In the Court of Appeal of Alberta

Citation: Canmore (Town of) v Three Sisters Mountain Village Properties Ltd, 2023 ABCA 278

Date: 20231003
Docket: 2201-0148AC;
2201-0151AC
Registry: Calgary

Between:

Town of Canmore

Appellant

- and -

Three Sisters Mountain Village Properties Ltd. and Land & Property Rights Tribunal

Respondents

- and -

Natural Resources Conservation Board and Stoney Nakoda Nations

Intervenors

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Elizabeth Hughes
The Honourable Justice Anne Kirker

Memorandum of Judgment

Appeals from the Decisions of
The Land & Property Rights Tribunal
Dated the 16th day of May 2022
(Decision Numbers LPRT2002/MG0671 & LPRT2022/MG0673)

Memorandum of Judgment

The Court:

Introduction

[1] The Town of Canmore appeals two decisions of the Land and Property Rights Tribunal that require it to adopt area structure plans known as the Smith Creek ASP and the Three Sisters ASP. The respondent, Three Sisters Mountain Village Properties Ltd., applied to the Town for approval of these ASPs in December 2020. The motions were defeated by Town Council. The respondent appealed the Town's decisions to the Tribunal. The respondent argued the Smith Creek and Three Sisters ASPs were consistent with the approval of the proposed development given by the Natural Resources Conservation Board (the NRCB) in 1992, and therefore s. 619(2) of the *Municipal Government Act*, RSA 2000, c M-26 (the *MGA*)[1] required the Town to approve them. The Tribunal agreed. It ordered the Town to adopt "the Smith Creek ASP as submitted and considered by Council on April 27, 2021" and "the Three Sisters ASP as submitted and considered by Council on February 9, 2021."

[2] The Town takes issue with the Tribunal's decisions. It argues the Tribunal failed to provide adequate reasons and erred in concluding that s. 619 of the *MGA* applies to impose any obligation on the Town to approve the respondent's applications. If s. 619 does apply, the Town submits the Tribunal failed to interpret the meaning of "consistent" in s. 619(2), failed to consider relevant evidence or considered irrelevant evidence in making its consistency findings, and exceeded its jurisdiction under s. 619(8)[2] by ordering the Town to adopt the two ASPs as submitted.

[3] It is apparent that the planning and development issues underlying this appeal have divided the community. There are strongly held and divergent views about what development should or should not occur. It is not the role of this Court to decide whose view is right. Rather, our task is confined to answering certain questions of law and jurisdiction.

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[1] 619(2) When an application is received by a municipality for a statutory plan amendment, land use bylaw amendment, subdivision approval, development permit or other authorization under this Part and the application is consistent with a licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC, the municipality must approve the application to the extent that it complies with the licence, permit, approval or other authorization granted under subsection (1).

[2] 619(8) In an appeal under this section, the Land and Property Rights Tribunal may

> (a) order the municipality to amend the statutory plan or land use bylaw in order to comply with a licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC, or
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> (b) dismiss the appeal.

Background

The NRCB Approval Process

[4] In October 1991, Three Sisters Golf Resorts Inc. (Golf Resorts) applied to the NRCB for approval to develop a recreational and tourism project near the Town. The land proposed to be developed had been purchased by Golf Resorts in 1989 when it was still in the Municipal District of Bighorn No. 8. It is situated on the south side of Highway 1 in both the Bow and Wind Valleys. Golf Resorts contemplated that development would occur in both areas over 20-30 years and would include "a broad range of land uses with a mixed development of resort, convention, commercial and residential facilities": Natural Resources Conservation Board Decision Report, Application #9103, Application to Construct a Recreational and Tourism Project in the Town of Canmore, Alberta (25 November 1992) (Decision Report) at 2-2. The long-term focus was for "residential and resort, with a complete product mix being required for each": Decision Report at 2-2.

[5] At the time Golf Resorts acquired the land it proposed to develop, s. 8 of the *Land Surface Conservation and Reclamation Act*, RSA 1980, c L-3 allowed the Minister of the Environment to order the preparation of an environmental impact assessment for any proposed operation or activity that would result or was likely to result in surface disturbance, if it was in the public interest to do so.[3] Golf Resorts was so ordered and between August and December 1990, Alberta Environment prepared terms of reference detailing the information required. Golf Resorts was asked to provide a project overview and description, environmental information, socio-economic information, and information in relation to market demand, transportation, waste disposal, public safety and emergency planning, archeological and historical resources assessment, and public consultation.

[6] The *Natural Resources Conservation Board Act*, SA 1990, c N-5.5 (the *NRCB Act*) came into force on June 3, 1991. Its purpose was described in s. 2 as follows:

> …to provide for an impartial process to review projects that will or may affect the natural resources of Alberta in order to determine whether, in the Board's opinion, the projects are in the public interest, having regard to the social and economic effects of the projects and the effect of the projects on the environment.

The *NRCB Act* established the NRCB (s. 11), and a process for the review and approval of specified projects (ss. 5-9). Recreational and tourism projects were among those specified as reviewable (s. 4(b)). Section 1(d) of the *NRCB Act* defined "environmental impact assessment" to mean "a report

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[3] Section 8(1) of *Land Surface Conservation and Reclamation Act*, RSA 1980, c L-3 states: When any person proposes to undertake any operation or activity and, in the opinion of the Minister, the operation or activity will result or is likely to result in surface disturbance, the Minister may order that person to prepare and submit to the Minister in the time prescribed in the order, a report containing an assessment of the environmental impact of the proposed operation or activity if the Minister considers it in the public interest to do so.

containing an assessment of the environmental impact ordered under section 8(1) of the *Land Surface Conservation and Reclamation Act*." Thus, Golf Resorts completed its environmental impact report at the request of the Minister of the Environment and in accordance with the terms of reference prepared by Alberta Environment pursuant to the *Land Surface Conservation and Reclamation Act* but submitted it to the NRCB as part of the approval process established by the *NRCB Act*.

[7] In May 1991, the Town applied to the Local Authorities Board to annex land from the Municipal District of Bighorn No. 8, Improvement Districts No. 5 and 8.[4] This included the land Golf Resorts planned to develop. The annexation was approved, and the required Order in Council was signed effective June 30, 1991. With the annexation, the Town became the municipal planning authority for the purposes of municipal approvals under the *Planning Act*, RSA 1980, c P-9.

[8] At the time of the annexation, the plans and bylaws pertaining to part of the annexed lands included a South Corridor Area Structure Plan which had been adopted by Ministerial Order 285/87 on August 10, 1987 (the 1987 South Corridor ASP).

[9] The NRCB hearing with respect to Golf Resorts' application took place over 28 days in May and June 1992. It involved over 150 participants, including the Town and Stoney Nakoda Nations (Stoney Nations), which has intervener status in this appeal: *Town of Canmore v Three Sisters Mountain Village Properties Ltd*, 2022 ABCA 274.

[10] In the Decision Report at 7-7, the NRCB commended Golf Resorts for presenting the project wholistically rather than taking a fragmented approach:

> …The Board considers that it has been fortunate for the public interest that the Applicant has presented the project as a whole, thereby allowing an in depth review of all of the impacts of the project before more specific approvals were sought. Most likely such a review would not have been possible if the proponent had proceeded piecemeal.

[11] The Town commented on aspects of the application and offered information about Town growth and the status of applicable statutory planning documents. In addition, "[i]nformation about the local planning process was reviewed and suggestions offered on how the possible approval of the [NRCB] could best be tailored to fit with the ongoing approval process under the *Planning Act* at the local level": Decision Report at 3-17. The NRCB was urged by several participants to refrain from approving any part of the application because "[NRCB] approval would arguably hamper the citizenry in their local initiatives to be effective in restricting or controlling development in the

[4] See, *Local Authorities Board Act*, RSA 1980, c L-27 which constituted the Local Authorities Board. See also, s. 20 of the *Municipal Government Act*, RSA 1980, c M-26 regarding petitions for annexation presented to the Local Authorities Board.

area": Decision Report at 7-4 to 7-5. In the context of addressing these submissions and explaining the required approvals the NRCB observed at 7-4 to 7-5:

> Because both the approval of the NRCB and the approval of the Town of Canmore as a municipal planning authority, … are required by legislation and because neither approval is sufficient alone to enable the Applicant to construct facilities on the project lands, it follows that an order of the Board in respect of the project is not finally determinative of the issue as to whether the project may proceed. The Board recognizes that it could approve all or part of the project but that the Applicant may not be successful in developing the parts of the project approved by the Board owing to failure by the Applicant to receive approval from the Town (or the appeal board) for more detailed plans for development in such areas. It also follows that if the Board fails to approve all or part of the project, the refused project or part could not proceed, whether or not the Town as a local planning authority (or the appeal board) approved the development.
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> …Since the local citizens are entitled to participate in the processes of planning approvals to be granted by the Town following this decision of the Board, and since such processes could result in a complete rejection of all or any part of the project approved by the Board, the Board has difficulty understanding how much more effective a process the local citizenry could wish. …

[12] It is clear from the Decision Report as a whole that the NRCB sought to ensure a coordinated, sequential approach to the planning process. It recognized there was "some degree of overlap between the function of the Board under the *NRCB Act* and certain functions of a municipal planning authority under the *Planning Act*": Decision Report at 7-1. The potential problem of conflicting decisions covering the same ground, and the resulting need to determine which decision was paramount, had yet to be expressly addressed by s. 619 of the *MGA.* However, s. 2.1(1) of the *Planning Act* signaled the Legislature's intention that municipal development permit conditions would not conflict with the approvals granted by provincial agencies.[5] See, *Kowalchuk v Two Hills (County)*, 1995 ABCA 270 at para 37; Frederick A Laux, QC & Gwendolyn Stewart-Palmer, *Planning Law and Practice in Alberta*, 4th ed (Edmonton: Juriliber, 2019) at §3.9(3)(a).

[13] The NRCB generally accepted "the views espoused by both the [Calgary Regional Planning Commission] and the Town...that for purposes of the [Golf Resorts] Application the Board [could] be considered as if it were part of the planning process, although technically not a

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[5] By the time the NRCB received the October 1991 application for approval, the *Planning Amending Act, 1991,* SA 1991, c 28 had come into force. It added s. 2.1(1) to the *Planning Act,* (later incorporated as s. 620 of the *MGA*) providing that a "condition of a license, permit, approval or other authorization granted by the Lieutenant Governor in Council, a Minister of the Crown or a government agency pursuant to an enactment prevails over any condition of a development permit that conflicts with it." A "development permit" was defined by s. 1(d.1) of the *Planning Act* as "a document authorizing a development issued pursuant to a land use by-law or the land use regulations."

planning authority for the purposes of the *Planning Act* [RSA 1980, c P-9]": Decision Report at 7-5. It said it was "mindful of the monumentality" of the work undertaken by Golf Resorts and did not wish "any applicant to be forced through unnecessarily duplicative proceedings.": Decision Report at 7-6. To this end, the NRCB determined at 7-6 of the Decision Report that it was appropriate to:

> … address in any approval of the [Golf Resorts] project the overall structure of the development, including sequencing or phasing of the project, land uses, general location of open spaces, minimum densities, general location of major transportation routes and public utilities, constraints due to undermining or coal seam methane, constraints due to environmental or social effects, location of wildlife corridors and location of buffer zones. However, the Board would not expect to include certain other items contemplated by the Town of Canmore for inclusion in its Area Structure Plans, such as design guidelines and architectural controls, because the Board considers them too detailed to be considered as part of its process.

The NRCB was satisfied that "such an approval would not denude the Town of its authority under the *Planning Act*": Decision Report at 7-6.

[14] The NRCB ultimately decided that only the Bow Valley part of the proposed project was in the public interest, stating at 13-7 of the Decision Report:

> …the proposed project as it relates only to the Bow Valley, in the Board's opinion, would be in the public interest. The Board is therefore prepared to approve the project, subject to certain terms and conditions, one of which would prohibit the proposed development in Wind Valley.

[15] The Order in Council 8/93 authorizing the NRCB's approval was signed in January 1993. The NRCB's formal Approval No. 3 was then issued (the NRCB Approval). It set out 15 conditions, including one requiring Alberta Forestry, Lands and Wildlife to approve wildlife movement corridors.[6] The following two conditions are engaged in these appeals:

> 3. The design of the project in the area immediately north of the boundary referred to in clause 2, may be changed with the approval of the Town of Canmore, provided that the changes are satisfactory to Alberta Forestry, Lands and Wildlife with respect to the provision of wildlife corridors.

[6] Condition 14 states: "[Golf Resorts] shall incorporate into its detailed design, provision for wildlife movement corridors in an undeveloped a state as possible, and prepare a wildlife aversion conditioning plan, both satisfactory to Alberta Forestry, Lands and Wildlife."

> 4. The phasing of the project, the land uses and related population densities, as proposed by [Golf Resorts] for the Bow Valley portion of the project, are approved, but the detailed timing and the specific land uses and population densities may be changed with the approval of the Town of Canmore.

[16] The NRCB declined to impose conditions requested by Stoney Nations. They had expressed concern about development in the Wind Valley given the historical and cultural significance of those lands to the Stoney People. However, they sought to share in the employment opportunities and indirect business benefits of the project if the NRCB approved development in the Bow Valley. They requested as conditions to any approval that Golf Resorts be required to establish a Stoney cultural information centre, use Stoney place names wherever possible, and enter into an agreement with the Stoney Tribal Council to commission the Nakoda Institute to document and report on the historical and cultural significance of the development site: Decision Report at 3-42 to 3-43. In declining to impose these conditions, the NRCB noted Golf Resorts' "stated willingness to work with the Stoney people to increase the potential for them to benefit from the project": Decision Report at 13-6.

[17] The NRCB Approval could have been, but was not, time limited: see *Natural Resources Conservation Board Act*, ss. 9, 29(2). No one appealed it: see, *Natural Resources Conservation Board Act*, s. 30.

The Implementation Plan

[18] Golf Resorts subsequently prepared an implementation plan incorporating adjustments made following the removal of the Wind Valley part of the project. The stated purpose of the document submitted to the NRCB in 1994 was to "summarize the scaled down Three Sisters' resort, recreational and residential project as defined by the N.R.C.B." and "provide guidelines for the implementation of the development plan as it relates to the N.R.C.B. and Planning Acts within the Province of Alberta."

[19] The version of the *Planning Act* in place when Golf Resorts' implementation plan was prepared described area structure plans in s. 64 as follows:

> 64(1) For the purpose of providing a framework for subsequent subdivision and development of an area of land in a municipality, a council may, by by-law passed in accordance with Part 6, adopt a plan to be known as the "(name) Area Structure Plan".
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> (2) An area structure plan shall
>
> > (a) conform to any general municipal plan in existence and affecting the area that is the subject of the area structure plan;

> (b) describe
>
> > (i) the sequence of development proposed for the area,
> >
> > (ii) the land uses proposed for the area, either generally or with respect to specific parts of the area,
> >
> > (iii) the density of population proposed for the area either generally or with respect to specific parts of the area, and
> >
> > (iv) the general location of major transportation routes and public utilities;
>
> (c) contain any other matters the council considers necessary.

Nearly identical language is now contained in s. 633(1) of the *MGA*.[7] This Court has observed that area structure plans are generally meant "to be interpreted in a flexible, broad, and aspirational manner": *Koebisch v Rocky View (County)*, 2021 ABCA 265 at para 34.

[20] Consistent with this purpose, the implementation plan contemplated that area structure plans for the development would "set town policy to implement the N.R.C.B. decision and development approvals in an ASP format" and that Town land use redesignations and subdivision would follow the "normal approval procedure".

[21] The implementation plan described development of four districts with associated uses as follows:

> Grassi District – Community Residential
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> Three Sisters District – Residential/Lodge/Resort
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> Stewart District – Residential/Community Service Centre
>
> Dead Man's Flats District – Community Residential

By letter dated June 2, 1994, the NRCB confirmed that the implementation plan accurately reflected the NRCB Approval.

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[7] What an area structure plan must describe has remained constant. The section has been amended such that it is no longer necessary for area structure plans to conform to any "general municipal plan" in existence; however, s. 638(2) of the *MGA* requires area structure plans to be consistent with what are now referred to as "municipal development plans".

Steps Taken to Proceed with the Development and Intervening Legislative Amendments

[22] Golf Resorts' next step was to apply for an amendment to the Town's land use bylaw to redesignate land in the Grassi District for residential use. Prior to the application being made, the *Municipal Government Amendment Act, 1995*, SA 1995 c 24, s. 103 repealed the *Planning Act*. The repealed planning provisions were replaced by Part 17 of the *MGA*, which includes s. 619. While the purpose of the planning provisions in the *MGA* was not expressly set out in the new legislation, this Court has held that s. 2 of the *Planning Act* stated its purpose and "under Part 17 [of the MGA], the purpose of the planning provisions remain[ed] substantially the same": *Lethbridge (City of) v Daisley*, 2000 ABCA 79 at para 51, leave to appeal to SCC refused, 27890 (8 March 2001).

[23] In 1996, s. 619 of the *MGA* stated:

> 619(1) A licence, permit, approval or other authorization granted by the NRCB, ERCB [Energy Resource Conservation Board] or AEUB [Alberta Energy and Utilities Board] prevails, in accordance with this section, over any statutory plan, land use bylaw, subdivision decision or development decision by a subdivision authority, development authority, subdivision and development appeal board, or the Municipal Government Board or any other authorization under this Part.
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> (2) When an application is received by a municipality for a statutory plan amendment, land use bylaw amendment, subdivision approval, development permit or other authorization under this Part and the application is consistent with a licence, permit, approval or other authorization granted by the NRCB, ERCB or AEUB, the municipality must approve the application to the extent that it complies with the licence, permit, approval or other authorization granted under subsection (1).
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> (3) An approval of a statutory plan amendment or land use bylaw amendment under subsection (2)
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> > (a) must be granted within 90 days of the application or a longer time agreed on by the applicant and the municipality, and
> >
> > (b) is not subject to the requirements of section 692 unless, in the opinion of the municipality, the statutory plan amendment or land use bylaw amendment relates to matters not included in the licence, permit, approval or other authorization granted by the NRCB, ERCB or AEUB.
>
> …

> (5) If a municipality does not approve an application under subsection (2) to amend a statutory plan or land use bylaw or the municipality does not comply with subsection (3), the applicant may appeal to the Municipal Government Board by filing a notice of appeal with the Board.

The wording of this section has remained largely unchanged. In addition to the NRCB, ERCB and AEUB, it now includes the Alberta Energy Regulator and the Alberta Utilities Commission. The Municipal Government Board (the MGB) is now the Tribunal.[8] The definition of "statutory plan" in the *MGA* has always included area structure plans.

[24] After receiving Golf Resorts' application to amend its land use bylaw, the Town declined to redesignate land in two of four phases of the proposed development within the Grassi District. Golf Resorts appealed the Town's decision to the MGB under s. 619(5). The Town argued the MGB had no jurisdiction to hear the appeal because s. 619 had a prejudicial, retrospective effect and therefore did not apply. The MGB rejected the Town's argument and determined that the proposed land use redesignations were consistent with the NRCB Approval. The Town was ordered to amend its land use bylaw to accord with the complete redesignation application submitted by Golf Resorts: MGB Order 35/97 (28 February 1997). In its reasons, the MGB said:

> … the MGB is satisfied that the NRCB Approval, like Section 619, permits a certain degree of flexibility on the specifics of the project as outlined at the time of the NRCB hearing. It is the level of flexibility or consistency which seems to be the major area of disagreement between the parties.
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> In attempting to clarify the intent and meaning of the NRCB Approval, the MGB has considered Section 7 of the 1992 Decision Report. In the MGB's opinion, the NRCB was clear in stating that the proponent must have a reasonable degree of certainty of land use. The matter before the MGB is a land use matter, not a subdivision or development matter. …
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> …
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> The Town does retain substantial power in dealing with applications to subdivide and develop. These types of applications are intended to implement the overall land use approval given by the NRCB. The Town, however, does not have the authority to refuse applications which are consistent with the land use approval or other specific matters approved by the NRCB unless a change is being proposed. The MGB is of the opinion that any differences between the NRCB Approval … and

[8] The AUC was added to s. 619 in 2008 when the *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s. 82(1)(h) came into force. The AER was added to s. 619 in 2013 when the *Responsible Energy Development Act*, SA 2012, c R-17.3, s. 95(3) came into force. The MGB became the Tribunal in 2021, when the *Land and Property Rights Tribunal Act*, SA 2020, c L-2.3, s. 24(29) came into force.

> the [Golf Resorts] redesignation application are not of a material nature, do not constitute changes within the meaning of the NRCB Approval, would not result in a lack of consistency within the meaning of Section 619 and would not entitle the Town to refuse to amend its Land Use Bylaw in the manner applied for.

[25] The Town sought permission to appeal the MGB's decision to this Court. Permission to appeal was granted in *Three Sisters Golf Resorts Inc v Canmore (Town)*, 1997 ABCA 137, but the appeal did not proceed. Instead, Golf Resorts and the Town negotiated a settlement in 1998 that led to the Town adopting Direct Control District Land Use Bylaw 1-98 (Bylaw DC1-98). Bylaw DC1-98 divided the land proposed for development into nine sites, shown on the maps reproduced at paragraph 17 of *Three Sisters Mountain Village Properties Ltd v Town of Canmore*, 2022 ABLPRT 671 (*Smith Creek ASP Tribunal Decision*) and paragraph 18 of *Three Sisters Mountain Village Properties Ltd v Town of Canmore*, 2022 ABLPRT 673 (*Three Sisters ASP Tribunal Decision*). Bylaw DC1-98:

> …allowed various uses on sites designated 1 through 9; however, on the lands roughly corresponding with the Smith Creek ASP area, Site 7 permitted only golf courses and accessory uses, and Sites 8 and 9 had no permitted or discretionary uses. Bylaw DC1-98 stated that specific additional land uses will be determined at the Area Structure Plan stage and implemented by appropriate redesignations under the Town's [Land Use Bylaw].

Smith Creek ASP Tribunal Decision at para 17; *Three Sisters ASP Tribunal Decision* at para 18.

[26] In September 2004, the Town adopted the Three Sisters Mountain Village Resort Centre ASP (Resort Centre ASP) that comprised sites 1 and 3 of Bylaw DC1-98. The Resort Centre ASP includes the area of the Three Sisters ASP that is the subject of one of the present appeals.

[27] When the Resort Centre ASP was adopted by Town Council, it also adopted the Stewart Creek ASP for sites 2B, 5 and 6. The development in Stewart Creek proceeded in phases, beginning in approximately 2005 to 2006. As summarized by the Tribunal in *Smith Creek ASP Tribunal Decision* at paras 18-19 and *Three Sisters ASP Tribunal Decision* at paras 19-20:

> … residential portions of the plan [were] generally constructed, while development of the commercial portions [had] only recently commenced. Alberta Environment and Parks (AEP), the successor to Alberta Forestry, Lands and Wildlife, approved a wildlife corridor alignment in May 2003 in the vicinity of these lands. A 35m-wide buffer around the west and south sides of the Resort Centre lands outside the wildlife corridor was agreed to between the applicant and the Town to provide for fire thinning and a potential public trail around the Resort Centre lands. The 2003 approval was the western portion of the approved wildlife corridor, while the eastern portion was not determined at the time.

> In 2007, the lands were sold to a real estate fund that went into receivership in 2009. At that time, the golf course was partially constructed, and PricewaterhouseCoopers Inc. (PwC), the court appointed Receiver, was of the opinion that the costs to complete the golf course would not maximize the value of the lands until residential and commercial development of the area took place. PwC focused its efforts on determining the configuration of the wildlife corridor, and obtained tentative approval from the Province in October 2012. In November 2012, PwC entered into a Framework Agreement with the Town with respect to the municipal development process, and retained consultants to prepare the required reports and make the necessary applications, in order to maximize the value of the asset.

[28] On April 4, 2013, PwC submitted a draft of what was called the 2013 Three Sisters Mountain Village ASP to the Town Planning Department for review and comment. This ASP appears to have included sites 7 and 8 and lands that were covered by the Resort Centre ASP and Stewart Creek ASP. Based on Town Planning Department input, PwC submitted a revised final draft several days later. At the request of the mayor of the Town, a meeting was held on April 17, 2013, so that the Town Planning Department, Town Council, and Town Administration could provide additional comments on the draft 2013 Three Sisters Mountain Village ASP. PwC made further revisions to the ASP following this meeting and submitted its application to the Town on April 22, 2013, understanding that Town Administration would prepare a report to Town Council recommending that the ASP be given first reading and that a public hearing would then be scheduled before second reading.

[29] On April 26, 2013, Town Administration released its report. It was not supportive of PwC's application. PwC was "shocked and disappointed" that despite its effort to work with the Town, the Town did not support the ASP when it was submitted for first reading. In the following days, PwC attended meetings with the mayor and various representatives of the Town. It eventually formed the view that "neither the Mayor nor the Town Planning Department would support development on the southern portions of Sites 7 & 8 or the Resort Golf Course as requested in the ASP" and this "reduction of 287 developable acres would reduce the value of the Three Sisters lands by an amount estimated to be well in excess of $10 Million". PwC ultimately concluded there was no value in continuing with the municipal approval process and that the most prudent and commercially reasonable decision was to market the lands on an as-is where-is basis.

[30] The respondent acquired the lands in 2013. In April 2015, Town Council approved a motion directing Town Administration to work with the respondent to prepare an ASP for the Smith Creek area (sites 7, 8 and 9). The Tribunal heard evidence that the area covered by the Smith Creek ASP is a portion of the lands covered by the 1987 South Corridor ASP, which had not been repealed. Because the delineation of a wildlife corridor in the vicinity of sites 7, 8 and 9 had still not been determined, the application for approval of the Smith Creek ASP was delayed until the corridor alignment was approved. This wildlife corridor approval was granted by Alberta Environment and Parks in February 2020.

[31] The respondent had, in the meantime, determined that another golf course in the Resort Centre ASP area was no longer economically viable. Therefore, in 2017, the respondent applied to the Town to amend the Resort Centre ASP to remove the golf course development and allow for the potential addition of other commercial lands and up to 475 additional resort accommodations or residential units. The proposed amendment to the Resort Centre ASP was defeated by Town Council at first reading in May 2017.

[32] After the defeat of the proposed amendment to the Resort Centre ASP in 2017, the terms of reference for the still outstanding Smith Creek ASP and another ASP in the area of the Resort Centre ASP were prepared. Town Council adopted the terms of reference by resolution on October 2, 2018. They state:

> The purpose of this document is to provide the foundation for the process and expectations that will be used to develop the ASPs. The applicant, Three Sisters Mountain Village Properties Limited (TSMV), intends to seek approval of the Three Sisters Village (formerly "Resort Centre") ASP by spring of 2019 and the Smith Creek ASP by end of 2019.
>
> All parties involved in the ASP preparation share the objective of producing ASPs that align with:
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> • The policy direction provided in the Town of Canmore's Municipal Development Plan (MDP)
>
> • The Town of Canmore's established policy direction
>
> • The applicant's objectives and goals
>
> • The community's aspirations and input for future development
>
> Successful alignment should lead to approval by the Town of Canmore Council. The TOR provides the foundation for the process that will be used by the Town and the Applicant to develop the ASPs.
>
> …

[33] Neither Town Council nor Town Administration suggested the NRCB Approval was no longer valid. On the contrary, the terms of reference made clear that the parties were proceeding on the basis that pursuant to s. 619 of the *MGA*, the Town would be obligated to approve the Smith Creek and Three Sisters ASPs if they were consistent with the NRCB Approval:

> The Natural Resources Conservation Board (NRCB) provides an impartial process for non-energy related natural resource projects to determine how they align to the

> public interest. NRCB review criteria are set out in the *Natural Resources Conservation Board Act*. Under the *NRCB Act*, Three Sister[s] Golf Resorts Inc. applied for approval to develop a recreational and tourism project on the subject land. Per section 619 of the *MGA*, a NRCB decision prevails over a Municipal, Subdivision and Development Appeal Board, or Municipal Government Board authority to the extent that an application complies with the licence, permit, approval or other authorization granted by the NRCB. [emphasis added]

It is not disputed that the respondent committed resources and spent millions of dollars working with the Town to prepare the Smith Creek and Three Sisters ASPs.

[34] In December 2020, the respondent applied to the Town for approval of the two ASPs. Both received first reading in February 2021. A public hearing followed in March 2021. The Smith Creek ASP was defeated at second reading on April 27, 2021. Council made several amendments to the Three Sisters ASP at second reading. It was defeated at third reading on May 25, 2021.

The Respondent's Appeal to the Tribunal from the Town's Refusal to Approve the ASPs

[35] The respondent appealed the Town's refusal to approve its application to the Tribunal pursuant to s. 619(5) of the *MGA*, which, by this point, read:

> (5) If a municipality does not approve an application under subsection (2) to amend a statutory plan or land use bylaw or the municipality does not comply with subsection (3), the applicant may appeal to the Land and Property Rights Tribunal by filing with the Tribunal
>
> > (a) a notice of appeal, and
> >
> > (b) a statutory declaration stating why mediation was unsuccessful or why the applicant believes that the municipality was unwilling to attempt to use mediation.

[36] Sections 619(6), (7) and (8) describe the appeal process:

> (6) The Land and Property Rights Tribunal, on receiving a notice of appeal and statutory declaration under subsection (5),
>
> > (a) must commence a hearing within 60 days after receiving the notice of appeal and statutory declaration and give a written decision within 30 days after concluding the hearing, and
> >
> > (b) is not required to notify or hear from any person other than the applicant and the municipality against whom the appeal is launched.

> (7) The Land and Property Rights Tribunal, in hearing an appeal under subsection (6), may only hear matters relating to whether the proposed statutory plan or land use bylaw amendment is consistent with the licence, permit, approval or other authorization granted under subsection (1).
>
> (8) In an appeal under this section, the Land and Property Rights Tribunal may
>
> > (a) order the municipality to amend the statutory plan or land use bylaw in order to comply with a licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC, or
> >
> > (b) dismiss the appeal.

[37] The Tribunal's task under s. 619 is limited to addressing questions of consistency between municipal statutory plans and land use decisions, on one hand, and approvals granted by the NRCB or other provincial authorities with power to approve specific types of land use and development in the public interest, on the other. The requirement to produce decisions quickly is complemented by the Tribunal's ability to review, vary, or rescind its own decisions: *MGA*, s. 504. There was no request for reconsideration in this case.

[38] The Tribunal held four preliminary hearings from September 2021 to January 2022 to deal with various procedural matters, including requests by Stoney Nations and others for the right to make limited submissions. The appeal hearings took place virtually from February 22 to March 9, 2022, and from March 22 to 28, 2022, in relation to the Smith Creek and Three Sisters ASPs, respectively. As noted at paragraphs 28-29 of the Tribunal's factum:[9]

> The Parties and Intervenors submitted 72 Exhibits with over three thousand pages for the Smith Creek ASP appeal, and additional material for the Three Sisters ASP appeal. The [Tribunal] heard related testimony from a total of nine witnesses about matters including the history of development in the area, the preparation of the ASPs and their predecessors, and the NRCB proceedings and report.
>
> The testimony included expert evidence comparing matters within the ASPs and the NRCB approval to help the [Tribunal] determine their consistency. Such matters included commercial and residential development, density requirements, transportation networks, municipal fiscal impact, environmental impacts and mitigation, wildlife corridors and movement, impacts of undermining, and utilities and infrastructure requirements.

The Positions of the Parties and Stoney Nations

[9] The Tribunal is a respondent pursuant to s. 688(6) of the *MGA*. It takes no position on the merits of the appeals.

[39] The respondent argued that the Three Sisters and Smith Creek ASPs were consistent with the NRCB Approval within the meaning of s. 619(2) of the *MGA* and therefore the Town was required to approve them. In relaying its position, the respondent took the Tribunal through each section of the ASPs, including, among other things, the development considerations, neighbourhood framework, open spaces, transportation and mobility, housing, utility infrastructure, and environment and sustainability, and explained how consistency was achieved. The respondent noted that to the extent there were differences between the ASPs and the NRCB Approval, changes had been made at the Town's request and to align with Town statutory plans and guiding documents. They argued the ASPs went above and beyond what was required by the NRCB Approval, did not reflect material changes, and fell within the scope of flexibility authorized by the NRCB Approval.

[40] Resiling from the position it took in the October 2018 terms of reference, the Town asked the Tribunal to find that ss. 619(1) and (2) of the *MGA* offended the presumption against retrospectivity and therefore did not apply. Alternatively, the Town argued, the Tribunal lacked jurisdiction to decide the appeal because the Smith Creek and Three Sisters ASPs were 'new' statutory plans, not statutory plan amendments.

[41] If s. 619 was found to apply, the Town resisted any finding of consistency on the basis that the NRCB Approval "expressly or implicitly" preserved its "authority under the MGA to adopt or not adopt" the ASPs for its own land use planning reasons. The Town also urged the Tribunal to consider that the NRCB Approval was based on outdated social, economic, and environmental evidence. In this respect, the Town argued that if the parameters relied upon by the NRCB were no longer reliable or accurate, it could not be said the NRCB had decided the issue which, in effect, meant there could be no "consistency" obligating the Town to adopt the ASPs. The Town was supported in this aspect of its argument by the Stoney Nations, who asked the Tribunal to consider "how reconciliation and honour of the Crown fits in with the concept of consistency between a 1992 approval and an area structure plan that's asked for today."

[42] The Town further contended that the ASPs were inconsistent with the NRCB Approval. In responding to the respondent's evidence and argument addressing specific aspects of consistency between the ASPs and the NRCB Approval, the Town made the following submissions for both the Smith Creek and Three Sisters ASPs:

(a) the number of residential units permitted under the ASPs exceeded what was contemplated by the NRCB Approval and would increase the resident population beyond what was approved by the NRCB;
(b) the density of units per hectare was higher than what was approved by the NRCB;
(c) affordable housing could fall short of what was set out in the NRCB Approval;
(d) the open space coverage was increased in the ASPs as compared to the NRCB Approval;
(e) all visitor accommodation units were in the Three Sisters ASP;

(f) in terms of employee housing for commercial development, together the ASPs only covered housing for visitor accommodation staff; and
(g) the fiscal impact on the Town was not as beneficial as the NRCB Approval contemplated.

[43] In addition to these concerns, the Town noted that the area immediately north of the Wind Valley boundary included in the Smith Creek ASP (known as the "Thunderstone Quarry Lands") was not part of the NRCB Approval. Therefore, the Town argued, the Smith Creek ASP was inconsistent with the NRCB Approval. This is the area that condition 3 (quoted in paragraph 15 above) said could "be changed with the approval of the Town of Canmore, provided that the changes are satisfactory to Alberta Forestry, Lands and Wildlife with respect to the provision of wildlife corridors."

[44] For the Three Sisters ASP, the Town raised a similar argument in relation to the phasing of the project. Because condition 4 provided that the phasing of the project could be changed with its approval and the Town had concerns with the phasing proposed, it argued the required consistency had not been achieved.

The Tribunal Decisions

[45] On May 16, 2022, the Tribunal issued its decisions allowing the respondent's appeals: *Smith Creek ASP Tribunal Decision* and *Three Sisters ASP Tribunal Decision.*

[46] Although its reasons are brief, it is evident the Tribunal was not persuaded that applying s. 619 would have a retrospective effect or that it was necessary to deploy the presumption against retrospectivity as a tool of statutory interpretation to determine what the Legislature intended the temporal scope of s. 619 would be:

> The LPRT agrees with [the respondent] and the NRCB that s. 619 is not retrospective - it provides for paramountcy of provincial approvals that are in place at the time of a municipal action. It is clear from the inclusion of ERCB in s. 619(1) that the legislative intent is that s. 619 should apply when an approval exists, regardless of when it may have been granted. The NRCB Approval was granted and has not been revoked; therefore, it continues to exist and prevails over municipal land use planning decisions and bylaws.
>
> Having found that s. 619 [is] not retrospective, the LPRT did not have to consider whether s. 619 is prejudicial in limiting municipal autonomy or beneficial to the holder of the Provincial permit.

Smith Creek ASP Tribunal Decision at paras 82-83; *Three Sisters ASP Tribunal Decision* at paras 83-84.

[47] With respect to the question about whether the Smith Creek and Three Sisters ASPs were amendments to existing area structure plans for the purposes of s. 619(8) or were, alternatively, 'new' statutory plans, the Tribunal held (at paras 84-87 of *Smith Creek ASP Tribunal Decision* and paras 85-88 of *Three Sisters ASP Tribunal Decision*):

> The 1987 South Corridor ASP has not been repealed and continues to be in effect, and its plan area includes the lands within the plan area of the Smith Creek ASP. Similarly, the 2004 Resort Centre ASP has not been repealed and continues to be in effect, and its plan area includes the lands within the plan area of the Three Sisters ASP. Accordingly, the LPRT finds that the subject appeals are each, in fact, an amendment notwithstanding that the Town instructed [the respondent] to follow the application process applicable to new ASPs.
>
> Section 619(5) allows an applicant to file an appeal with the LPRT if a municipality does not approve an application to amend a statutory plan or land use bylaw and the application is consistent with an NRCB approval. On appeal, 619(8) authorizes the LPRT to order the municipality to amend the statutory plan or land use bylaw to comply with a provincial approval.
>
> The plain wording of these subsections does not require the amendments ordered by the LPRT to be specific amendments to specific clauses in an existing statutory plan. Rather, the provisions give the LPRT broad authority to order modifications to existing land use planning bylaws when applications to amend them are consistent with a relevant provincial approval. In this case, the Smith Creek ASP and Three Sisters ASPs would in fact amend the existing planning documents, including the 1987 South Corridor ASP and the 2004 Resort Centre ASP. As such, the applications now under consideration are applications to amend the existing ASPs for the purposes of s. 619(8) and the LPRT has jurisdiction to decide the appeals.
>
> This conclusion is consistent with the purpose of s. 619, which, as noted in *Borgel*, is to "reduce regulatory burdens and increase administrative efficiency and consistency …by granting paramountcy to decisions of certain provincial bodies, to ensure projects are not blocked at the municipal level for issues already considered and approved at the provincial level." The Appeal mechanism in 619(8) furthers the statutory intent by enabling applicants to obtain amendments to municipal land use planning legislation that would stop development approved by a provincial authority for reasons that are inconsistent with the provincial approval. In this case, this intent would be frustrated if the Town's decisions to block the project by refusing the applications for the Smith Creek and Three Sisters ASPs were found to be outside the scope of a s. 619 appeal.

[48] Having determined that s. 619 applied, the Tribunal turned to the merits of the respondent's appeals. It rejected the arguments premised on the assertion that the NRCB effectively preserved the Town's authority to reject the ASPs, or parts of them, whether they were consistent with the NRCB Approval or not. The Tribunal also declined to revisit the NRCB's public interest determination. It concluded that the Smith Creek and Three Sisters ASPs were "consistent" with the NRCB Approval within the meaning of s. 619(2) of the *MGA*. In doing so, the Tribunal noted the NRCB Approval "did not specify a time after which the approval was no longer valid" and addressed each of the specific inconsistencies alleged by the Town.

[49] Regarding the question of economic impact, the Tribunal acknowledged the fiscal impact analysis indicated the Smith Creek ASP had a $50,000 shortfall; however, it accepted that the combined ASPs would provide a net economic benefit to the Town. Since the NRCB had considered the development as a whole, the Tribunal found the net positive fiscal impact of the two ASPs was consistent with the NRCB Approval.

[50] In considering the Town's concerns regarding the consistency of the housing provisions, which included concerns about affordability, the Tribunal emphasized that in contrast to the Town's position, the NRCB's references to affordable housing meant lower-cost forms of housing, not below-market housing. From this perspective, the Tribunal found, the dwelling unit mix proposed in the two ASPs satisfied the intent in the NRCB Approval. The Tribunal otherwise determined that the number and nature of the proposed housing in the two ASPs was consistent with the NRCB Approval.

[51] With respect to the inclusion of the Thunderstone Quarry Lands in the Smith Creek ASP, the Tribunal reasoned that since the terms of reference approved at the October 2018 Town Council meeting showed that the Thunderstone Quarry Lands were to be included in the Smith Creek ASP, the Town had approved the change, as it was entitled to do by condition 3 of the NRCB Approval. Given this, the inclusion of the Thunderstone Quarry Lands was not inconsistent with the NRCB Approval.

[52] Finally, with respect to the phasing of development in the Three Sisters ASP, the Tribunal agreed with the respondent that a certain residential population was needed before commercial development was viable. The Tribunal found there was no indication in the NRCB Approval, or the subsequent implementation plan, that commercial parts of the development had to be constructed first. Overall, the Tribunal was satisfied the proposed phasing of the lands in the Three Sisters ASP was consistent with the NRCB Approval.

[53] As a result of finding that the Smith Creek and Three Sisters ASPs were consistent with the NRCB Approval, the Tribunal ordered the Town to adopt the Smith Creek ASP as submitted and considered by Town Council on April 27, 2021, and the Three Sisters ASP as submitted and considered by Town Council on February 9, 2021. Although the Town now argues that the Tribunal exceeded its jurisdiction by ordering the Town to adopt the Three Sisters ASP without

incorporating any of the amendments made at second reading, this submission was not made before the Tribunal.

Grounds of Appeal

[54] This Court is a statutory court. This means the right of appeal must be found in a statute: *Calgary (City) v Resman Holdings Ltd*, 2016 ABCA 81 at para 30. In this case, a limited right of appeal "on a question of law or jurisdiction" is found in s. 688(1)(b) of the *MGA* with respect to

> …
>
> (b) a decision made by the Land and Property Rights Tribunal
>
> > (i) under section 619 respecting whether a proposed statutory plan or land use bylaw amendment is consistent with a licence, permit, approval or other authorization granted under that section
>
> …

[55] Section 688(2) requires that an application be made for permission to appeal.

[56] The appellant was granted permission to appeal on grounds that can be summarized as follows:[10]

> (a) Did the Tribunal err in concluding it had jurisdiction to hear the respondent's appeals by:
>
> > (i) misinterpreting s. 619 of the *MGA* as prospective in nature; or
> > (ii) finding that the Smith Creek and Three Sisters ASPs were statutory plan amendments, or alternatively, that s. 619 applies to new statutory plans?
>
> (b) Did the Tribunal err in concluding that the Smith Creek and Three Sisters ASPs were consistent with the NRCB Approval by failing to interpret the meaning of "consistent" in s. 619(2) of the *MGA* or by failing to consider relevant evidence or considering irrelevant evidence?
>
> (c) In ordering the Town to adopt the Smith Creek and Three Sisters ASPs as originally submitted, did the Tribunal exceed its authority under s. 619(8) of the *MGA*?

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[10] *Canmore (Town of) v Three Sisters Mountain Village Properties Ltd*, 2022 ABCA 346 at para 9. As intervenors, the Stoney Nations were limited to addressing the questions summarized in paragraph 56(b) and the adequacy of reasons. The NRCB focused on the question in paragraph 56(a)(i).

Related to some of these issues is a question about whether the Tribunal provided adequate reasons: see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 79, 81; *Mohr v Strathcona (County)*, 2020 ABCA 187 at paras 22 and 35.

[57] The Tribunal's findings of fact and its answers to questions of mixed fact and law are beyond the scope of appellate review: *MGA*, s. 688; *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 at para 45; *Windy Field Ltd v Cardston (County)*, 2023 ABCA 1 at para 51 citing *Mohr v Strathcona (County)*, 2018 ABCA 205 at para 3.

Standard of Review

[58] In reviewing the Tribunal's decisions to determine whether it made the legal and jurisdictional errors alleged, the Court must also respect the legislated standard of review. That standard is reasonableness: *Land and Property Rights Tribunal Act*, SA 2020, c L-2.3, s. 19; see also, *Windy Field Ltd* at para 24 and *Vavilov* at para 37. This standard of review does not ask what decision the appellate court would make: *Vavilov* at para 15. It is instead a process of review "marked by judicial restraint" and, in the context of these appeals, thoughtful "respect for the mandate and specialized expertise of decision makers": *Altus Group Ltd v Alberta (City of Edmonton Composite Assessment Review Board)*, 2023 ABCA 35 at para 10 citing *Vavilov* at para 75. The Town bears the burden of showing that the Tribunal's decisions are unreasonable: *Vavilov* at para 100.

[59] Like its predecessor, the MGB, the Tribunal has relative expertise in relation to land use planning and development: see *Hopewell Development (Leduc) Inc v Alberta (Municipal Government Board)*, 2011 ABCA 68 at para 25. While the Town argues the Tribunal should be held to a higher standard in relation to the adequacy of its reasons given this expertise, that would be inconsistent with the Supreme Court of Canada's direction that reasonableness is a single standard that takes colour from its context:

> … elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": [citations omitted]

Vavilov at para 89.

[60] The parties agree that:

> …A reasonable decision is one that is based on an internally coherent and rational chain of analysis, and that is justified in relation to the facts and law that constrain the decision maker, and exhibits the requisite degree of justification, intelligibility and transparency: *Vavilov* at paras. 85, 99-107. To be reasonable, the analysis must

> be rational and logical, and demonstrate a line of reasoning that leads to the ultimate conclusion. The outcome must also be reasonable. It must be justified in relation to the constellation of law and facts that are relevant to the decision: *Vavilov* at para. 105.

Altus Group Ltd at para 9. See also, *Cavendish Farms Corporation v Lethbridge (City)*, 2022 ABCA 312 at paras 21-24.

[61] In assessing the Tribunal's analysis and the reasonableness of the conclusions reached, its reasons must be read wholistically in the context of the record and with sensitivity to the administrative setting in which the reasons were given. An appellate court must bear in mind that:

> … the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.
>
> Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

Vavilov at paras 91-92.

Decision

The Tribunal Made no Reviewable Error in Concluding it had Jurisdiction to Hear the Appeals

Retrospectivity

[62] Where the Legislature does not include transitional provisions in new legislation, it falls to the courts, or in this case the Tribunal, to determine its temporal application: see *R v Chouhan*, 2021 SCC 26 at paras 86-87.

[63] The general rule is that statutes operate prospectively; that is, they apply to legal situations that are ongoing, or arise after, the time when the new statute comes into effect: see *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at paras 113-115, citing Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed (Scarborough, ON: Carswell, 2000) at 169. When a statute applies to a legal situation that is ongoing at the time of enactment, the new statute governs the future developments of the situation and is said to have immediate effect. "A legal situation is ongoing if the facts or effects are occurring at the time the law is being modified...A statute of immediate effect can therefore modify the future effects of a fact that occurred before the statute came into force without affecting the prior legal situation of that fact": *Dell Computer Corp* at para 113.

[64] In some cases, new legislation may apply retroactively or retrospectively, notwithstanding that such operation can overturn settled expectations and is sometimes perceived as unjust: *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 71 per Major J., citing E Edinger, "Retrospectivity in Law" (1995), 29 UBC L Rev 5 at 13.

[65] What do the terms "retroactive" and "retrospective" mean in this context? The Supreme Court of Canada has adopted the definitions of "retroactive" and "retrospective" articulated in Elmer A Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can Bar Rev 264 at 268-69 (Driedger 1978):

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [emphasis in original]

See *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 127; *Épiciers Unis Métro-Richelieu Inc, division Éconogros v Collin*, 2004 SCC 59 at para 46; *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para 39, 143 DLR (4th) 577.

[66] Driedger clarifies that "[a] statute is not retrospective unless the description of the prior event is the fact-situation that brings about the operation of the statute": Driedger 1978 at 276, cited in *Mosten Investments LP v The Manufacturers Life Insurance Company (Manulife Financial)*, 2021 SKCA 36 at para 348, leave to appeal to SCC refused, 39675 (4 November 2021); *O'Brien (Guardian of) v Anderson*, 2000 BCCA 460 at para 38; *Re City of Oshawa and 505191 Ontario Ltd* (1986), 54 OR (2d) 632 (CA), 1986 CarswellOnt 630 (WL) at para 26, leave to appeal to SCC refused, 58 OR (2d) 535 (note) (SCC).

[67] Where it is determined a statute has retroactive or retrospective effect, presumptions against retroactivity and retrospectivity may preclude its application. The presumption against retrospectivity (upon which the Town relies) is a tool of statutory interpretation, used "to protect acquired rights and to prevent a change in the law from 'look[ing] to the past and attach[ing] new prejudicial consequences to a completed transaction'": *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 43 citing Elmer A Driedger, *Construction of Statues*, 2nd ed (Toronto: Butterworths, 1983) at 186. It ensures that "statutes are not...construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act": *Tran* at para 43 citing *Gustavson Drilling (1964) Ltd v Minister of National Revenue*, [1977] 1 SCR 271 at 279, 1975 CanLII 4 (SCC). "In the absence of an indication that [the Legislature] has considered retrospectivity and the potential for it to have unfair effects", the presumption is the Legislature did not intend them: *Tran* at para 48 citing *Imperial Tobacco* at para 71.

[68] Before the Tribunal, and again here, the Town maintains that in this case, applying s. 619 has a prejudicial retrospective effect because it "operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted." In the Town's submission, the prior event to which s. 619 applies is the NRCB Approval. It submits that:

> [a]pplying s. 619 retrospectively means conferring prevalence to a past decision or approval in the circumstance where the NRCB Approval expressly preserved municipal authority. The concurrency of the municipal process and the required municipal approval was not only recognized by the NRCB but emphasized; applying s. 619 retrospectively would not only deprive the Town and its residents of the role they were assured but run counter to the NRCB Approval itself.

[69] The Town argues the Tribunal fell into reviewable error by failing to properly consider this and the prejudice that flows from applying s. 619 in the circumstances. It maintains "[i]t would be profoundly unfair for the NRCB Approval to be given prevalence over the local planning processes when the NRCB itself expressly contemplated that local planning processes would still apply and address any objections raised by affected parties."

[70] Before the Tribunal, the respondent disagreed with the Town's contention that the NRCB Approval was a discrete prior event. It argued the NRCB Approval was part of an ongoing legal situation and that the "event" that brought about the operation of s. 619 was the Town's refusal to pass the ASPs. The respondent noted that the same retrospectivity argument had been previously rejected by the MGB (MGB Order 35/97). It also urged the Tribunal to consider that the language of s. 619 supported the conclusion the Legislature intended s. 619 to apply to provincial approvals in place when the provision came into force if a municipality subsequently declined to approve an application under s. 619(2).

[71] Before this Court, the respondent argues the Tribunal's decision in relation to the temporal scope of s. 619 is reasonable. Read wholistically and in the context of the record, the respondent submits the decision is based on an internally coherent and rational analysis and is justified in relation to the facts and law.

[72] We agree. Leaving aside that the NRCB plainly sought to avoid the very situation that has arisen in this case and did not, as the Town contends, just assure "local agency going forward", we cannot interfere with the Tribunal's characterization of the NRCB Approval as a continuing fact or its interpretation of s. 619 as providing for "paramountcy of provincial approvals that are in place at the time of a municipal action": *Smith Creek ASP Tribunal Decision* at para 82 and *Three Sisters ASP Tribunal Decision* at para 83.

[73] As the Town itself notes, successfully determining whether a particular case involves applying legislation to a discrete prior event or to a continuing or current legal condition involves a determination about whether, in all the circumstances, the most significant or relevant feature of the situation to which the new law applies is the past event or the ongoing facts or effects arising from it: see *Benner* at para 46. "Making this determination will depend on the facts of the case, on the law in question, and [in the context of *Benner* where a *Charter* right was at issue] on the *Charter* right which the applicant seeks to apply": *Benner* at para 46. We cannot disturb the Tribunal's determination that the NRCB Approval is continuing, and the reasonableness standard of review prevents this Court from interfering with the Tribunal's interpretation of the law in question.

[74] The Tribunal's interpretation of s. 619 is consistent with the purpose of the legislation, to "reduce regulatory burdens and increase administrative efficiency and consistency ... by granting paramountcy to decisions of certain provincial bodies, to ensure projects are not blocked at the municipal level for issues already considered and approved at the provincial level": *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192 at para 22. As noted by the Tribunal, it is also justified by the text of the section. The Energy Resources Conservation Board (ERCB) was included in s. 619's list of agencies. Before s. 619 came into effect, the ERCB had power to issue licenses, permits, approvals, or other authorizations: see, *Energy Resources Conservation Act*, RSA 1980, c E-11. When s. 619 came into effect on September 1, 1995, that was no longer the case: see, *Alberta Energy and Utilities Board Act*, SA 1994, c A-19.5, s. 8(1) whereby the ERCB and the Public Utilities Board formed the Alberta Energy and Utilities Board on February 15, 1995. The Legislature is presumed to know the law. It was reasonable for the Tribunal to adopt an interpretation that did not render the Legislature's reference to the ERCB meaningless or pointlessly repetitive: *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58 at para 36, citing Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham, Ont: Butterworths, 2002) at 158; see also, *Canada (National Revenue) v Thompson*, 2016 SCC 21 at para 32.

[75] Further, we cannot lose sight of the context in which s. 619 of the *MGA* was enacted: *Vavilov* at para 117 citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193 and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, both quoting Elmer A Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87. As noted in paragraph 12 above, there was residual uncertainty as to when provincial approvals prevailed over municipal approvals before the *Planning Act* was repealed and replaced with Part 17 of the *MGA*. Municipalities were asking for clarification regarding the scope of s. 2.1 of the *Planning Act*: see Decision Report at 7-2; *Smith Creek ASP Tribunal Decision* at para 49; *Three Sisters ASP Tribunal Decision* at para 50; *Borgel* at paras 20-22. Section 619 of the *MGA* was obviously designed to resolve the uncertainty. The Town's interpretation assumes the Legislature resolved the problem, but only in part: after 1995 provincial approvals would prevail over municipal approvals as set out in s. 619, but before 1995 the uncertainty would remain. This cannot have been the intention. Section 619(1) of the *MGA* says that a provincial authorization "granted . . . prevails" over any local decision. Although s. 619 is broader and contains more detail, this same wording was seen in s. 2.1 of the *Planning Act*. The Town wants to read the words in s. 619 as saying: "granted after 1995 . . . prevails". However, the qualifying words are not there and can only be read in through some presumption that the Legislature intended them to be there. Since s. 619 was aimed at resolving uncertainty that stood in the way of the legislation's purpose, the Town's interpretation of s. 619 is not a reasonable one. In fact, this may be a case where the Tribunal's interpretation of s. 619 is the single reasonable interpretation: *Vavilov* at para 124.

[76] Once the Tribunal determined that the factual circumstances of the appeals involved the application of s. 619 to continuing facts and additionally considered whether the language of the provision revealed the Legislature's intention that it have immediate effect and apply to provide a right of appeal from future actions taken by a municipality, it was not necessary for the Tribunal to turn to the question of prejudice and the presumption against retrospectivity.

[77] Finally, we question whether it would have been reasonable for the Tribunal to depart from the decision of the MGB in rejecting the identical argument made by the Town in 1997 when Golf Resorts appealed the Town's refusal to redesignate land for development in the Grassi district: *Altus Group Limited v Calgary (City)*, 2015 ABCA 86 at paras 16-33; *Vavilov* at paras 112, 129, 131; *Alberta Union of Provincial Employees v Alberta*, 2020 ABCA 284 at para 12. To do so would have injected considerable uncertainty into a statutory framework designed to eliminate it.

[78] This ground of appeal is dismissed.

Statutory Plan Amendments

[79] The Tribunal found as fact that both the Smith Creek and Three Sisters ASPs were amendments to existing statutory plans:

> The 1987 South Corridor ASP has not been repealed and continues to be in effect, and its plan area includes the lands within the plan area of the Smith Creek ASP.

> Similarly, the 2004 Resort Centre ASP has not been repealed and continues to be in effect, and its plan area includes the lands within the plan area of the Three Sisters ASP. Accordingly, the LPRT finds that the subject appeals are each, in fact, an amendment notwithstanding that the Town instructed TSMVPL to follow the application process applicable to new ASPs.

Smith Creek ASP Tribunal Decision at para 84; *Three Sisters ASP Tribunal Decision* at para 85.

[80] The Town disagrees with this characterization of the ASPs and asks this Court to revisit the evidence and argument considered by the Tribunal in making these factual findings. This is beyond the scope of the Court's jurisdiction and in any event, is not a court's role in performing a reasonableness review: see *Vavilov* at para 125; *Gezehegn v Alberta (Appeals Commission of the Workers' Compensation Board)*, 2021 ABCA 93 at para 13; *Kot v Canada (Attorney General)*, 2022 FCA 133 at para 16, leave to appeal to SCC dismissed, 40409 (30 March 2023). While this is sufficient to dispense with this ground of appeal, for the benefit of those with an interest in the outcome of this case we observe that the Tribunal's conclusions find support in the record and are not unreasonable.

[81] It is unnecessary to address the Town's alternate argument that s. 619 cannot be interpreted as applying to 'new' statutory plans.

The Tribunal Made no Reviewable Error in its NRCB Approval Findings of Consistency

[82] We do not agree that the Tribunal erred in failing to interpret the meaning of the word "consistent" in s. 619(2) of the *MGA*. This part of the Town's argument is closely related to its assertion that the Tribunal's reasons are inadequate. While the Town argues the Tribunal gave no consideration to the "salient legal issue" about what consistency means for the purposes of s. 619(2), the reasons read in the context of the record reveal otherwise. The Tribunal's reasons are responsive to the arguments made.

[83] It is evident the Tribunal heard and considered the Town's submissions in relation to framing the relevant questions. It summarized the Town's position in each decision as follows:

> The first question is whether the [ASP] and the NRCB Approval are "consistent", i.e., sufficiently similar, alike, or the same. If the answer is no, then the inquiry is complete; s. 619 does not apply and imposes no obligations on Council with respect to the [ASP]. If the answer is yes, the next question is what "must approve the application to the extent that it complies with the [NRCB Approval]" means in the context of s. 619. This requires an assessment of what matters have already been addressed or decided by the NRCB. For those, Council has no discretion to refuse or change the [ASP]; however, Council retains authority with respect to matters not addressed by the NRCB.

Smith Creek ASP Tribunal Decision at para 105; *Three Sisters ASP Tribunal Decision* at para 115.

[84] The Tribunal identified the overarching issue to be decided in each appeal as whether the ASP "is consistent with the NRCB Approval, and, if it is, whether [the Tribunal] should order the Town to approve the ASP amendment to the extent that it complies with the NRCB Approval pursuant to s. 619(8) of the [*MGA*]": *Smith Creek ASP Tribunal Decision* at para 101; *Three Sisters ASP Tribunal Decision* at para 111.

[85] There was little disagreement between the parties about the meaning of "consistent" for the purposes of s. 619(2) of the *MGA*. They both referred the Tribunal to, among other cases, *AES Calgary ULC, Re*, MGB 091-02 (2 July 2002), 2002 CarswellAlta 2246 (WL), a decision of the MGB which, at paragraph 83, addressed the meaning of the word "consistent" as encompassing any action or comparison "shown to be accordant, agreeable, compatible, conforming, consonant, constant, equable, harmonious, regular, undeviating and uniform", and *Borgel*, a decision of this Court which, although it did not consider the meaning of "consistent", considered the purpose of s. 619 more generally.

[86] In its written submissions, the Town argued:

> … an application cannot be consistent in spirit with a provincial authorization without being broadly consistent in its terms, meaning that while some minor inconsistencies may not be sufficient to render the application inconsistent on the whole, a finding of inconsistency is justified where there are a significant number of inconsistent terms, or a lesser number of significant inconsistent terms or inconsistencies which go to the root of the project.

[87] In its oral submissions before the Tribunal, the Town acknowledged that consistency did not "mean that it has to be exactly the same in every single way." It argued "there needs to be a sufficient consistency that one would look at the two and say yes, they are consistent, they are alike, they are the same."

[88] In short, both sides agreed that the term "consistency" in s. 619(2) of the *MGA* had to be interpreted broadly and purposively: see s. 10 of *Interpretation Act*, RSA 2000, c I-8 and *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 8. It is not intended to be an exacting standard, but rather approached wholistically and with regard to what was considered and approved at the provincial level to ensure the legislation's purpose is achieved.

[89] Where the parties diverged was in their arguments about how the question of consistency ought to be answered *in this case*. Beyond arguing the Tribunal lacked jurisdiction to hear the respondent's appeal under s. 619 of the *MGA*, the Town resisted a finding of consistency by emphasizing that the NRCB preserved municipal discretion to "refuse the project". As noted above, the Tribunal did not accept the Town's assertion that it had the authority to completely reject the project even if it complied with the NRCB Approval. Neither do we.

[90] The Town also asked the Tribunal to consider that the NRCB Approval was based on outdated evidence that may not be accurate or suitable today:

> So the Town's position is that the studies that were provided to the NRCB to show, prove, demonstrate, justify, whatever word you want to use, that the destination resort project, because that's what it was, was in the public interest, it is not clear that those studies are still accurate. And those were the studies that the NRCB relied upon in determining that the development was suitable from a public policy perspective.
>
> But if those studies are no longer accurate or you are not satisfied that those studies continue to be supportive of this new iteration of the development or even supportive of the previous iteration of the development 30 years later, if you can't say that they accurately reflect the state of affairs in Alberta and in Canmore anymore, then it's the Town's submission that the NRCB cannot be said to have considered or addressed or decided these issues or areas of concern in reaching the conclusion that they did that it was in the public interest.

[91] The Town was supported in this argument by the Stoney Nations, who asked the Tribunal to address their concern that the NRCB Approval was granted in a legal and social context that pre-dated judicial confirmation of the duty to consult and the requirement to consider impacts on Aboriginal interests and accommodations to Aboriginal concerns. Like the Town, Stoney Nations argued there could be no consistency between the NRCB Approval and the respondent's ASPs because these factors were not part of the decision in 1992. The problem with these arguments is they amounted to a request that the Tribunal revisit the NRCB's public interest determination. Counsel for the Stoney Nations specifically confirmed that was the case, agreeing its position was the "appeals should be dismissed because the NRCB decision was so long ago that it can no longer be considered to - the projects can no longer be considered to be in the public interest...". Counsel described the NRCB Approval as "stale-dated ... well past its best-before date."

[92] The Tribunal reasonably declined the invitation to revisit the NRCB public interest determination. That is not something the Tribunal has jurisdiction to do: *MGA*, s. 619(7). It is also important to remember that the NRCB Approval was expected to govern for several decades.

[93] The Town's position therefore came down to an argument that the ASPs were simply too different from what was considered and approved by the NRCB to be considered consistent with the NRCB Approval. The Tribunal disagreed, with reasons that adequately explain its reasoning process when they are read in the context of the proceedings: *Vavilov* at para 94. The Tribunal considered the evidence and argument it heard and addressed all the consistency issues raised by the Town in an intelligible and transparent way.

[94] The Town argues the Tribunal ought to have reached a different conclusion: that having regard to the facts, consistency means there should be a different outcome. This is, again, a question of mixed fact and law that is beyond the scope of appellate review.

[95] The Town's argument that the Tribunal took into consideration irrelevant evidence in concluding the ASPs were consistent with the NRCB Approval is without merit. The Town objects to the Tribunal's consideration of "the history of the ownership and development of the lands and the cost associated with the early stages of development." But the Tribunal "is not bound by the rules of evidence or any other law applicable to court proceedings and has the power to determine the admissibility, relevance and weight of any evidence in determining any matter within its jurisdiction": *Land and Property Rights Tribunal Act*, s. 10. It reasonably considered evidence about the history of the lands in the context of the various arguments it heard, including those suggesting the passage of time had expanded the Town's authority.

The Tribunal Did Not Exceed its Authority Under s. 619(8) of the MGA

[96] Section 619(8) of the *MGA* provides that the Tribunal may:

> (a) order the municipality to amend the statutory plan ... in order to comply with a[n] ... approval ... granted by the NRCB, ..., or
>
> (b) dismiss the appeal.

[97] Contrary to the Town's contention, the Tribunal did nothing more than s. 619(8)(a) allows. Its decision reveals no jurisdictional error. The Town did not ask the Tribunal to consider ordering approval of the Three Sisters ASP as amended at second reading. On the contrary, the Town conceded the amendments had not been made using the lens of consistency. The Tribunal had the benefit of a considerable body of evidence – including expert evidence – addressing the question of consistency between the NRCB Approval and the Three Sisters ASP as submitted and considered by Council on February 9, 2021. It was not satisfied the amendments made to the Three Sisters ASP at second reading had been subject to the same study: *Three Sisters ASP Tribunal Decision* at paras 223-224. There is nothing unreasonable about the order it made.

Conclusion

[98] The Town has not established a basis upon which we can interfere with the Tribunal's decisions.

[99] The appeals are dismissed.

Appeal heard on April 3, 2023

Memorandum filed at Calgary, Alberta
this 3rd day of October, 2023

Authorized to sign for: Slatter J.A.

Hughes J.A.

Kirker J.A.

Appearances:

K.L. Becker Brookes
for the Appellant

G.J. Stewart-Palmer, KC
K. Elhatton-Lake
for the Respondent, Three Sisters Mountain Village Properties Ltd.

M.J. d'Alquen
for the Respondent, Land & Property Rights Tribunal

W.Y. Kennedy
F.N. Vance (No Appearance)
for the Intervenor, Natural Resources Conservation Board

B.A. Barrett
for the Intervenor, Stoney Nakoda Nations