

Clerk's stamp:

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COURT OF QUEEN'S BENCH OF ALBERTA

2101-15048

JUDICIAL CENTRE:

CALGARY

PLAINTIFF:

THREE SISTERS MOUNTAIN VILLAGE PROPERTIES LTD.

DEFENDANTS:

TOWN OF CANMORE, JOHN BORROWMAN, ESME COMFORT, JEFFREY HILLSTAD, JOANNA MCCALLUM, KAREN MARRA, VI SANDFORD and ROBERT SEELEY

DOCUMENT:

**STATEMENT OF DEFENCE**

PARTY FILING THIS DOCUMENT:

TOWN OF CANMORE, JOHN BORROWMAN, ESME COMFORT, JEFFREY HILLSTAD, JOANNA MCCALLUM, KAREN MARRA, VI SANDFORD and ROBERT SEELEY

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**Statement of facts relied on:**

No Attornment

1. The Defendants state that part of the relief sought in the Statement of Claim, in particular subparagraphs 129(b), (c), (d), and (e), are properly the subject of judicial review and/or appeals to the Land and Property Rights Tribunal, and these portions of the Statement of Claim should be struck out in their entirety.
2. The Defendants plead and rely upon sections 536 and 537 of the *Municipal Government Act*, RSA 2000, c M-26 and Rules 3.15 and 3.16 of the *Alberta Rules of Court*.

3. The Defendants expressly reserve the right to apply to strike or stay portions of the within action on the basis that litigation in the Court of Queen's Bench of Alberta is not the proper forum for this dispute.
4. The Defendants expressly state that by filing this Statement of Defence, they are not attorning to the litigation jurisdiction of the Court of Queen's Bench of Alberta. This Statement of Defence is filed for the sole purpose of preventing the Defendants from being noted in default.

#### Preliminary Matters

5. Except as hereinafter expressly admitted, the Defendants deny each and every allegation contained in the Statement of Claim.
6. The Defendants adopt the defined terms as set out in the Statement of Claim except where otherwise defined in this Statement of Defence.
7. The Defendant, Hillstad, states that his name is properly spelled as Jeffrey Hilstad.
8. The Defendant, Comfort, states that her name is properly spelled as Esmé Comfort.
9. In response to the entirety of the Statement of Claim, the Defendants state that the within action is an attempt by TSMV to intimidate Canmore and its elected municipal councilors to approve TSMV's proposed developments, notwithstanding the Defendants' good faith actions taken in accordance with their legislated powers and obligations.
10. In particular, TSMV's inclusion of Borrowman, Comfort, Hilstad, McCallum, Marra, Sandford and Seeley (collectively, the "Individual Defendants") as individually named defendants is an effort to coerce elected individuals to accede to TSMV's wishes at all costs, and regardless of any other relevant considerations.
11. Canmore admits that it is a municipality incorporated pursuant to and in accordance with the *Municipal Government Act*, RSA 2000, c M-26.
12. The Defendants further admit paragraphs 3, 24-32, 34-36, 39, 41-42, 44-45, 50-51, and 59, the first sentence of paragraph 64, and the first sentence of paragraph 75 of the Statement of Claim.

#### History of Three Sisters Land

13. TSGR acquired the Three Sisters Land, and in or about 1989, proposed a tourism and recreation project in the Bow Valley and Wind Valley that would include residential, accommodation and commercial space. The large-scale nature of the project required approval from the NRCB.

14. Following public hearings, in 1992 the NRCB ruled, by way of the NRCB Order, that the TSGR proposal was in the public interest and TSGR could develop the Three Sisters Land in the Bow Valley, but not in the critical wildlife habitat of the Wind Valley.
15. The NRCB Order provided that TSGR's proposal, while approved, had several conditions, including the designation of wildlife movement corridors requiring provincial government approval. The project also required review of an environmental impact assessment by the NRCB before Canmore could consider any municipal approvals.
16. The NRCB Order provided approval in concept for development upon the Three Sisters Land, but made clear that detailed planning would be required for any proposal to go through the municipal approval process. As a result, Canmore and its elected municipal councillors, including the Individual Defendants, retained the ability to influence the scale and scope of development on the Three Sisters Land through the applicable municipal review processes.
17. In or about 1998, Town Council at the time, which did not include any of the Individual Defendants, approved Master Zoning Bylaw DC1-98 ("Bylaw DC1-98"), which subsequently became Section 14.9 of Canmore's Land Use Bylaw 2018-22 (the "LUB"). A substantial portion of DC1-98, particularly in the easterly portion of the Three Sisters Land, still represents current zoning in the area.
18. On or about April 7, 1998, Canmore entered into a settlement agreement with Three Sisters Resorts Inc., the owner of the Three Sisters Land at that time, with respect to ultimate zoning and development of the Three Sisters Land (the "Settlement Agreement"). However, the Settlement Agreement was not assigned to TSMV and did not otherwise enure to the benefit of TSMV.
19. In or about 2004, Canmore approved the Resort Centre Area Structure Plan and the Stewart Creek Area Structure Plan, both area structure plans which were submitted by Three Sisters Resorts Inc.
20. To date, the only development within the Resort Centre Area Structure Plan area is a partially completed (15 of 18 holes) golf course straddling Three Sisters Creek. To date, the only development within the Stewart Creek Area Structure Plan area is several multi-family condominium projects and a golf course clubhouse.
21. In or about 2009, the prior owner of the Three Sisters Land was placed into receivership. PWC was appointed Receiver.
22. In or about 2013, Canmore received an ASP proposal for the Three Sisters Land from PWC. The application was withdrawn, and first reading of the ASP bylaw was canceled at the request of PWC.
23. On or about September 27, 2016, Canmore enacted Bylaw 2016-03, which put Canmore's Municipal Development Plan (the "MDP") into effect.
24. On or about December 10, 2019, Canmore passed the LUB.

### TSMV Development History

25. In or about September 2013, TSMV purchased the Three Sisters Land.
26. On May 2, 2017, a motion was defeated by Town Council for first reading of the proposed Resort Centre ASP amendment submitted by TSMV. TSMV was proposing to amend the existing Resort Centre ASP to remove the 110 hectare golf course development and allow for the development of additional commercial, resort accommodation, recreation, and residential. Specifically, the proposal contemplated a potential addition of 15-20 hectares of commercial lands, and up to 475 additional resort accommodation or residential units.
27. Town Council advised TSMV that it would need to apply for an ASP for the remainder of the Three Sisters Land. In response, TSMV prepared two separate ASPs for the “Village” and “Smith Creek”.
28. On or about October 2, 2018 Town Council, which by that time comprised all of the Individual Defendants, approved Terms of Reference which mapped out the process and scope of both the Village ASP and Smith Creek ASP.
29. On or about January 22, 2019, TSMV presented Town Council with the results of its “What We Heard” report. This report was based on community outreach which took place in Canmore through October and November 2018.
30. On or about March 3, 2020, a delegate from Alberta Environment and Parks approved TSMV’s proposed wildlife corridor in Smith Creek.
31. On or about June 16, 2020 TSMV provided an update to Town Council on its next steps as part of ASP preparations.
32. Throughout July and August 2020, TSMV had conversations with active community groups to raise awareness of the ASPs and supporting studies, and listen to understand where the community had further input or questions. TSMV advised Canmore that it planned to seek broader community input in August and September 2020 to raise awareness of development benefits, impacts and community considerations, seek broad community input including use of virtual tools, and would then revise its ASP submissions based on Canmore administration and community feedback.
33. On or about October 1 and 2, 2020, TSMV held two virtual open houses to seek community feedback on their draft ASPs and supporting studies. TSMV also collected feedback via their website on the draft ASPs until on or about October 14, 2020.
34. On or about February 9, 2021, Town Council gave first reading to Bylaw 2021-05 for the Village ASP and Bylaw 2021-06 for the Smith Creek ASP.
35. A multi-day virtual public hearing was held, concluding on March 23, 2021, where Canmore received submissions from interested parties in support of, neutral to, and opposed to the TSMV ASPs.

36. On or about April 27, 2021, Town Council unanimously defeated Bylaw 2021-06 for the Smith Creek ASP at second reading. The reasons articulated by Town Council for voting against the Smith Creek ASP included the following:
  - (a) the Smith Creek ASP required moving Canmore's urban growth boundary, which was premature;
  - (b) the Smith Creek ASP did not align with the MDP;
  - (c) the Smith Creek ASP required rezoning a large portion of land from CW Conservation of Wildlands to a commercial and/or residential designation; and
  - (d) the low density housing proposed was not what was needed for Canmore's future development.
37. On or about April 27, 2021, Town Council approved second reading of Bylaw 2021-05 for the Village ASP, with amendments. Town Council voted to postpone third reading of Bylaw 2021-05 to May 25, 2021 and directed Canmore administration to meet with TSMV in order to review and evaluate their identified concerns and how best to achieve the stated objectives of Town Council as approved through amendments to the Village ASP at second reading.
38. On or about May 14, 2021, Canmore administration met with TSMV representatives. From these meetings, a series of amendments to the Village ASP were agreed to between Canmore administration and TSMV, to be put before Town Council at its May 25, 2021 meeting.
39. On or about May 25, 2021, Town Council voted 6-1 to defeat third reading of Bylaw 2021-05. Borrowman voted to approve Bylaw 2021-05. The reasons articulated by Town Council, other than Borrowman, for voting against the Village ASP included the following:
  - (a) the overall development footprint was too large, given that the unfinished golf course development was not being retained;
  - (b) a development footprint more in line with the 2004 Resort Centre Area Structure Plan would be preferable, and was more consistent with the NRCB Order;
  - (c) the uncertainty regarding potential development on undermined lands;
  - (d) concerns over the efficacy of proposed wildlife fencing; and
  - (e) the phasing plan placed most of the proposed commercial development onto high-risk lands for construction, with residential development occurring on the lower-risk lands.

**Any matters that defeat the claim of the plaintiff:**

40. Canmore states that at all material times, it was acting in accordance with its statutory and legal authority. Canmore specifically pleads and relies upon Section 527.2 of the *Municipal Government Act*, RSA 2000, c M-26 (the “MGA”).
41. Canmore further pleads and relies upon Section 529 of the *MGA*.
42. The Individual Defendants plead and rely upon Section 535 of the *MGA* and state that at all material times, they acted in good faith in the performance or intended performance of their functions, duties or powers under the *MGA* in their role as Canmore councillors.
43. In response to paragraphs 88 - 101 of the Statement of Claim, under the heading “MISFEASANCE IN A PUBLIC OFFICE” the Defendants deny any misfeasance, and further deny any malice, dishonesty, ill-intent, bad faith, or recklessness, as alleged, or at all.
44. At all material times, the Defendants acted reasonably, lawfully and in the good faith exercise of their duties.
45. In response to paragraphs 102 - 109 of the Statement of Claim, under the heading “NEGLIGENT MISREPRESENTATION”, the Defendants deny owing TSMV a duty of care as alleged, or at all.
46. Further, or in the alternative, the Defendants state that all of their conduct at issue in this Action amounts to one or more policy decisions for which the Defendants are exempt from liability in negligence.
47. Further, or in the alternative, if the Defendants owed TSMV a duty of care, which is denied, the Defendants deny that they were negligent or in breach of said duty as alleged, or at all. At all material times, the Defendants discharged any common law, statutory, or other duties of care that they may have had.
48. Further, or in the alternative, the Defendants deny that Canmore or its administration made representations as alleged in paragraphs 105 and 107 of the Statement of Claim, or at all. The Defendants further deny that TSMV proceeded with its preparation of the Village ASP and Smith Creek ASP based on such representations if they were made.
49. Further, or in the alternative, if TSMV did proceed based upon the representations alleged, it did not act reasonably in doing so. The representations did not constitute contractual commitments and were vague and unenforceable. As statements of opinion or intention and not statements of facts, the alleged representations could not reasonably be relied upon, and are not actionable.
50. In response to paragraphs 110 - 122 of the Statement of Claim, under the heading “*DE FACTO* EXPROPRIATION”, the Defendants deny that Canmore has committed an expropriation of the Three Sisters Land, as alleged, or at all. In particular, Canmore denies that it has acquired any beneficial interest in the Three Sisters Land, or that all reasonable uses of the Three Sisters Land have been removed to TSMV’s deprivation.

51. Further, or in the alternative, TSMV's allegations in paragraph 116 of the Statement of Claim with respect to Bylaw DC1-98 relate to a bylaw passed in 1998, the content of which has remained unchanged since 1998. As such, TSMV's claim of *de facto* expropriation is statute-barred, and the Defendants plead and rely upon the provisions of the *Limitations Act*, RSA 2000, c. L-12 in response to those allegations.
52. Further, or in the alternative, TSMV's allegations in paragraph 116 of the Statement of Claim relate to the alleged invalidity of Bylaw DC1-98, which bylaw may only be challenged via an application for judicial review filed within six months of the date Bylaw DC1-98 was passed. As such, the entirety of TSMV's claims are statute-barred, and Canmore pleads and relies upon sections 536 and 537 of the *Municipal Government Act*, RSA 2000, c M-26, and Rule 3.15 of the *Alberta Rules of Court*.
53. In the further alternative, Canmore denies that TSMV has suffered losses or damages as alleged in paragraphs 18, 19, 21, 98, 127 and 128 of the Statement of Claim, or at all.
54. Further, or in the alternative, if TSMV suffered losses or damages, as alleged, or at all, which is denied, such losses or damages were caused solely or contributed to substantially by the negligence of TSMV, particulars of which include, but are not limited to:
  - (a) submitting the Village ASP and Smith Creek ASP in a form which was not compliant with the provisions of Part 17 of the *MGA* and the regulations thereunder;
  - (b) submitting the Village ASP and Smith Creek ASP in a form which was not consistent with the NRCB Order;
  - (c) submitting the Village ASP and Smith Creek ASP in a form which was not compliant with the LUB and the MDP; and
  - (d) such further and other particulars as will be proven at trial.
55. Further, or in the alternative, if TSMV suffered any losses or damages, as alleged or at all, which is denied, TSMV's losses or damages were not foreseeable, are excessive and are too remote to be compensable.
56. In the further alternative, if TSMV has suffered losses or damages as alleged, or at all, which is denied, it has failed to take any reasonable steps to mitigate those losses or damages, some particulars of which include, but are not limited to:
  - (a) failing to resubmit the Village ASP and Smith Creek ASP in a form which was compliant with the provisions of Part 17 of the *MGA* and the regulations thereunder;
  - (b) failing to resubmit the Village ASP and Smith Creek ASP in a form which was consistent with the NRCB Order;

- (c) failing to resubmit the Village ASP and Smith Creek ASP in a form which was compliant with the LUB and the MDP; and
  - (d) failing to take any other reasonable steps to mitigate its losses as may be proven at trial.
57. In specific response to paragraphs 98 and 129(g) of the Statement of Claim, the Defendants deny that their conduct gives rise to a claim for punitive/aggravated/exemplary damages as alleged, or at all.
58. The Defendants further plead and rely on the provisions of the *Contributory Negligence Act*, RSA 2000, c C-27 and the *Tort-feasors Act*, RSA 2000, c T-5, both as amended.

**Remedy sought:**

59. The Defendants respectfully request that:
- (a) The Plaintiff's claim against them be dismissed;
  - (b) The portion of the relief sought in subparagraphs 129(b), (c), (d), and (e) of the Statement of Claim be struck, or in the alternative stayed;
  - (c) In the alternative, that the entirety of TSMV's claims be dismissed with costs on a solicitor and own client basis, or alternatively, on a party-party basis;
  - (d) They be granted leave to amend the within Statement of Defence;
  - (e) Such further and other interlocutory relief as may be applied for from time to time; and
  - (f) Such further and other relief as may be sought.