outdoor storage" is defined in the Bylaw as (in part) "accessory storage". What are the limits of that concept? Carleo argues that outdoor storage, as a use, was accessory either to the shop or to the principal use of the subject land (although that principal use – whether residential or agricultural – is unclear). The County argues that the relevant use (outdoor storage) cannot be accessory to another accessory use (indoor storage) but only to a principal use (agricultural or residential use). It also argues says that outdoor storage for a commercial purpose cannot be accessory to agricultural or residential use. While this may be true, that does not necessarily exclude the possibility of outdoor storage of any kind from qualifying as indoor storage, as Carleo says it does.

[14] In my view, the answer to this question also has implications for future cases, and again I am unaware of a panel of this Court having discussed the concept of the limits on accessory use as a basis for granting a development permit.

[15] Carleo's difficulty lies in the final hurdle posed by section 688(3), whether the appeal has a reasonable chance of success. Issue #1 goes to the limits of the County's *vires* to issue a development permit. Carleo does not, however, dispute that it needed a development permit for outdoor storage. Rather, the gist of Carleo's submissions is that it *already had one* in the form of

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[2] Section 640(2)(b) provides that a land use bylaw must prescribe the use or uses of land or buildings that are permitted with or without conditions, or that may be permitted with or without conditions at the discretion of the development authority.

[3] Section 642 provides for the issuance (or refusal) of a development permit in accordance with the land use bylaw for both permitted uses and discretionary uses.

[4] I note the County's submission that this point was not raised before the SDAB. Strictly speaking, this is incorrect. The development officer who issued the Stop Order raised the issue of whether the 2009 development permit authorized outdoor storage, and argued that it was not a permitted or discretionary use of the property: Respondent's Memorandum and Authorities, Tab A, p 132 "Final summation by the Development Officer". It is, however, true that no arguments were made about whether outdoor storage was an accessory use, and so the SDAB did not address it.

the 2009 development permit for the shop. Any ruling by this Court on the limits of uses that can be authorized by a development permit and of "accessory uses" would therefore not resolve this appeal. Indeed, it would be entirely *obiter dicta*. I would as a consequence grant leave on this issue only were I to grant leave on Issue #2 – that is, on whether the development authority in this case approved outdoor storage when it granted the 2009 development permit to build the shop for indoor storage.

[16] While Issue #2 raises a question of law (interpretation of the 2009 development permit), answering this question does not warrant an appeal. First, it is not reasonably arguable that the SDAB misinterpreted the 2009 development permit. That permit does not mention outdoor storage at all, nor does it identify a use that might implicitly include outdoor storage. To the contrary, if implication is all we have to go on, then the development permit for *indoor* storage would appear to implicitly exclude *outdoor* storage. Further, this is not an issue of sufficient importance to merit a further appeal. Given the zoning of the subject land, the issue of whether the 2009 development permit authorized outdoor storage on the subject land has no significance to any (or many) other landowners and, given the low prospect of success on this issue, there is no compelling reason to conclude that doing justice between Carleo and the County merits a further appeal.

[17] In the result, neither issue raised by the question of whether Carleo had a development permit for outdoor storage merits granting leave to appeal.

b. *Whether the County was estopped from enforcing the prohibition*

[18] *Obiter dicta* at the Supreme Court of Canada has held that public authorities may be estopped from exercising discretionary powers in narrow circumstances: *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 40, [2001] 2 SCR 281 [*Mount Sinai*]. Those circumstances include the normal conditions of private law promissory estoppel,[5] with the additional requirement that the representee show that it is consistent with legislative intent, and the broader statutory scheme, that the public body may be bound to exercise its power in accordance with its prior representations: *Mount Sinai* at paras 47-48.

[19] As I understand Carleo's argument, it is that the County was estopped under the doctrine of public law promissory estoppel from issuing a Stop Order under section 645 of the *Act* because its omission to issue Stop Orders against nearby landowners and against the predecessor owner of the subject land somehow constituted a representation to Carleo that it would not exercise its power to issue a Stop Order against Carleo. Further, I take it that it is Carleo's position that it acted in reliance on that representation (although it is not clear how).

[5] The party relying on the doctrine must establish that the other party has, (1) by words or conduct, made a promise or assurance (2) which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, (3) in reliance on the representation, (4) he acted on it or in some way changed his position: *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50 at 57, 80 DLR (4th) 652.

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[20] In my view, Carleo has no reasonable chance of showing that the County was estopped from issuing a Stop Order. From the record, it does not appear that the issue of estoppel was raised before the SDAB. On that basis alone, this ground must fail. Even putting that aside, the record cannot support a finding of the requisite representation that the County would not issue a Stop Order requiring Carleo to clear items stored outside. The conduct Carleo relies on (the County's omission to issue Stop Orders against others) is, putting it mildly, ambiguous. Carleo cannot say whether those others had a development permit, or whether their use was legally non-conforming in accordance with section 643(1) of the *Act*. Even if those difficulties could be overcome, there is no evidence that, by omitting to issue Stop Orders against others, the County intended to restrict its ability to issue Stop Orders against Carleo. Indeed, to the contrary, the evidence is that, from 2011 to 2014, the County consistently maintained its position that Carleo must cease using the subject land for outdoor storage.

[21] Finally, there is no evidence that Carleo acted in reliance upon this supposed representation.

[22] Answering this question about estoppel therefore does not merit, in the circumstances of this case, a further appeal.

c. *Whether the SDAB failed to consider relevant evidence*

[23] While I am unaware of any decisions of this Court which address whether an administrative tribunal's failure to consider all of the evidence is a question of law, for the purpose of an application for leave under s 688(3), I would – assuming it were a question of law – still deny leave to appeal on this ground. Carleo's prospects for success here are remote. It argues that the SDAB ignored evidence that the predecessor owner of the property had also used it for outdoor storage, that the County granted Carleo a development permit to build an "Accessory Development-Storage Building/Shop" on the subject property, and that there is considerable outdoor storage on lands in the vicinity of the subject property which are also zoned "AG Agriculture: General". A review of the record, however, shows that the SDAB reasons expressly note Carleo's evidence about the other properties.[6] The minutes of its proceedings also note Carleo's evidence about the 2009 development permit[7] and that the predecessor owner stored items outside.[8] In effect, Carleo would be urging an appeal panel to infer that, having noted this

[6] Return and Certificate of the Secretary of the Strathcona County Subdivision and Development Appeal Board (the "Return"), p 2: "A number of photographs of other properties in the area were provided to the Board that exhibit outdoor storage in highly visible locations. … [I]t was their view that the bylaw seems relaxed in many cases or that enforcement is very 'random'."

[7] Return, p 132: "A development permit was issued in 2009 to develop a shop building as an accessory use to the rural residential property."

[8] Return, p 131: "The greenhouse business operating prior to their purchase of the parcel had outdoor storage associated with the business."

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evidence, the SDAB proceeded to ignore it when it made its decision. As I say, the prospects for Carleo's success here are frail.

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VI. Conclusion

[24] None of the questions advanced by Carleo merit a further appeal. The application for leave to appeal is dismissed.

Application heard on September 10, 2014

Reasons filed at Edmonton, Alberta
this 16th day of September, 2014

Brown J.A.

Appearances:

K.D. Wakefield, Q.C.
for the Applicant

G.J. Stewart-Palmer
for the Respondents

2014 ABCA 302 (CanLII)

Calgary Subdivision and Development Appeal Board
P.O. Box 2100, Station M, # 8110,
Calgary, AB T2P 2M5
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Subdivision & Development APPEAL BOARD

2011 CGYSDAB 55 (CanLII)

CALGARY SUBDIVISION AND DEVELOPMENT APPEAL BOARD

Citation: 2011 CGYSDAB 055

Case Name: SDAB2011-0055 (Re)

File No: CO2010-01278

Appeal by:	Istvan Heiter
Appeal against:	Development Authority of The City of Calgary
Hearing date:	May 19, 2011
Decision date:	May 31, 2011
Board members:	Rick Grol, Chairman Kerry Armstrong John Attrell Sally Haggis Andrew Wallace

DECISION

2011 CGYSDAB 55 (CanLII)

Basis of appeal:

This is an appeal from an order of the Development Authority for **Gizella Heiter and Istvan Heiter** to **remove the basement kitchen from the property including the lower cabinets, countertop, sink and faucets, stove and wire service to it, and any/all other cooking facilities including microwave oven and not re-install any of these items at anytime thereafter** at 63 Mardale Crescent NE.

Description of Application:

The appeal before the Subdivision and Development Appeal Board ("Board") deals with an order issued by the Development Authority to remove the basement kitchen from the property including the lower cabinets, countertop, sink and faucets, stove and wire service to it, and any/all other cooking facilities including microwave oven and not re-install any of these items at anytime thereafter at 63 Mardale Crescent NE. The property is located in the community of Marlborough and has a land use designation of Residential – Contextual One Dwelling (R-C1) District.

Hearing:

The Board heard verbal submissions from:

Gordon Yorke representing the Development Authority; and
Istvan Heiter, the appellant and owner of the subject property, in favour of the appeal.

Summary of Evidence:

The Board report forms part of the evidence presented to the Board. It contains the Development Authority's decision respecting the development permit application and the materials submitted by the Development Authority that pertain to the application. The Board report further contains the notice of appeal and the documents, materials or written submissions of the appellant, applicant and any other party to the appeal.

The Development Authority:

The Development Authority presented: the report; viewgraphs; photographs; a sketch of the lower level basement layout; the original building permit for the single detached dwelling dated October 10, 1971; and relevant sections of Land Use Bylaw 1P2007. The Development Authority then stated the following:

> This matter is the appeal of an order issued by the Development Authority to remove the basement kitchen from the property including the lower

5 The Development Authority submitted that a second dwelling unit was added to the subject site in the form of a basement suite in the lower level of the home without the benefit of a required development permit contrary to Land Use Bylaw 1P2007. The single detached home was built in 1971 as a single family residence under a building permit.

6 It is the evidence of the Development Authority that in January 2010 it received a complaint about a possible illegal basement suite (dwelling unit). During a site inspection in April 2010, a development inspector found a dwelling unit was added to the basement area of the building for which no approvals were obtained. As the building had been returned to one dwelling unit which complied with the Land Use Bylaw, the first complaint file was closed.

7 The Development Authority received another complaint for this property in May 2010. An inspection on February 2011 found that the main floor contained a complete dwelling unit with two bedrooms, a living room, dining room, bathroom and full kitchen. The lower level of the home was found to have a shared laundry/mechanical room, two bedrooms, a living room, bathroom (tub, toilet, and sink) and the re-installed kitchen with upper and lower kitchen cabinets, kitchen counter, kitchen sink, fridge, stove, microwave oven, foodstuffs, cooking and eating utensils. The basement kitchen, which had been restored, is the same as found during the previous inspection before it was removed. The Development Authority determined that two dwelling units existed in the building and that the basement kitchen facilities had been re-installed since April 26, 2010 without a required development permit.

8 At the hearing, the appellant did not dispute the facts and confirmed that there is a complete dwelling unit/ basement suite in the lower level of the building. The appellant further confirmed that the basement suite is rented out to tenants. In addition, the appellant advised that he is aware that there is no development permit for the basement suite. The appellant, however, requested a stay of the order in order to allow them to make an application for a land use amendment that would allow a secondary suite.

9 Having considered all the evidence, in particular the photographic evidence, the Board accepts the evidence of the Development Authority with respect to the existence of a kitchen in the basement level.

10 Based on the evidence, the Board finds that the basement level of the subject home contains components that constitute a kitchen: upper and lower cabinets, kitchen counter, sink and faucet, fridge, and stove. In the opinion of the Board, these components are commonly found in a kitchen area. The Board finds that the components can be used or are designed to be used for the cooking or preparation of food. In particular, on the basis of the photographic evidence as contained in the Board report and the photographic evidence submitted at the hearing, the Board finds that there is a kitchen in the basement level of the subject home.

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11 The Board finds that these components in the basement level meet the definition of "kitchen" as defined in the section 13(75) of Land Use Bylaw 1P2007.

12 Having regard to all of the evidence and based on the lay-out of the basement level of the home, which was not disputed by the appellant, the Board further finds that all the components of a full dwelling unit exist in the basement level of the home, i.e. kitchen, living room, two bedrooms, and sanitary facility (bathroom). In addition, the Board finds that the fact tenants are residing in the basement is supporting evidence that a separate dwelling unit exists in the basement level of the subject home.

13 Therefore, the Board finds that the basement level of the home contains a kitchen, living, sleeping and sanitary facilities (bathroom), and these are designed to be used as a residence by one or more persons, as stipulated in section 188(a) Land Use Bylaw 1P2007 .

14 Based on all the evidence, the Board thus finds that the development in the basement of the subject home meets the definition of "dwelling unit" as defined in section 188 of Land Use Bylaw 1P2007.

15 The appellant did not rely on the exemptions as set out in section 25 of Land Use Bylaw 1P2007. The Board finds that the exemptions of section 25 of Land Use Bylaw 1P2007 do not apply.

16 Further the Board notes that pursuant to sections 385 and 386 of Land Use Bylaw 1P2007, a second dwelling unit is neither allowed as a permitted or a discretionary use in the R-C1 District. The uses of "Contextual Single Detached" and "Single Detached Dwelling" are allowable uses within the R-C1 District but pursuant to sections 171 and 305 of Land Use Bylaw 1P2007 those uses only allow one "Dwelling Unit", as defined in section 188 of Land Use Bylaw 1P2007.

17 Furthermore, the Board notes that the subject property does not have the land use designation of R-C1s District, which pursuant to section 384(2) of Land Use Bylaw 1P2007 would allow for the use of a secondary suite on the same parcel. Therefore, Land Use Bylaw 1P2007 does not allow for more than one dwelling unit on the subject property.

18 Based on the evidence, the Board finds that the addition of the subject second dwelling suite qualifies as a "development" as defined in section 616(b) of the *Municipal Government Act* and section 13(52) of Land Use Bylaw 1P2007 as the additional dwelling unit (basement suite) amounts to a change of use of the subject land.

19 In addition, "dwelling unit" is a "use" pursuant to section 188 of Land Use Bylaw 1P2007 and the Bylaw does not allow for a second dwelling unit on the property.

20 Section 683 of the *Municipal Government Act* provides that, except as otherwise provided in a land use bylaw, a person may not commence any development unless the

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person has been issued a development permit in respect of it pursuant to the land use bylaw.

21 Pursuant to section 23 of Land Use Bylaw 1P2007 a development permit is required for every development unless it is otherwise exempted in the Bylaw.

22 Pursuant to section 23, and in conjunction with section 13(52) of Land Use Bylaw 1P2007, the Board finds that a development permit is required for the development of the basement suite.

23 The Board finds that there is no evidence that a development permit was issued for the addition of a second dwelling unit to the subject property either pursuant to Land Use Bylaw 1P2007 or its preceding Bylaws.

24 Moreover, the Board accepts the evidence of the Development Authority with respect to the upper level of the home and finds that the upper level of the home already contains one "dwelling unit" as defined in Land Use Bylaw 1P2007.

25 In any event, in the absence of a prior issued development permit, the development and use of the subject basement suite (second dwelling unit) on the property is clearly prohibited under Land Use Bylaw 1P2007.

26 Thus, based on the evidence, the Board finds that more than the allowable number of dwelling units exists on the property in contravention of the rules of Land Use Bylaw 1P2007.

27 Accordingly, pursuant to section 645 of the *Municipal Government Act*, the Board finds that the stop order is correctly issued.

28 For the above reasons the Board denies the appeal and upholds the stop order.

29 The appellant requested a stay of the stop order for at least six months so as to allow for making a land use amendment application. The Board finds that a stay of at least six months would be unreasonable as it would be tantamount to approving a temporary development permit for the basement suite development which is outside of the purview of the Board. As the Development Authority did not object to a stay of three months, the Board finds it reasonable in this case to stay the stop order for a period of three months.

30 Therefore, the Board is staying enforcement of the stop order until September 01, 2011 so as to provide the appellant with time to comply with the stop order.

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_____
Rick Grol, Chairman
Subdivision and Development Appeal Board

Issued on this 31st day of May, 2011

2011 CGYSDAB 55 (CanLII)

IN THE MATTER OF	Application to Appeal a Stop Order dated February 19, 2026
APPELLANT	Nelson Commercial Real Estate Inc.
SUBJECT LANDS	5109 41 Street, Lloydminster Alberta
DOCUMENT	REPLY SUBMISSIONS OF NELSON COMMERCIAL REAL ESTATE
DATE OF SUBMISSION	Friday, May 15, 2026
DATE OF HEARING	Tuesday, May 26, 2026
NAME AND ADDRESS FOR FILING FOR PERSON FILING THE DOCUMENT	McLennan Ross LLP Barrister & Solicitors 600, 12220 Stony Plain Rd. Edmonton, AB T5N 3Y4 Attention: Cody Van de Veen Email: cody.vandeveen@mross.com Phone: (780) 482-9191 Fax: (587) 686-9726 File No: 20260832

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PART 1 – THE CITY'S FAILURE TO REBUT THE APPELLANT'S LEGAL NON-CONFORMING USE

A. Overview

1. The Appellant provides these reply submissions (the "**Reply Submission**") in support of its appeal of the Stop Order, in accordance with the process and schedule agreed upon by the parties. Capitalized terms in this Reply Submission are herein adopted and have the same meaning as in the Appellant's written submissions of May 1, 2026 (the "**Appellant's Submission**").

2. The Appellant does not intend to repeat the points as advanced in the Appellant's Submission, except to the extent necessary to respond to a some of the points raised by the City in their submissions of May 1, 2026 (the "**City's Submission**").

B. Legal Non-Conforming Use Established

3. While the City appears to have established the Current Use may not conform with the 2025 Bylaw, that by itself does not support the City's position that the Stop Order should be upheld.

4. The Appellant's Submission has established, well beyond a balance of probabilities, that the Current Use is properly deemed a legal non-conforming use at law. The City has failed to rebut what the Appellant has established, and on this basis the Stop Order ought to be revoked.

5. In fact, the City's Submission has bolstered the Appellant's assertions that the Lands have consistently and continuously supported various industrial operations and local businesses for over fifty years, thirty years of which exist since the issuance of the Development Permit.

6. Suddenly and without sufficient legal grounds, the City has elected to interfere with the Appellant's legal use of their lands, and advances a position that the only legal non-conforming use of the lands is a truss manufacturing shop. This position clearly does not conform with the intent of the MGA nor the sanctity of upholding private property rights, which has been expressly acknowledged by the law and upheld by the Supreme Court of Canada.

The City's Submission, at para 46.

7. The City's contradiction of its own submissions and disregard for the Appellant's rights, is further demonstrated by the City's refusal to issue the New Business License to the Appellant, despite the City's own submissions that it continuously issued business licenses between the years 2013 to 2023, to tenants of the Lands that did not operate a truss manufacturing shop.

The City's Submission, at paras 18, 20, 21

8. The City's own actions and treatment of various tenants of the Lands for no less than 24 years after the cessation of a truss manufacturing shop, demonstrates that in practice, the City itself agrees with the Appellant's submissions that a legal non-conforming use was ongoing at the Lands and that the legal non-conforming use is not confined to only the operation of a truss manufacturing shop.

9. Prior to issuing business licenses to non-truss manufacturing tenants for over a decade, the City's own evidence is that it confirmed the Lands could be used for temporary storage of RV inventory by a lessee of the Lands, and that the City accepted a proposal to use the Lands for parking and storage of equipment by an oilfield services operator. Contemporaneous to the RV Storage and oilfield services use, and immediately following the cessation of truss manufacturing, Nelson Group Inc. also continuously maintained its presence and General Industrial Use of the Lands.

The City's Submission, at paras 15, 16, Tab 8, Tab 9

10. While the Appellant's Submission has sufficiently established, well beyond a balance of probabilities, that the Lands have been used as a General Industrial Use with storage since at least 1975, and that said use constitutes a legal non-conforming use of the Lands at law, at minimum, the Appellant has produced evidence to raise doubt as to whether the Current Use falls within a legal non-conforming use under the MGA.

C. Unreasonableness in City's Position

11. The City's Submissions contain a repeated theme: the advancement of rigid interpretation and application of legal non-conforming use, that is not consistent with how the principle has been interpreted and applied by the Supreme Court of Canada and elsewhere. Such rigidity does not result in reasonable, proportionate outcomes when applied by courts or tribunals such as the SDAB, and hinders fair and equitable decisions.

12. The correct interpretation and application of non-conforming uses, as directed by the Supreme Court of Canada, is that legal non-conforming uses require reasonable flexibility and evolutions. Landowner's reasonable and real expectations matter.

TAB A: *Watts v. Benvenuti,* 2005 CanLII 63810 (ON SC), at para 36.
As affirmed in *Watts v. Benvenuti*, 2006 CanLII 17920 (ON CA).

13. As the Appellant has established, the General Industrial Use as defined under All Bylaws includes the historical use of the Lands and the Current Use, where the Lands are used for storage or transshipping of materials, goods and equipment. While the City appears to acknowledge the Appellant's classification of General Industrial Use in paragraph 11 of the City Submission, the very next paragraph, at paragraph 12 of the City Submission also advances the definition for Industrial Storage.

14. The Appellant denies that the historical use or Current Use of the Lands is properly described as Industrial Storage, as the definition requires that the development be used exclusively for outdoor storage of goods, and that such storage does not involve the erection of permanent structures. The historical use and the Current Use involves the use of the Building, a permanent structure on the Lands, and any storage is not exclusive to the outside portion of the Lands. Thus, any assertions by the City that the Development Permit did not expressly authorize Industrial Storage is simply not relevant to this appeal.

15. The City, at paragraph 34 of the City Submission, indicates that no development permit has been issued for the Current Use of the Lands, and that this is a violation of the MGA. While the City appears to suggest that this non-conformance with the MGA somehow warrants the issuance of the Stop Order, this point argument is satisfactorily addressed by the ultimate issue at core of this appeal: that is, if a legal non-conforming use is established, this is a complete defence to the stop order, and the authority for the Current Use lies in the principle of a legal non-conforming use. As such, any assertion by the City that a development permit more recent than the 2025 Bylaw ought to exist, does not form a material issue of this appeal.

16. The City suggests that the Development Permit, and specifically any site plans in support of the Development Permit, are absent of identification that the outside portion of the Lands will be used for storage. What the City has failed to establish, is how or why it is reasonable to suggest that this would be expressly noted. It is not clear what, if any, alternate uses, the City suggests that the outside portion of the Lands could possibly be used for.

17. The Lands contain an approximate 20,100 sq ft Building near the centre portion of the lot, and only covers a small portion of the Lands. The remainder of the lot is otherwise graveled and is used for the storage of various materials and equipment, as intended since the construction of the Building and the issuance of the Development Permit. Any suggestion by the City that the outside graveled portion of the Lands, which composes a majority of the lot, was intended to remain completely empty so as it could serve no useful purpose on the Lands only further emphasizes the unreasonableness in the City's argument.

Appellant Submission, at TAB G

D. No Discontinuance of Use Exists

18. Having sufficiently established the existence of the legal non-conforming use of the Lands, the final consideration that the Appellant ought to address is section 643(2) of the MGA. The discontinuance of a non-conforming use for a period of 6 consecutive months or more, may prevent the allowance of the non-conforming use to continue.

19. However, the timeline of historical use advanced in both parties' submissions, confirms that that use of the Lands for a General Industrial Use was continuous and uninterrupted over the relevant time period, and so the potential consequences of section 643(2) do not apply to this appeal.

20. Further and in the alternative, if the Appellant is incorrect in the assertion that the use of the Lands were never discontinued for a period of 6 consecutive months, , the common law interpretation of section 643(2) renders the operation of section 643(2) inapplicable on these circumstances.

21. Once again, the common law interpretation of this clause is not rigid as the City would contend. Rather, the courts, and specifically the Alberta Court of Appeal, asserts that the intention of the landowner is relevant in determining whether an interruption in use of lands actually amounts to a discontinuance of use.

22. The leading Alberta authority on discontinuance, holds that discontinuance of a non-conforming use requires an intention to end the use coupled with actual non-use; discontinuance is not established where it is shown that a landowner has a bona fide intention to use the premises and that actual use continues so far as is practicable. Specifically, discontinuance will not be found to have occurred, in circumstances where a landowner that serves as a lessor has difficulty in securing tenants for the continued use of their lands.

TAB B: *Stavely (Town) v. Fern Brothers,* 1987 ABCA 233 ("*Stavely*"), at paras 4-5.

23. In short, not only have the Lands actually been used uninterrupted over the relevant period of time, but if any period of discontinuance did exist, which is denied and not supported by any evidence, the Appellant always maintained the intention to continue the non-conforming use.

PART 2 – CLOSING REMARKS / REMEDY SOUGHT

24. The use of the Lands fully or substantially conforms with a historical development permit, authorizing a general industrial use in a light industrial zoning district. The Appellant respectfully requests that the SDAB revoke the Stop Order and declare that the Current Use constitutes a legal non-conforming use, so as the Current Use may continue and that the City can then proceed with issuing the New Business License.

25. Not only is the Appellant's request reasonable, just and equitable, but such a determination by the SDAB conforms with the law and the foundation that the Current Use is a legal non-conforming use as contemplated by the MGA and All Bylaws. The Appellant merely seeks that the SDAB continue to accept the legal non-conforming use of the Lands via revoking the Stop Order and granting the relief sought by the Appellant

26. In order for the City to prevail in this appeal, it needs to persuade the SDAB that the current use of the Lands is not a legal non-conforming use as interpreted by the common law and to:

    a) find that the only legal non-conforming use of the lands is a truss manufacturing shop, and that the principle of a legal non-conforming use is not applied with flexibility or evolution as intended by the common law;

    b) ignore the real and reasonable expectations held by the Appellant with respect to the available General Industrial Use of the Lands;

    c) ignore the City's conduct over the past 25 years since the cessation of a truss manufacturing shop and disregard the continual issuance of business licenses by the City which permitted General Industrial Uses on the Lands that were not truss manufacturing shops; and

    d) ignore the fact that the Lands have consistently and continuously supported various industrial operations and local businesses in Lloydminster for over thirty years.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Lloydminster, in the Province of Alberta, this 15th day of May, 2026.

McLennan Ross LLP

[redacted]

Cody Van de Veen, counsel for the Appellant, Nelson Commercial Real Estate Inc.

Watts et al. v. Benvenuti et al.

[Indexed as: Watts v. Benvenuti]

2005 CanLII 63810 (ON SC)

77 O.R. (3d) 386
[2005] O.J. No. 3254
Court File No. 9/05

Ontario Superior Court of Justice,
Turnbull J.
July 25, 2005

Municipal law -- By-laws -- Zoning -- Non-conforming use -- Property zoned for agricultural use until new by-law passed in 2000 under which property was zoned for residential use -- Owner of property using it for crop cultivation before and after passage of new by-law -- Respondent purchasing property in 2003 and using it to board and exercise quarter horses -- Land still used for agricultural purposes -- Legal non-conforming use of lands for farming purpose not terminated when respondent started quarter horse operation on lands.

Until 2000, the part of the property which the respondent purchased in 2003 was zoned for residential use and part was zoned for agricultural use. The previous owner of the land used the agricultural part of the property to raise crops. A new by-law was passed in 2000, under which the property in its entirety received a residential hamlet designation. The respondent was unaware of the 2000 by-law when he purchased the property. He began a quarter horse operation on the part of the property that was formerly zoned agricultural, boarding and training eight horses. The applicants brought an application for a declaration that the respondent was in violation of the by-law and for an order requiring the removal of all horses from the land.

Held, the application should be dismissed.

The new use of buying, selling, training, boarding and exercising quarter horses was simply a change of activities within the old use of the property for agricultural purposes, with little community impact. The present use of the property was not remote from the former use. The change in use was one that a landowner might reasonably undertake within the context of a legal non-conforming use, provided the number of horses and intensity of use were not excessive. The land in question was being used for agricultural purposes when the 2000 by-law was enacted, and the use of the property for agricultural purposes had continued. The respondent had established a legal non-conforming use.

Dennis v. East Flamboro (Township), [1956] O.W.N. 282, 3 D.L.R. (2d) 130 (C.A.), distd

Saint-Romuald (City) v. Olivier, [2001] 2 S.C.R. 898, [2001] S.C.J. No. 54, 2001 SCC 57, 204 D.L.R. (4th) 284, 275 N.R. 1, apld

Other cases referred to

Gayford v. Kolodziej, [1959] O.W.N. 341, 19 D.L.R. (2d) 777 (C.A.); Glenelg (Township) v. Davis, [1992] O.J. No. 1316, 92 D.L.R. (4th) 441, 56 O.A.C. 382, 10 M.P.L.R. (2d) 260 (C.A.); Heutinck v. Oakland (Township), [1997] O.J. No. 4796, 105 O.A.C. 364, 42 M.P.L.R. (2d) 258 (C.A.); O'Riley (Re) (1991), 8 M.P.L.R. (2d) 190 (Ont. M.B.); Ottawa (City) v. Ottawa (City) Chief Building Official, [2003] O.J. No. 4530, 180 O.A.C. 48, 45 M.P.L.R. (3d) 29 (S.C.J.); Ottawa (City) v. Ottawa (City) Chief Building Official, [2003] O.J. No. 1945, [2003] O.T.C. 430, 3 C.E.L.R. (3d) 46, 39 M.P.L.R. (3d) 1 (S.C.J.); Peacock v. Norfolk (County) Chief Building Official, [2003] O.J. No. 2771, [2003] O.T.C. 624, 40 M.P.L.R. (3d) 12 (S.C.J.); R. v. Cappy, [1953] 1 D.L.R. 28, [1952] O.W.N. 481, 103 C.C.C. 25 (C.A.); Toronto (City) v. San Joaquin Investments Ltd. (1978), 18 O.R. (2d) 730, 83 D.L.R. (3d) 584, 5 M.P.L.R. 113 (H.C.J.); Walton v. Lincoln (Town), [1997] O.J. No.

2005 CanLII 63810 (ON SC)

3363, 39 O.T.C. 246, 43 M.P.L.R. (2d) 291 (Gen. Div.); Wilmot v. Kingston (City), [1946] O.R. 437, [1946] 3 D.L.R. 790, [1946] O.W.N. 500 (C.A.)

Statutes referred to

Municipal Act, R.S.O. 1937, c. 266, s. 406

Municipal Act, R.S.O. 1950, c. 243, s. 390

Municipal Amendment Act, 1941, S.O. 1941, c. 35, s. 13

Planning Act, R.S.O. 1990, c. P.13, s. 34 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 14.05 [as am.]

APPLICATION for a declaration that the respondent was in violation of a zoning by-law.

Thomas Cline, Q.C., for applicants.

David Schell, for respondents.

[1] TURNBULL J.:-- This is an application brought under rule 14.05(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

[2] At the outset of the proceedings the parties agreed that the style of cause of these proceedings should be amended to name only Shawn Benvenuti as the named respondent. I so order.

[3] The applicants seek a declaration that the respondent is in violation of By-law NW-1-2000 for the former City of Nanticoke because he is boarding and exercising up to eight horses on his lands known municipally as 1991 Regional Road 24.

2005 CanLII 63810 (ON SC)

They seek a mandatory order requiring the removal of all horses from the subject lands forthwith. They further seek an injunction precluding the keeping of horses and livestock on the respondent's lands in contravention of the by-law.

Chronology

[4] On August 5, 1986, By-law number 1-NA86 for the former City of Nanticoke was passed and it was approved by the Ontario Municipal Board on February 10, 1987. The parties agree that the respondent's lands which were closest to Regional Road 24 (the most easterly portion) were zoned for residential use and the rear of the property (the most westerly portion) making up most of the 5.03 acres of the respondent's lands was zoned agriculture. Under the by-law, permitted uses of agriculturally zoned agricultural included the following:

(1) Air strip and hanger, one each per farm;

(2) Animal kennel or hospital; [page388]

(3) Bed and breakfast;

(4) Bunkhouses, provided occupants are employed by the farm operation where the bunkhouse is located;

(5) Commercial greenhouse;

(6) Farm;

(7) Farm processing;

(8) Farm produce grading and distribution station;

(9) Farm produce outlet;

(10) Farm vacations;

(11) Home occupation;

(12) Home industry;

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(13) Seasonal storage of recreational vehicles and recreational equipment as a secondary use to a farm;

(14) Single detached dwelling;

(15) Storage of operational school buses.

[5] It was agreed between the parties that at all material times a single family residence and two barns were on the respondent's property. The two barns were close to the zoning line separating the agricultural portion from the residential portion of the respondent's property. There seems to be no issue that the barns are located on what were at all times the agricultural portion of the respondent's property. On the portion of the respondent's lands zoned for residential purposes, there has been at all material times a single family residence which has been used for that purpose. Counsel indicated that to the court during submissions.

[6] The applicants purchased their property, which is a single family residence two doors removed to the north from the residence of the respondents, in the spring of 2000.

[7] By-law NW-1-2000 (hereinafter also referred to as the "new by-law") was passed by the council of the City of Nanticoke on November 10, 2000 and approved by the Ontario Municipal Board on March 27, 2001. Under the new by-law, the respondent's property in its entirety became designated RH which is a residential hamlet designation. Permitted uses under the RH zoning are: [page389]

(1) Single detached dwelling;

(2) Home occupation;

(3) Home industry;

(4) Bed and Breakfast.

[8] The applicant Gregory Watts has deposed in his affidavit

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that when he and his wife took possession of their home in 2000, the respondent's property did not house any horses and or livestock. The respondent's property in 2000 was used for the purpose of growing corn. Corn was likewise grown in 2001. In 2002, the respondent's property was used for growing pumpkins. In the spring of 2003, an area for a corral was fenced and when the fencing was completed the subject property became occupied by horses.

[9] On August 7, 2003, the respondent's offer to purchase the lands and premises at 1991 Regional Road #24 was accepted by the executor for the former owner of the property. Sale price was $145,000 and the closing of the transaction took place on September 12, 2003.

[10] After the date of purchase new activity then began occurring on the respondent's property. The evidence indicates that the barns began to be used, horses were brought onto the property and construction of the fencing completed. The applicant also swore in para. 7 of his affidavit, that the respondent's property currently provides accommodation for eight horses.

[11] At the outset of the hearing, counsel for the respondent conceded that the last time livestock were kept on the property was sometime in the mid-1990s. This was the testimony of his client Mr. Benvenuti on his cross-examination transcript at p. 7, question 36 to question 46. Those questions and answers form part of the exhibit one on the application. There seems to be no issue that the property was continuously used for residential and agricultural purposes up to and including the time the respondent acquired the property.

[12] The respondent purchased his lands from Claude Robert Hill, a farmer who retired after living on the farm for approximately 26 years. Mr. Benvenuti swore in his affidavit that he purchased the lands in question solely for the purpose of raising quarter horses. He had looked in many locations in Norfolk County for a suitable farm property and the property owned by Mr. Hill seemed to meet his needs. He knew that sheep were being raised on the property immediately to the north of

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the former agricultural portion of his land. That sheep farming operation backs [page390] onto the entire west side of the applicants' property. Ginseng was being planted in the field immediately to the south of the respondent's property.

[13] At exhibit A to the respondent's affidavit there is a copy of the Agreement of Purchase and Sale by which the respondent contracted to buy the property. It contained a condition which provided as follows:

> Seller agrees to provide written verification that the zoning for the property is agricultural at the rear, residential at the front of the subject land prior to closing. If the seller is unable to obtain such then this agreement shall be terminated.

[14] Unfortunately the real estate agent for the respondent appears to have advised him that the property at the rear was zoned "agricultural". The respondent's affidavit indicates that the agent provided him with schedule A-1A to By-law 1-NA86 for the City of Nanticoke which displayed the rear (or westerly) portion of the farm as being agricultural. His real estate agent also provided him with a letter signed by the owner, Claude Hill, who confirmed that during his period of ownership, he kept livestock on the property. The respondent understood this livestock to be cattle as well as chickens and pigeons and rabbits. This was all averred to in the affidavit of Mr. Benvenuti. Unfortunately the schedule A-1A to By-law 1-NA86 for the City of Nanticoke was not the relevant schedule as the new by-law had been passed by the municipality in late 2000 .

[15] The respondent deposed that he engaged a law firm to represent his interests on the purchase and prior to closing, he made inquiries of the building/zoning department of Norfolk County concerning the zoning of the property. He satisfied himself that the rear of the property was zoned agricultural. Clearly he was wrong in that respect.

[16] Immediately after closing, Mr. Benvenuti erected a 100-foot by 200-foot outdoor riding pen to temporarily house

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three horses until he could fence the pasture adequately. This caused some concern with the nearby neighbours. Shortly thereafter, a complaint was made against him by the local by-law enforcement officer regarding the fence and the housing of horses on his property by the municipal enforcement officer. Mr. Benvenuti was advised the property was zoned residential and that he could only keep horses on the farm if in fact there was a legal non-conforming use that could be established from prior to the establishment of the new by-law. In order to establish that there was a legal non-conforming use Mr. Benvenuti spoke to certain neighbours who knew Mr. Hill and were able to confirm that he kept approximately six to eight [page391] beef cattle, chickens, pigeons and rabbits on the property and in the barns. Letters from neighbours verifying that fact were next entered as exhibit D to the affidavi t of Mr. Benvenuti. However, these letters do not constitute proper evidence before the court on an application and I have disregarded their import in the consideration of this matter. I further place no weight on the reasons given by the municipal by-law enforcement officer in rendering his decision that this was a legal non-conforming use.

The Legal Issue

[17] The legal issue in this matter is relatively straightforward. Was the legal non-conforming use of the lands for a farming purpose terminated by virtue of the respondent commencing a quarter horse operation on the subject lands?

[18] The applicants contend that the legal non-conforming use which existed at the time of the enactment of the new by-law was that of an agricultural cash crop farm and nothing more. They argue that the change to a horse farm for the training and boarding of quarter horses is a change in use and therefore the legal non-conforming designation which formerly attached to the respondent's property has been lost. As a result, the quarter horse operation on the respondent's property violates the existing zoning by-law and should not be allowed to continue.

[19] The respondent on the other hand argues that the use of the property for agricultural purposes has continued on an

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uninterrupted basis since the enactment of the new by-law and it is simply the type of farming which has been changed.

Argument of the applicant

[20] The applicants note that there is a statutory basis to the position they are taking on this application. Section 34 of the Planning Act, R.S.O. 1990, c. P.13 provides as follows:

> 34(1) Zoning by-laws may be passed by the councils of local municipalities:
>
> 1. For prohibiting the use of land, for or except for such purpose as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.

Section 34(9) provides as follows:

> 34(9) No by-law passed under this section applies,
>
> (a) to prevent the use of any land building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose; [page392]

[21] The applicants contend that the land and buildings on the respondent's land were not used for a horse farming operation on the day of the passing of the by-law and therefore the respondent is in contravention of the Planning Act. It is trite law to note that there is an onus on the respondent to prove he has an exemption to a by-law, which proof must not only go to the use of the lands at the time of the amendment of the by-law but also to its continued use until the time of the issuance of the proceedings. See Toronto (City) v. San Joaquin Investments Ltd. (1978), 18 O.R. (2d) 730, 5 M.P.L.R. 113 (H.C.J.), at p. 123 M.P.L.R.

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[22]The applicant Gregory Watts swore in para. 16 of his affidavit that an inquiry about the legality of the horse farming operation of the respondent had been made by his solicitor to the solicitor for Norfolk County. The solicitor for Norfolk County responded as follows:

> The use that predates the current by-law and the prior by-law in 1986, as well, is broader than the keeping of horses in the barn. The use to be considered is the "agricultural uses" (i.e. those uses permitted in an agricultural zone) within the by-law which includes a farm as one of such uses. The definition of farm includes the boarding of livestock and as such definition allows a variety of farming activities to be undertaken. The definition is not restrictive, in that only one of the elements listed within it can be undertaken at any point in time, to the exclusion of any other elements within the definition. The information we have is to the effect that the property has consistently been used for agricultural purposes and therefore, the boarding of horses is permitted under the by-law.

[23] This evidence was adduced by the applicant in his own affidavit. In addition, counsel for the applicants candidly acknowledged that the boarding of livestock would include under any definition the boarding of horses, as is being done by the respondent.

[24] In support of that contention, the applicants rely on Dennis v. East Flamboro (Township), [1956] O.W.N. 282, 3 D.L.R. (2d) 130 (C.A.). In that case, the Court of Appeal was dealing with a property that had ceased to be used for a gas station or for any other commercial purposes. After the cessation of such usage, a by-law of the respondent corporation was passed prohibiting the use of the property for a gas station. Subsequent to the enactment of the by-law, an application was made by the appellant to the clerk of the municipality for a licence to operate a gasoline station on the premises. The application was refused on the ground that the operation of a gasoline station on the premises was contrary to the provisions of the newly enacted by-law. The concrete base for the pumps and the underground gas tanks still remained on

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the premises at the time the appellant applied for a [page393] licence. The appellant argued that a legal non-conforming use existed because the property at all materia l times was available for usage as a gas station. The court disagreed with the appellant and at p. 285 O.W.N. of the decision the Honourable Mr. Justice J.A. Hogg wrote:

> It's obvious that the by-law cannot alter or extend the purpose or intention of the statute upon which the authority to act the by-law rests. The building involved in the appeal may have been designed, arranged and intended as a gasoline-station, but on the day of the passing of the by-law it was not used nor had it been used for that purpose for approximately the preceding three years. Even if it had been so used, it did not continue to be used for that purpose after the by-law had been enacted. The premises, therefore did not fall within the ambit of the exemption provision contained in s. 390(6) of The Municipal Act [the equivalent of s. 34(9) of the Planning Act].

[25] Thus, in the Dennis decision, the court held there was no legal conforming use. This case is distinguishable from the one at bar as the commercial usage had terminated prior to the enactment of the by-law. In the case before this court, the use of the property for farming purposes had not terminated at the time of the passage of the new by-law and I so find on the basis of para. 9 of the applicants' supporting affidavit.

[26] Counsel for the applicant further referred the court to the decision of Gayford v. Kolodziej, [1959] O.W.N. 341, 19 D.L.R. (2d) 777 (C.A.) at p. 343 O.W.N. This involved a property on Lake Simcoe in Gwillimbury Township. The defendant's property at the relevant time was used as a tourist home. A by-law was enacted by the municipality which changed the zoning and made the defendant's tourist home a legal non-conforming use. After the enactment of the by-law the owner of the property leased the property for most of the summer season to a lessee who used the property for private residential purposes only, i.e., not as a tourist home. The plaintiffs sought an injunction restraining the defendants from using the property as a tourist home again. The plaintiffs were

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granted an injunction at trial as claimed and the defendants appealed to the Court of Appeal. One of the grounds of appeal was that use of the property as a tourist home was a legal non-conforming use and permitted under the Municipal Act, R.S.O. 1950, c. 243, s. 390(6). The Court of Appeal agreed that the discontinuance of use as a lodge or tourist home catering to the public during the major part of the summer season was tantamount to a discontinuance for the whole year of the use of the property as a legal non-conforming use. In the court's opinion, [page394]

> ... there was such a lapse in or discontinuance of the nonconforming user [sic] in 1953 as to remove from the property the cloak that under s. 390(6) up to that time exempted it from the by-law ...

[27] The applicant contends that this case is applicable to the case before this court as there has been a discontinuance of the use of the property which existed at the time of passage of the new by-law (cash crop farming) and thus the legal non-conforming status has been lost. For reasons I will elaborate on hereafter, I find that there has not been a discontinuance of the use of the property for agricultural purposes.

[28] The applicant further relies upon the case of Heutinck v. Oakland (Township), [1997] O.J. No. 4796, 42 M.P.L.R. (2d) 258 (C.A.). In that case, the appellant property owner sought to use the barn on his property for raising emu but was advised by the respondent municipality that such use was not allowed. The Ontario Court of Appeal clearly held in this case that the nature of a non-conforming use is not defined by references to the definition in a by-law but must be determined by reference to the use which the property was put at the time the by-law was passed. The court held at para. 4 of its endorsement that as the property owner's barn "was not being used for the purpose of raising emu or, indeed, for any agricultural purpose" at the time of the enactment of the relevant by-law, it did not fall within the definition of non-complying use, building or structure within the meaning of the by-law. At p. 260 M.P.L.R. of the report, the Court of Appeal stated as

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follows:

> Central to this analysis is our reliance upon the well established rule that the nature of a non-conforming use is not defined by reference to definitions in the by-law. Rather, it must be determined by reference to the use to which the property was put at the time the by-law was passed. In this case, the activity now engaged in by the appellant is fundamentally different from that which had occurred at the time of the passage of the by-law: Glenelg (Township) v. Davis (1992), 10 M.P.L.R. (2d) 260 (Ont. C.A.) at p. 265.

[29] The appellant further referred the court to Re O'Riley, (1991) 8 M.P.L.R. (2d) 190 (Ont. M.B.), which is a decision of the Ontario Municipal Board. The appellants owned two properties in Oshawa, Ontario. There was a single family dwelling located on each of the properties at the time that the municipality enacted a by-law rezoning the properties commercial. The appellants attempted to renovate their buildings to establish two family residential dwellings on each property. When the City opposed their application, the appellants sought a minor variance from the by-law before the Committee of Adjustments. The issue before the Board was whether the appellants' legal non-conforming uses were lost through the conversion of the two buildings to dual-family dwellings. The Board applied a strict and narrow [page395] interpretation to the definition of use and held that "use" consisted of a precise function. At p. 199 M.P.L.R., the Board made the following statement of principle which is urged on this court in this application:

> Following on this, the Board cannot accept the contention of the counsel for the appellants that the "use" need only be a residential use in order to be a continuing legal non-conforming use. It must be the same residential use, that of a single-family dwelling. Therefore, it follows that at the time occupation of the buildings as dual dwellings took place, their occupation as single-family dwellings ended, since no part of the two buildings could, in these circumstances, remain occupied by single-family dwellings.

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[30] However, that strict and narrow definition of use was not absolutely accepted the following year by the Ontario Court of Appeal in Glenelg (Township) v. Davis, [1992] O.J. No. 1316, 10 M.P.L.R. (2d) 260 (C.A.). After finding that the status of legal non-conforming use had been lost by the appellant changing the use of his business from primarily one of the wrecking and storage of vehicles to a scrap metal processing operation, Doherty J.A., writing for a unanimous court, stated:

> This is not a situation where a subsequent owner merely expands on a pre-existing use, or engages in a different activity which is within the generic description of the pre-existing use: see Central Jewish Institute v. Toronto (City), [1948] S.C.R. 101 at pp. 105, 113-114, [1948] 2 D.L.R. 1, at pp. 4-5, 12; R. v. Cappy (1952), 103 C.C.C. 25 at pp. 32-33, [1953] 1 D.L.R. 28 (C.A.), at pp. 35-36. Instead, this is a case where Davis engaged in a fundamentally different activity than that which had occurred on the property prior to 1981.

[31] It appears that the position of the Court of Appeal is to not apply a strict and narrow approach to the matter but to look more broadly at the generic use, among other things, and to determine if the activity involved is fundamentally different than that which occurred at the time of the passage of the by-law.

Respondent's argument

[32] The respondent's position is that the pre-existing use of the lands and premises was for agricultural purposes. Black's Law Dictionary, 8th ed. (West Group, 2004), defines agriculture as "the science or art of cultivating soil, harvesting crops, and raising livestock". The respondent argues that the change in use to farming horses or livestock, in the context of the information before the court falls within the fair definition of agriculture. He contends that his raising and boarding eight quarter horses has not changed "the essential use of the land". The respondent argues that the essential use of the land at all material times was for agricultural purposes and the only thing that has changed is

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the type of farming which is taking place. [page396]

[33] In support of that contention, the respondent relies largely on the Supreme Court of Canada decision in Saint-Romuald (City) v. Olivier, [2001] 2 S.C.R. 898, [2001] S.C.J. No. 54. In that case, the respondents were the owners of a building located within a commercial zoned area of the City of Saint-Romuald. They had provided country and western entertainment in a bar/restaurant environment since 1990. In 1991, a new zoning by-law came into effect which prevented the respondents from allowing nude dancers as live entertainment. After the enactment of the by-law, the respondent began using nude dancers instead of western singers to attract patrons to the night club. The municipality argued that this was a contravention of the new by-law. The respondents argued that expansion of the use was within their rights as a legal non-conforming use and that the by-law did not apply to their establishment.

[34] The Supreme Court of Canada held substitution of nude dancers for western singers is not such an extreme variation in the nightclub or cabaret formula so as to constitute a wholly different and therefore unprotected use. In other words, a user could, in certain circumstances alter the use of the property and still claim a legal non-conforming exemption from the by-law. The court held that the respondent's pre-existing use could appropriately be characterized as a commercial offering of a combination of food, drink, ambience and lawful entertainment to the public. The change to a different form of entertainment was within the protected use. Applying the operative terminology of s. 34 of the Planning Act of Ontario, the use of the land and buildings was for the same purpose despite the fact that some of the activities in effecting that purpose had changed.

[35] At para. 34 of the decision of the majority in the Saint-Romuald decision, the Honourable Mr. Justice Binnie, writing for the majority, suggested a series of factors that a court should consider in determining if there has been a change of use so as to terminate a previously existing legal non-conforming use. The use of these factors by the court

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hearing the original application was approved by the Divisional Court in Ottawa (City) v. Ottawa (City) Chief Building Official, [2003] O.J. No. 4530, 45 M.P.L.R. (3d) 29 (S.C.J.), at paras. 25 and 26. These include the following:

(1) The purpose of the pre-existing use and the activities that were carried on the property prior to the enactment of By-law NW-1-2000 (the new by-law). I find that in this case, the pre-existing use of the property was residential and agricultural. [page397]

(2) Is the new proposed use simply an intensification of the old use or does it go beyond a matter of degree and constitute, in terms of community impact, a difference in kind? I find that the new use of buying, selling, training, boarding and exercising quarter horses is simply a change of activities within the old use of the property for agricultural purposes with little community impact. It is noteworthy, but not at all determinative of the issue, that such usage by the respondent would clearly have been allowed under the former by-law which permitted the use of the lands as a farm.

(3) How remote is the change of the activity from the earlier activity? This is the most difficult of the considerations for this court. In the case of R. v. Cappy (1952), 103 C.C.C. 25, [1952] O.W.N. 481 (C.A.), the Ontario Court of Appeal had to deal with the issue of whether or not owners of a stadium which allowed stock car racing on the property had violated a by-law. The stadium owners defended on the basis of a legal non-conforming use. The majority of the Court of Appeal per Laidlaw J.A. acquitted the stadium owners on the basis they operated a "general purpose" stadium whose permissible program was not limited to the type of specific events on "the day of passing of the by-law". The majority seemed influenced by the idea of remoteness, meaning that the new activity of stock car racing, while a different activity, was not remote but was closely related to what had gone on before. I find this consideration of use is relevant in the context of this case.

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I have carefully considered the evidence before the court and had the opportunity to look at the photographs presented to the court. The house, the barns and the lands continue to be used for farming purposes in conjunction with residential living. The setting is a rural one with nothing more than a few horses living on the property. The property is immediately adjacent to a sheep farm. There is no evidence that the intensification of use of the lands and buildings has been significant nor that it has caused disruption to anyone other than the applicants. There has been no added construction of buildings on the lands. I find the usage of this property as it presently is being used is not remote from the former usage.

(4) To what extent are the new activities within the original scope of usage? The greater the disruption, the more tightly drawn will be the definition of the pre-existing use or [page398] acquired right. As stated above, I find the new activities are within the original scope of usage. I find the disruption to the neighborhood to be minimal. In every one of these cases, when someone complains (as is their right) about a new activity not permitted under a new zoning by-law, the court must consider not just the impact on the complainant but on other people in the neighborhood and in the greater community. There has been no such evidence brought before this court aside from the concerns of the applicants and I find the impact on the neighborhood and the greater community to be minimal.

(5) The neighborhood effects as established by the evidence. I have carefully considered the evidence led by the applicants with respect to the neighborhood effects of the respondent's use of his property. There was an allegation by the applicant Gregory Watts in his affidavit that manure piles were smelly and urine was allowed to accumulate on the property. The respondent rebutted such information and in fact in his responding affidavit indicated the manure pile had been moved to an area approximately 650 feet from the applicant's property. In addition there was no evidence of ponds of urine on the property other than a

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photocopy of a piece of property showing water on it. There was no evidence that this was urine. There was some vague evidence in the applicants' affidavit that a neighbor's well water was non-potable. There was no evidence though that this was in any way related to the respondent's farming operation and I discount that evidence. The applicants contended that there were more flies i n the vicinity since the horse operations commenced and combined with the odour from the respondent's operation, it made it difficult and unenjoyable to entertain guests at their home. The respondent has produced evidence from the by-law enforcement officer of the County of Norfolk confirming that as of April 18, 2005, the storage of solid waste manure on the respondent's property is in compliance with the required minimum distance setbacks. I have further reviewed the decision of Taliano J. in Peacock v. Norfolk (County) Chief Building Official, [2003] O.J. No. 2771, 40 M.P.L.R. (3d) 12 (S.C.J.) and Roy J. in Ottawa (City) v. Ottawa (City) Chief Building Official, [2003] O.J. No. 1945, 39 M.P.L.R. (3d) 1 (S.C.J.) where the considerations relative to neighbourhood and community impact on expanded hog farming operations were considered extensively. I find in this case, the impact of the [page399] respondent's use of his property on the neighbourhood and the community to be minimal.

(6) The court must consider the proper balance in the characterization of the legal non-conforming use (not too general to liberate the owner from the constraints of what he actually did and not so narrow as to rob him of flexibility). In considering this issue, the decision of the Supreme Court in Saint-Romuald v. Olivier, supra, dictates that the court can not any longer determine there has been a change of use by using a broad "category" approach to the question. Hence, a categorization of his activities as being "agricultural" within the meaning of the former by-law is not appropriate. The court must look at the essential purpose for which the property is being used to determine if the change of activities is beyond the scope of that purpose. At para. 19 of his reasons for the majority, Binnie J. wrote:

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> Under the doctrine of "acquired rights", the respondents were not only entitled to continue to use the premises as they were when the new by-law was passed, but was given some flexibility in the operation of that use. My colleague Gonthier J. notes that regard is to be had in such cases to "the real and reasonable expectations" of the landowner caught by changes in the zoning by-law (para. 63 (emphasis deleted)).

[36] In the circumstances of this case, I am satisfied that this change in use from crops to horses is one that a landowner might reasonably undertake within the context of a legal non-conforming use, provided the number of horses and intensity of use is not excessive. A landowner who farms his property would have "a real and reasonable expectation" that such a change in farming activity as found in this case would be lawful and not terminate his legal non-conforming status of his property.

[37] Counsel for the applicants further relied on the decision of Mr. Justice Quinn of this court in Walton v. Lincoln (Town), [1997] O.J. No. 3363, 43 M.P.L.R. (2d) 291 (Gen. Div.). At p. 319 M.P.L.R. of that decision, Mr. Justice Quinn was required to consider the wording of s. 34(9)(a) of the Planning Act. He found that the key feature of that section is that the non-conforming use must be a "continuing use" if it is to survive a subsequent prohibitory by-law. He cited with approval Laidlaw J.A. in Wilmot v. Kingston (City), [1946] O.R. 437, [1946] 3 D.L.R. 790 (C.A.). He noted that the court analyzed s. 406(2) of the Municipal Act, R.S.O. 1937, c. 266 as re-enacted by the Municipal Amendment Act, 1941, S.O. 1941, c. 35, s. 13. That section was an early predecessor to s. 34(9)(a) of the Planning Act. At p. 446 O.R., Laidlaw J.A. said: [page400]

> Thus, if land is used on the day of the passing of a by-law for a purpose prohibited thereby, that use may continue, and such a by-law by express statutory provision is not applicable to that land so long as it continues to be used for that purpose. If the use for that purpose ceases, the by-

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law thereupon becomes applicable and the land cannot thereafter be used for a prohibited purpose. In the same manner, and to the same extent, the use of any building in existence at the time a by-law is passed for a purpose prohibited by the by-law may continue.

[38] Quinn J. found no reason why s. 34(9)(a) should not be interpreted literally. I concur with him. If the land or building was used for such purpose on the day of the passing of the by-law and so long as it continues to be used for that purpose the by-law passed under s. 34 does not apply to the property.

[39] In the circumstances of this matter I find that the respondent's lands were being used for agricultural purposes at the date of the enactment of By-law NW-1-2000 passed by the council of the City of Nanticoke. I find that the use of that property for agricultural purposes has continued to and including the present date and while the type of farming has changed, the use of the property and the buildings for farming purposes has not substantially changed so as to no longer consider the lands of the respondent as a legal non-conforming use.

[40] In conclusion of argument, counsel for the respondent requested that if his client was successful in this matter, I would award costs to his client. However, the court is cognizant of the fact that the respondent is somewhat the author of his own misfortune in that he, his lawyers or his real estate agent failed to properly check the zoning by-laws of the municipality prior to closing his purchase of the property. The case has raised a relatively novel point in that as noted by the Supreme Court in the Saint-Romuald v. Olivier decision (supra), many of these cases will turn on their own facts. I find that this matter has been a very troublesome and difficult matter for both parties and in the circumstances this court will not award the respondent his costs of this application despite his success in these proceedings.

[41] The application is therefore dismissed without costs.

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Watts et al. v. Benvenuti

[Indexed as: Watts v. Benvenuti]

80 O.R. (3d) 721

Court of Appeal for Ontario,
Simmons, Cronk and MacFarland JJ.A.
June 1, 2006

2006 CanLII 17920 (ON CA)

Municipal law -- Zoning -- Non-conforming use -- Application judge reasonably finding that use of respondent's property to buy, sell, exercise and raise horses was legal non-conforming use -- Section 45(2) of Planning Act not applying as that provision applies to non-conforming uses that require variance approval and this case involved legal non-conforming use that came within exemption contemplated by s. 34(9) of Act -- Application judge erring in denying respondent costs -- Planning Act, R.S.O. 1990, c. P.13, ss. 34(9), 45(2).

The application judge found that the use of the respondent's property to buy, sell, board, train, exercise and raise horses was a legal non-conforming use under the applicable municipal zoning by-law. The judge found as a fact that the property in question was continuously used for residential and agricultural purposes, up to and including the time the respondent acquired the property, and that while the type of farming had changed, the use of the property itself and the buildings for farming purposes had not substantially changed. The appellants appealed, arguing that there was a change in use from the historical use of the property that required Committee of Adjustment approval under s. 45(2) of the Planning Act. The respondent cross-appealed on the issue of the application judge's refusal to award costs in his favour.

Held, the appeal should be dismissed and the cross-appeal

allowed.

The application judge's findings were open to him on the record before him. Section 45(2) of the Planning Act was not engaged. That provision pertains to non-conforming uses that require variance approval. This was a legal non-conforming use that came within the exemption contemplated by s. 34(9) of the Act.

The application judge erred in denying the respondent his costs. He misdirected himself by concluding that the respondent's conduct leading up to the agreement of purchase and sale was relevant to the disposition of the costs of the application. There are no special circumstances to warrant departure from the usual rule that costs should follow the event.

Cases referred to

Saint-Romuald (City) v. Olivier, [2001] 2 S.C.R. 898, [2001] S.C.J. No. 54, 2001 SCC 57, 204 D.L.R. (4th) 284, 275 N.R. 1

Statutes referred to

Planning Act, R.S.O. 1990, c. P.13, ss. 34(9), 45(2)

APPEAL from the judgment of Turnbull J. (2005), 77 O.R. (3d) 386, [2005] O.J. No. 3254 (S.C.J.), holding that the respondent's use of property was legal non-conforming use, and cross-appeal on the issue of costs.

Thomas A. Cline, Q.C., for appellant.

David M. Schell, for respondent. [page722]

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Endorsement by THE COURT: --

A. Appeal

[1] The appellants argue that the application judge erred in law by concluding that the use of the respondent's property to buy, sell, board, train, exercise and raise horses is a legal non-conforming use under the applicable municipal zoning by-law. The appellants maintain that this use is a change from the historical use of the property that requires Committee of Adjustment approval under s. 45(2) of the Planning Act, R.S.O. 1990, c. P.13. We disagree.

[2] The application judge found as a fact: that the property in question was "continuously used for residential and agricultural purposes, up to and including the time the respondent acquired the property"; that the respondent's lands were being used for agricultural purposes at the date of the enactment of the relevant by-law; that while the type of farming on the property had changed, the use of the property itself and the buildings for farming purposes had not substantially changed; and, finally, that the new use of buying, selling, boarding, training, exercising and raising quarter horses was simply a change of activities within the old use of the property for agricultural purposes, with little community impact. These findings were open to the application judge on the record before him. They, therefore, attract deference from this court.

[3] The appellants submit that these findings are flawed because the application judge failed to consider the import in this case of s. 45(2) of the Planning Act. We reject this argument.

[4] Section 45(2) of the Planning Act pertains to non-conforming uses that require variance approval. But this is a legal non-conforming use that comes within the exemption contemplated by s. 34(9) of the Planning Act. Thus, the application of s. 45(2) does not arise. Put somewhat differently, on the facts here as found by the application judge, s. 45(2) of the Planning Act is not engaged. The

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application judge concluded that the use of the property itself did not change. Rather, only the type of activities that together constitute the use were changed. These altered activities are within the category of a "protected use".

[5] Finally, we do not agree with the appellants' submission that Saint-Romuald (City) v. Olivier, [2001] 2 S.C.R. 898, [2001] S.C.J. No. 54 has no application to planning law in Ontario. In Saint Romuald, notwithstanding that the particular facts of the case arose in the context of legislation in Qubec, the Supreme Court of Canada detailed the factors to be taken into account in evaluating whether a land use change is of a quality and kind that operates to terminate a pre-existing legal non-conforming [page723] land use (or its equivalent). These factors are of general import and application: see Olivier at paras. 32-34. We find no fault with the application judge's consideration and application of these factors in this case.

B. Cross-Appeal

[6] The respondent cross-appeals from the application judge's costs disposition on the ground that the application judge erred by denying the respondent costs because, in the application judge's view, the respondent was "somewhat the author of his own misfortune".

[7] Costs awards by application judges attract considerable deference from this court. Appellate intervention is warranted only where the application judge errs in principle, or the costs award is plainly wrong.

[8] In this case, in our opinion, the application judge misdirected himself by concluding that the respondent's conduct leading up to the agreement of purchase and sale was relevant to the disposition of the costs of the application. In the circumstances of this case, this was an irrelevant factor. There is no suggestion that the respondent engaged in any conduct that would disentitle him to costs. Moreover, there are no special circumstances here to warrant a departure from the usual rule that costs should follow the event of both the

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application and these proceedings.

C. Disposition

[9] Accordingly, the appeal is dismissed and the cross-appeal is allowed. The respondent is entitled to his costs of the application and of the appeal and the cross-appeal on the partial indemnity scale, fixed in the total amounts of $4,800 and $4,000, respectively, including, in each case, disbursements and Goods and Services Tax.

Appeal dismissed.

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In the Court of Appeal of Alberta

Citation: Stavely (Town) v. Fern Brothers, 1987 ABCA 233

Date: 19871130
Docket: 18901
Registry: Calgary

Between:

Town of Stavely

Appellant
(Applicant)

- and -

Fern Brothers; Beverly Stacey; and Credit Foncier Trust Company

Respondents
(Respondents)

The Court:

The Honourable Mr. Justice Stevenson
The Honourable Mr. Justice Foisy
The Honourable Mr. Justice Stratton

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

R. Dodic, Esq., for the Appellant (Applicant)

T. Gould, Esq., for the Respondents for Fern Brothers, Beverly Stacey appeared in person and No-one appeared for Credit Foncier

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MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

STEVENSON, J.A. (for the Court):

1987 ABCA 233 (CanLII)

[1] The issue on this appeal is whether the respondents, landowners, have "discontinued" a non-conforming use, so as to lose the benefit of s. 74(2) of the Planning Act. The section says:

> A non-conforming use of land or a non-conforming use of a building may be continued but if that use is discontinued for a period of 6 consecutive months or more, any future use of the land or building shall conform with the provisions of the land use by-law then in effect.

[2] The evidence shows that the lands were being used as a residence prior to the passage of the zoning by-law which now zones the lands as commercial. For some time they have been vacant, notwithstanding efforts to find residential tenants. Apparently, there have been occasional tenancies but periods of vacancy for at least six months are established with respect to each parcel.

[3] The question is whether there must be an intention to end the use, coupled with the actual non-use. We were referred to City of Saint John v. Killam (1973), 6 N.B.R. (2d) 642. There the New Brunwsick Court of Appeal noted that there was a large body of U.S. authority that discontinuance is synonymous with abandonment and that there must be a concurrence of intention and action or failure to act. In that case, the New Brunswick Court said:

> A distinction must, I think, be drawn between a provision that the right to a nonconforming use is lost by mere discontinuance and a provision that it is lost by discontinuance for a specified time. In the former, discontinuance may be equivalent to abandonment which requires an intention to abandon, while in the latter, the right to the use is lost merely be ceasing to exercise it for the specified period. In such circumstances "discontinued" is not equivalent to abandonment.

[4] We do not agree with the distinction and prefer the generally held view that a discontinuance requires an element of intention. It is true the owners here were not using the property for residential purposes but they were striving to do so. We would not hold the discontinuance to be found in the unavailability of tenants. To so hold would work a grave hardship on a landowner who had a right to continual lawful use, but is precluded from actual use by circumstances beyond his control.

[5] In our opinion, what is required is a bona fide intention to use the premises and actual use so far as is practicable. That conclusion is consistent not only with American authority but with the Canadian authority of long standing referred to in the trial judgment in the City of Saint John v. Killam case.

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[6] We would, therefore, dismiss the appeal as against the respondents who appeared before us. Credit Foncier has not appeared in the proceedings and, in the absence of any evidence from it, the only inference to be drawn is that it has discontinued the residential use and the appeal against it is allowed. We will hear counsel as to costs.

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