LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Three Sisters Mountain Village Properties Ltd. v Town of Canmore, 2022 ABLPRT 671
Date: 2022-05-16
File No. P21/CANM/T-002
Decision No. LPRT2022/MG0671
Municipality: Town of Canmore

In the matter of an appeal under section 619 of the *Municipal Government Act*, RSA 2000, c M-26 (*Act*) from a decision of the Town of Canmore with respect to the Smith Creek Area Structure Plan (Smith Creek ASP).

BETWEEN:

Three Sisters Mountain Village Properties Ltd. (TSMVPL)

Appellant

- and -

Town of Canmore (Town)

Respondent Authority

BEFORE: H. Kim, Presiding Officer
B. Horrocks, Member
W. Jackson, Member
D. Piecowye, Member
D. Thomas, Member
(Panel)

K. Lau, Case Manager

DECISION

APPEARANCES

See Appendix A

This is an appeal to the Land and Property Rights Tribunal (LPRT or Tribunal). The hearing was held via videoconference, starting on February 22, 2022 until March 9, 2022, after notifying interested parties, with additional submissions accepted until March 28, 2022.

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OVERVIEW

[1] There are two appeals before the LPRT which are the subject of two decisions; however, there is substantial common evidence and a common jurisdictional matter was argued for both appeals at the same time. Accordingly, the background and some of the preliminary matters are common to both appeals. The first hearing, the appeal of the Smith Creek ASP, was not closed, and some evidence relating to the Smith Creek ASP appeal was considered for the appeal of the Three Sisters Village Area Structure Plan (Three Sisters ASP), which was held from March 22, 2022 until March 28, 2022.

[2] The subject of this decision is the Smith Creek ASP, which was defeated at second reading before Town Council on April 27, 2021. The Appellant submitted section 619 of the *Act* required the Town to approve the Smith Creek ASP, because it is consistent with the Natural Resources Conservation Board (NRCB) approval for Application #9103 – Three Sisters Golf Resorts Inc. (NRCB Approval). The Town disagreed, arguing the Smith Creek ASP is not consistent with the NRCB Approval in several respects and the Town was not required to adopt it.

[3] The Yellowstone to Yukon Conservation Society (Y2Y), the Stoney Nakoda Nations (Stoney Nations), and the NRCB participated as intervenors under the LPRT Procedure Rules. Y2Y argued the wildlife corridors in the Smith Creek ASP are inconsistent with the NRCB Approval. The Stoney Nations submitted that the passage of time since the NRCB Approval has potentially rendered the NRCB's finding that the project is in the public interest inapplicable. The NRCB responded to the Stoney Nations submissions and made further submissions with respect to NRCB jurisdiction.

[4] The LPRT determined that the Smith Creek ASP is consistent with the NRCB Approval and ordered the Town to adopt the Smith Creek ASP as submitted.

BACKGROUND

[5] TSMVPL filed this appeal with the LPRT on July 9, 2021 pursuant to section 619 of the *Act* after the Town refused to approve the Smith Creek ASP. The reasons accompanying the Appeal were as follows:

1. In 1992, the NRCB approved the development of a large scale recreational and tourism project subject to conditions (the "Project") as reflected in the NRCB Approval.

2. TSMVPL, and the predecessor owners of the Project, have endeavoured to obtain planning approvals for the Project from the Town, which process has been characterized by long delays, unauthorized and unnecessary impediments and procedures that have frustrated the Project.

3. Under the Town's Land Use Bylaw 2018-22, the Town requires the adoption of an area structure plan before there can be any subdivision or development in furtherance of the Project. Between 2017 and 2020, TSMVPL worked with the Town to develop a new area structure plan for lands within the Project called the Smith Creek area. This became the Smith Creek ASP. The proposed Smith Creek ASP was consistent with the NRCB Approval. The work required by the Town cost TSMVPL in excess of $11 million, to prepare the Smith Creek ASP and the Three Sisters Village ASP. The Three Sisters Village ASP is also part of the Project which has also been rejected by the Town Council and will be the subject of a separate appeal.

4. In December 2020, TSMVPL applied to the Town to adopt the Smith Creek ASP. As the application for the Smith Creek ASP was consistent with the approval or authorization granted by the NRCB in the NRCB Approval, the Town was required to approve the Smith Creek ASP under section 619(2) of the *Municipal Government Act*.

5. The Town did not approve the Smith Creek ASP as it was required to do. Instead, Town Council voted to defeat the Smith Creek ASP at second reading of the bylaw that was required to give effect to the Smith Creek ASP.

6. Alternatively, if the application for the Smith Creek ASP was in part consistent with the NRCB Approval, the Town was required to approve the Smith Creek ASP to the extent that TSMVPL's application complied with the approval or other authorization granted in the NRCB Approval.

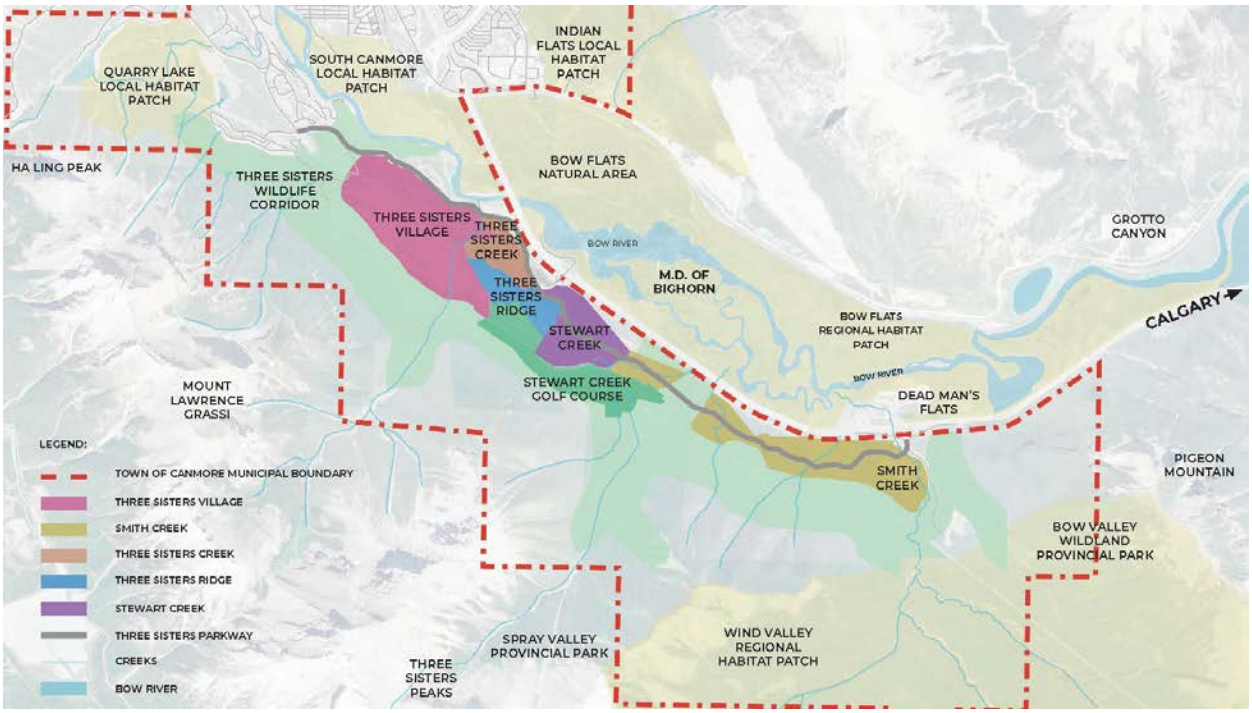
[6] In light of these reasons, TSMVPL requested the LPRT to order the Town to adopt the Smith Creek ASP to comply with the approval or other authorization granted by the NRCB.

[7] As noted, the Town also refused the Three Sisters ASP, and the appeal of that decision was filed with the LPRT on August 9, 2021. Preliminary hearings were held by videoconference on September 3[1] and 30, 2021[2] and via written submissions on December 3, 2021[3] and January 28, 2022[4]. These hearings

[1] Decision LPRT2021/MG0483
[2] Decision LPRT2021/MG0662
[3] Decision LPRT2021/MG0816
[4] Decision LPRT2022/MG0247

dealt with procedural issues including whether the two appeals would be consolidated or heard separately; whether the Town's jurisdictional challenge would be the subject of a separate hearing; the status and submissions of intervenors; dates for disclosure; and hearing dates. The LPRT decided to hear the two appeals sequentially commencing February 22, 2022, with preliminary and jurisdictional matters common to both appeals to be heard first; it also granted the NRCB, Stoney Nations and Y2Y limited intervenor status.

[8] The Smith Creek ASP Plan Area is at the eastern edge of the Town. It is in two parts separated by a wildlife corridor, and is adjacent to the Stewart Creek Golf and Country Club and south of the Trans-Canada Highway (Hwy 1). The hamlet of Dead Man's Flats in the Municipal District of Bighorn No. 8 is directly across Hwy 1 to the north. The overall Smith Creek Plan Area comprises approximately 154 hectares (ha) (380 acres) and proposes a 20 to 30-year buildout. The stated goal of the Smith Creek ASP is to guide the future development of the Smith Creek Plan Area for residential, mixed-use commercial, business, and industrial uses. The Smith Creek ASP application was submitted in conjunction with the Three Sisters ASP application.



History of the TSMVPL Lands

[9] In September 1989, Three Sisters Golf Resorts Inc. (TSGR) acquired title to approximately 1,169 ha (2,887 acres) of land in the Municipal District of Bighorn No. 8 (MD), on the south side of Hwy 1 in the Bow and Wind Valleys. Development plans for the land contemplated a resort including four golf courses, six hotel complexes, and over 6200 housing units. The MD's relevant planning documents in place at the time were the General Municipal Plan and the South Corridor Area Structure Plan adopted in 1987 (for the then Improvement District of Bighorn No. 8).

[10] On August 1, 1990, Alberta Environment (AE) sent a letter to TSGR advising that pursuant to Section 8 of the *Land Surface Conservation and Reclamation Act*, they were required to prepare and submit an Environmental Impact Assessment (EIA) report for their proposed development. Terms of Reference prepared by AE in December 1990 detailed the information required for the EIA, which

included project overview and description, market demand, environmental information, socio-economic information, transportation, waste disposal, public safety and emergency planning, archeological and historical resources assessment, and public consultation. A portion of the TSGR lands at the west end of their holdings was intended to be purely residential and was not included in the requirement for the EIA.

[11] In May 1991, the Town applied to the Local Authorities Board to annex 5,390 ha (13,319 acres) of land from the MD and Improvement Districts No. 5 and 8. The Annexation Study prepared in support of the application stated the land was required to satisfy the long-term growth requirements of the community and represent logical extensions to the Town's boundaries from planning, servicing, and socio-economic perspectives, and referenced four proposed major projects including the Three Sisters Resorts. The Local Authorities Board approved the annexation request and on September 5, 1991, the Order in Council was signed granting the annexation, effective June 30, 1991.

[12] The *Natural Resources Conservation Board Act* (*NRCB Act*) was enacted in December 1990 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 NRCB'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* specifies projects that are reviewable, and includes recreational or tourism projects, defined as a project to construct one or more facilities for recreational or tourism purposes for which an environmental impact assessment has been ordered. The *NRCB Act* at the time defined "environmental impact assessment" to mean a report containing an assessment of the environmental impact ordered under section 8(1) of the *Land Surface Conservation and Reclamation Act*. Accordingly, TSGR's proposed development was reviewable by the NRCB, and an application was submitted in October 1991. The NRCB hearing took place from June 15 to July 23, 1992. The Decision Report for Application #9103 – Three Sisters Golf Resorts Inc. - was issued in November 1992 and the Order in Council was signed in January 1993. It approved the Bow Valley portion of the project but not the Wind Valley portion, with conditions relevant to the subject appeal as follows:

1. The project of Three Sisters Golf Resorts Inc. (hereinafter called "Three Sisters") for a recreational and tourism project in the Town of Canmore, as such project is described in Application No. 9103 from Three Sisters to the Board dated October 9, 1991, and descriptive material supporting the application marked as exhibits at the Canmore, Alberta hearing by the Board from June 15, 1992 to July 23, 1992, including undertakings of the Applicant, is approved, subject to the terms and conditions herein contained.

2. Three Sisters shall not develop the portion of the project proposed for the area known as Wind Valley, located south of a line 200 m north of, and parallel to, the boundary between sections 1 and 12, township 24, range 10, and between sections 6 and 7, township 24, range 9, all west of the 5th meridian.

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.

4. The phasing of the project, the land uses and related population densities, as proposed by Three Sisters 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.

5. The locations of community services, transportation routes and public utilities, as proposed by Three Sisters for the Bow Valley portion of the project, are approved, but the locations and design details may be changed with the approval of the Town of Canmore.

6. Prior to the construction of any facilities over an undermined area, Three Sisters shall, to the satisfaction of the Town of Canmore, complete the four stage assessment of the safety of the area for development and take any remedial action required by the Town of Canmore.

…

14. Three Sisters shall incorporate into its detailed design, provision for wildlife movement corridors in as undeveloped a state as possible, and prepare a wildlife aversive conditioning plan, both satisfactory to Alberta Forestry, Lands and Wildlife. …

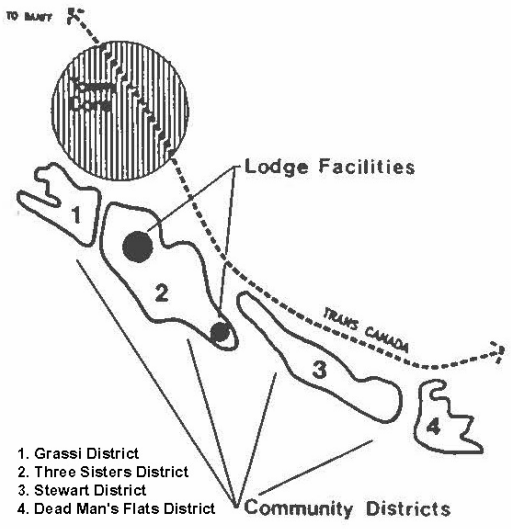
[13] Following the NRCB Approval, TSGR prepared two documents which were submitted to the NRCB for review. On June 2, 1994 the NRCB provided a letter stating:

> Further to your recent request for clarification concerning the NRCB Approval of the Three Sisters Report, we have reviewed the two documents provided to us by the Three Sisters Resorts Inc: Project Summary: NRCB Implementation Plan (Draft) - Background Information - February 1994; and Project Summary: NRCB Implementation Plan - April 1994. As we understand the documents, they were prepared by Three Sisters Resorts Inc. to summarize the development as approved in the public interest by the NRCB.
>
> The staff of the NRCB have examined the documents and concluded that they accurately reflect the approval of the Application issued by the NRCB. The documents also highlight two specific aspects, which the NRCB anticipated would require adjustments to the development to reflect the NRCB Approval: "a downsized resort located in the Three Sisters Creek area" and a change in the design of the project in the area immediately north of the Wind Valley boundary line. …

[14] The April 1994 document Project Summary: NRCB Implementation Plan (1994 Implementation Plan) described four community districts, with details of specific uses in development pods within each district. The general description of each Community District was listed as follows:

1. GRASSI DISTRICT - This District, as a natural extension of the town, will provide an affordable residential product within a natural open space landscape. Local convenience commercial facilities may be appropriate to this area. This District is adjacent to existing development areas of Canmore.

2. THREE SISTERS DISTRICT - This District includes a central core of Lodge/Resort facilities and associated retail. It will be the major resort employment centre and business base of the project. Residential components will consist of a combination of primary residences, second home/recreation properties, retirement communities and natural open space as recommended by the N.R.C.B.



3. STEWART DISTRICT - Community service related facilities such as schools and local shopping in conjunction with residential development are within the Stewart District. The diverse residential component includes apartments, medium and lower density housing, and open space.

   The Community service core comprises a significant employment centre.

4. DEAD MAN'S FLATS DISTRICT - This District primarily provides low density single and multi family housing as recommended by the N.R.C.B. Average lot size is about one half acre. A highway commercial component is also included.

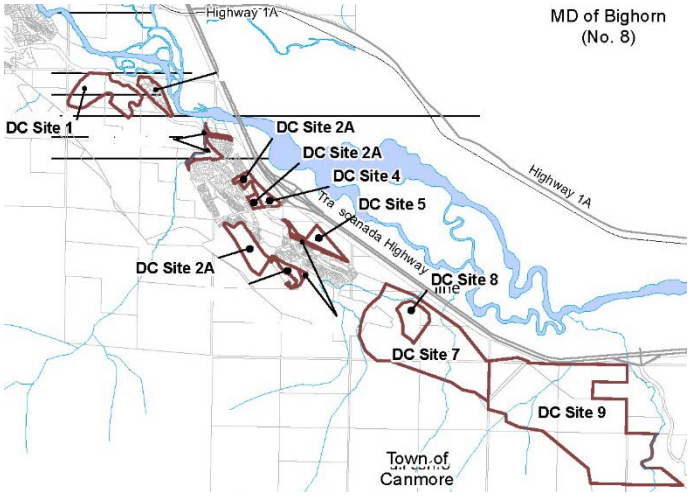
   Open natural spaces will predominate.

[15] In 1995, the *Planning Act* was repealed and replaced with Part 17 of the *Act*. It included s. 619, which provided for paramountcy of provincial approvals. The current version reads:

> 619(1) A licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC 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 Land and Property Rights Tribunal or any other authorization under this Part.

[16] In April 1996, TSGR applied to redesignate Pods 7 and 8 in the Grassi District for residential purposes. The Town approved the portion of the application corresponding to Pod 8 and refused to redesignate the majority of Pod 7. TSGR appealed to the Municipal Government Board (MGB), the predecessor to the LPRT, pursuant to s. 619 of the *Act*. The MGB heard the matter and issued MGB 35/97 ordering the Town to amend the Town's Land Use Bylaw (LUB) to the extent required to be in accordance with the complete redesignation application originally submitted by TSGR.

[17] The Town applied to the Court of Appeal for leave to appeal MGB 35/97. Leave was granted on seven questions of law or jurisdiction. The Court application was not pursued, and in April 1998, the Town and the applicant entered into a settlement agreement. Bylaw DC1-98 was approved, which 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 LUB.



[18] In September 2004 the Town adopted the Resort Centre Area Structure Plan (2004 Resort ASP) comprising sites 1 and 3 of DC1-98. It planned for a golf course and resort accommodation on an area of land slightly larger than the Three Sisters ASP area. At the same Council meeting, the Town adopted the Stewart Creek ASP for sites 2B, 5 and 6 of DC1-98. The development of Stewart Creek proceeded and

the residential portions of the plan are generally constructed, while development of the commercial portions has 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.

[19] 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. The application for the Three Sisters Mountain Village Area Structure Plan was submitted in April 2013; however, Town administration did not support the application and did not recommend Council give first reading. A number of meetings were held, after which PwC determined that there was no value at the time to continue with the municipal approvals process, and that the most prudent and commercially reasonable course of action was to market the lands on an as-is where-is basis. The Appellant acquired the lands in September 2013.

The Smith Creek and Three Sisters ASP applications

[20] The Town's approval process requires the adoption of an ASP for lands prior to any subdivision or development. The Smith Creek ASP application process commenced in April 2015 when Council approved a motion to direct administration to proceed in accordance with the Collaborative ASP Working Together Guideline for the preparation of an ASP for the Smith Creek area (sites 7, 8 and 9 in DC1-98). The delineation of the wildlife corridor in the vicinity of these lands had not been determined and it was decided to delay application until the corridor alignment was approved.

[21] The Three Sisters ASP application process commenced in January 2016. TSMVPL determined that another golf course in the Resort Centre would no longer be economically viable due to a decline in the demand for golf in North America and a market saturation of golf courses in the Bow Valley. The 2004 Resort ASP had envisioned the golf course as an important feature; therefore, an alternative use for the golf course land was necessary and in 2017, TSMVPL submitted an application to amend the 2004 Resort ASP to remove the 110 ha golf course development and allow for the potential addition of 15-20 ha of commercial lands and up to 475 additional resort accommodation or residential units. TSMVPL considered this to better align with the Town's MDP and to address lands occupied by an unfinished and unfeasible golf course. This amendment to the 2004 Resort ASP, the Three Sisters Mountain Village Resort Centre Area Structure Plan, Bylaw 23-2004, was defeated by Council at first reading in May 2017.

[22] After the defeat of the proposed amendment, Terms of Reference for the Smith Creek and Three Sisters ASP were prepared, to outline items to be considered as part of developing the ASPs and role of Administration in working with the applicant. Council approved this document in October 2018. In February 2020, AEP approved the wildlife corridor alignment, along with recommendations to which TSMVPL agreed to commit.

[23] In December 2020, TSMVPL applied to the Town for approval of the two ASPs. Both bylaws received first reading in February 2021, followed by a public hearing 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 but postponed third reading. The Three Sisters ASP was defeated at third reading on May 25, 2021.

PRELIMINARY MATTER – JURISDICTION

[24] The appeals of the Smith Creek ASP and the Three Sisters ASP were filed pursuant to s. 619, which was included in Part 17 of *Act* when it was proclaimed in 1995. Section 619 states:

> 619(1) A licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC 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 Land and Property Rights Tribunal or any other authorization under this Part.
>
> (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).
>
> (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 after 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, AER, AEUB or AUC.
>
> (4) If a municipality that is considering an application under subsection (2) holds a hearing, the hearing may not address matters already decided by the NRCB, ERCB, AER, AEUB or AUC except as necessary to determine whether an amendment to a statutory plan or land use bylaw is required.
>
> (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 …

Preliminary Issues

[25] The Town raised two issues with respect to whether the LPRT had jurisdiction to hear and decide the appeals. It was agreed by the parties that the preliminary matter would apply to both appeals and would be argued at the same time:

1. Does the application of s. 619 offend the presumption against retrospective legislation, as s. 619 did not exist when the NRCB Approval was issued in 1992?

2. Does the LPRT have the authority under the *Act* to consider the appeal given that s. 619(5) refers only to a statutory plan amendment, while the ASPs in question are new statutory plans?

Town's Position on Preliminary Jurisdictional Issues

[26] The Town submits the LRPT does not have jurisdiction to hear the two appeals. Section 619 is retrospective in nature and it ought not to be given retrospective application to facts that occurred before its enactment. Accordingly, s. 619 of the *Act* does not apply either to the approval process under s. 619(2) or to grant jurisdiction to the LPRT under s. 619(5).

[27] In the alternative, if s. 619 is found to apply to the facts in issue, the application falls outside the scope of s. 619(5), which refers only to statutory plan amendments; therefore, it is outside of the jurisdiction of the LPRT.

Section 619 Retrospectivity

[28] Section 619 is retrospective in nature: a retrospective statute operates for future events only, but changes the legal effect of events that occurred prior to its enactment. This is contrary to the presumption against interference with vested rights, whereby legislation attaches a new consequence to a past event. As outlined by the Supreme Court of Canada in *Brosseau v. Alberta Securities Commission* [1989] 1 S.C.R. 301

> The so-called presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit. As Elmer Driedger, Construction of Statutes (2nd ed. 1983), explains at p. 198:
>
> > . . . there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption. [emphasis added]

[29] A prejudicial effect includes situations where new legislation imposes a new duty or obligation with respect to an event that occurred in the past. The presumption against retrospective application can be rebutted where there is a clear legislative intent that a statute was intended to apply to past events. The NRCB Approval was rendered in 1992; therefore, properly construed, s. 619 is retrospective because it attaches legal consequences (a municipality's mandatory approval) to a past event (a decision rendered by a provincial board). The consequences of s. 619 is prejudicial as it imposes a new obligation with respect to that past event.

[30] The effect of applying s. 619 to a past approval of the NRCB would prejudice the municipality and impose upon it a new duty and prescribed authority; therefore, the presumption that it should not apply to that past event is engaged. Section 619 does not include any clear and unambiguous language demonstrating that the legislature intended the section to apply retrospectively; consequently, the presumption has not been rebutted. Nothing in Hansard suggests that retrospective application was intended, or even contemplated. Therefore, properly interpreted, s. 619 only applies to licences, permits, approvals or other authorizations granted by provincial bodies after its enactment in 1995.

[31] The Town acknowledges the MGB considered s. 619 in MGB 35/97 and found it was not retrospective in nature. However, the Town submits the MGB erred in both principle and law, and therefore its previous decision ought not to be followed. Tribunals are not bound by their previous decisions and the issue should be reconsidered, applying the correct legal framework. The factor that determines whether a statute is retrospective is whether it attaches new legal consequences to past discrete events, as opposed to a status, characteristic or ongoing condition. Although the MGB found the statute was not triggered by a discrete event, the Town disputes its reasoning. The MGB stated:

> The NRCB Approval is a continuing fact and is not isolated to the year the Approval was granted. This is evidenced by the ongoing requirement for local approvals and the fact that the Approval was in respect of a project estimated to continue over a 20 year period

[32] This conclusion is problematic, firstly, because it confounds the NRCB approval and local approval, and views them as one single (and, therefore, ongoing) event. However, s. 619 is premised on provincial and local approvals being distinct - s. 619 was enacted because of the need to impose a hierarchy. Moreover, the logic is flawed as it fails to distinguish between the *approval* of a project and its *implementation.* On this point, the MGB continued by noting:

> Further, any decision made by the MGB under Section 619 does not have a retrospective or retroactive effect on the Approval of the NCRB. It is clear that the NRCB prevails.

[33] While the statute does operate in this fashion, the MGB neither considered fully whether the presumption was rebutted, nor did it apply the proper test when it stated:

> The legislation on its face, by necessary implication, reflects that the Legislature did intend Section 619 to apply to the Three Sisters NCRB Approval of 1992.

[34] This is not the test. The presumption can only be rebutted by evidence of clear legislative intent. A finding of "necessary implication" without further consideration of the statutory language or its reason for being falls short of this threshold. In light of subsequent case law dealing with retrospectivity, s. 619, properly construed, is retrospective in nature and the presumption against its operation to facts that occurred prior to its enactment has not been rebutted; therefore, the LPRT does not have jurisdiction.

<u>New ASP or Amendment</u>

[35] The Town's failure to enact a new bylaw falls outside of the scope of s. 619(5), which states: "If a municipality does not approve an application … <u>to amend</u> a statutory plan or land use bylaw … the applicant may appeal to the Land and Property Rights Tribunal by filing with the Tribunal [emphasis added]."

[36] Subsection 619(5) lists the instances in which the LPRT has jurisdiction, and that list is closed and exhaustive. Moreover, the approach to interpretation of municipal statutes that requires they be given a broad, liberal construction is concerned with maximizing the semantic content of what the existing words in a text can bear; it cannot be used to add elements to the text itself.

[37] The Town cited the Federal Court of Appeal in *Watkin* v. *Canada (Attorney General)* 2008 FCA 170 which upheld the Human Rights Commission's finding that it could not consider the seizure of drugs under the *Food and Drugs Act* as the government's actions did not constitute "provision of services" as referenced in the Commission's enabling legislation:

> In reaching this conclusion, I have had in mind throughout that the Act, being dedicated to the advancement and protection of human rights, should be given a broad, liberal and purposive interpretation in order to maximize its reach. However this is not a matter of giving the word "services" a generous meaning in order to achieve that goal; this is a matter of not giving that word a meaning that it cannot bear.

[38] Similarly, finding that the LPRT has jurisdiction to hear an application upon a municipality's denial to implement a new statutory plan would accord a meaning to the term "amendment" that the word simply cannot bear.

[39] Giving primary significance to the text of a legislative provision is compatible with a broad, purposive interpretation, and is in fact required. As the Supreme Court of Canada explained in *Quebec (Attorney General)* v. *9147-0732 Québec Inc*, a purposive interpretation must not overshoot or undershoot the actual purpose of the provision. Giving primacy to the text is how this is achieved, and therefore ought to be both the starting point and the anchor of a broad, purposive interpretation.

[40] The legislative context suggests the omission of new statutory plans and bylaws from s. 619(5) was not an error. As a whole, s. 619 only deals with amendments and not new bylaws or statutory plans. Subsection 619(2) is triggered upon an application for a "statutory plan *amendment*" or a "land use bylaw *amendment*". Section 619(7) provides the LPRT can only consider whether "the proposed statutory plan or land use bylaw *amendment*" is consistent with a provincial authorization. Many other provisions in the *Act* draw a distinction between *new* plans and bylaws and *amendments* to statutory plans and bylaws. For instance, s. 636 of the *Act* sets out different notice procedures a municipality must follow when preparing a new statutory plan and amending a statutory plan, thereby recognizing a distinction. Similarly, s. 631, which deals with Intermunicipal Development Plans, gives guidance for their adoption and requires that they include provisions setting out a procedure for their amendment, again drawing attention to the fact that these distinct concepts were known to the drafters of the *Act*. The *Act* also recognizes this distinction with respect to bylaws.

[41] It can be inferred that the Legislature was aware of these differences and the decision not to include new statutory plans and bylaws was a deliberate choice, not an oversight. This interpretation is well supported based on established principles of statutory interpretation. As explained by the Federal Court of Appeal, "the expression of one thing in a statute usually suggests the exclusion of the other (*expressio unius est exclusio alterius*)" - i.e. where the legislator has set out a list of items and fails to list others that are comparable, the presumption is that this silence is deliberate - the legislature turned its mind to it and opted not to make the inclusion. Given the *Act* as a whole suggests the difference between new and amended bylaws and statutory plans was known to the drafters, the presumption is even stronger.

[42] The Town noted that appeal mechanisms concerning municipal approvals are tied to the forms applications can take, as set out in s. 619(2): a statutory plan amendment, a land use bylaw amendment, a subdivision approval, a development permit or other authorization. Other than *amendments* to statutory plans and to land use bylaws, the *Act* already has appeal mechanisms in place - development permit and subdivision appeals go to the Subdivision and Development and Appeal Board (SDAB) or the LPRT. Having other review procedures already in place for various authorizations granted at the municipal level, the legislative context indicates s. 619(5) was intended to fill a gap and the LPRT need only be concerned with municipalities' failure to amend land use bylaws or statutory plans. Challenges to new statutory plans or new land use bylaws are properly judicial review applications to the Court.

[43] A new land use bylaw or statutory plan engages broad based policy considerations relating to land use within the municipality; therefore, judicial review and the corresponding deference it accords Council as the decision-maker is better suited to reviewing new bylaws. The limited scope of what the

LPRT can consider under s. 619(7) suggests the Legislature intended it to deal only with the discrete issue of consistency with a provincial approval, which is better suited for consideration in the context of a review of a bylaw amendment than of an entire bylaw.

[44] To enlarge the LPRT's jurisdiction risks frustrating the statutory scheme by rendering other means of review redundant. Constraining the LPRT's jurisdiction to matters concerning amendments does not run afoul of the purpose of s. 619, which the Court of Appeal in *Borgel* v *Paintearth (Subdivision and Development Appeal Board)* 2020 ABCA 192 *(Borgel)* stated as follows:

> Considering the text of s 619 in the context of the *MGA* as a whole and its legislative history, and having regard to lower court judicial and tribunal interpretation, it is apparent that the purpose of s 619 is to reduce regulatory burdens and increase administrative efficiency and consistency. Section 619 achieves this 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.

[45] Subsections 619(1) and 619(2) give effect to this purpose. Subsection 619(1) says unequivocally that a decision issued by a provincial board "prevails" whereas ss. 619(2) prevents a municipality from revisiting the substance of the decision and any considerations that were already accounted for by a provincial body and requires the relevant municipal approval process to adopt the decision made at the provincial level.

[46] Subsection 619(5), however, sets out the process to seek a review of a municipality's decision in the event it does not give primacy to a decision taken at the provincial level. More particularly, s. 619(5) is concerned with whether the LPRT has the jurisdiction to undertake that review. Simply put, limitations on a municipality's decision making over land use decisions and the mechanisms available to challenge those decisions are distinct. Interpreting s. 619(5) in a manner that only accords jurisdiction to the LPRT in the case where a municipality did not approve an amendment to a statutory plan or land use bylaw, i.e. construing s. 619(5) narrowly, does not detract from the purpose of s. 619 as identified by the Court of Appeal. Giving s. 619(5) a broad construction that goes beyond its text is not necessary for s. 619 to achieve its purpose.

[47] The Town conceded that the Appellant could have applied for an amendment to the land use bylaw (LUB) notwithstanding that the Town's planning process requires an ASP in advance of such an application. If the Appellant had done so, the Town agreed that the LPRT would have jurisdiction to hear an appeal of the Town's refusal to amend the LUB.

TSMVPL's Position on Preliminary Jurisdictional Issues

[48] TSMVPL submits that the LPRT does have jurisdiction to consider the appeals, and set out the relevant historical context. The *Natural Resources Conservation Board Act (NRCB Act)* was proclaimed on June 3, 1991. The NRCB's role includes determining whether provincially important recreation and tourism projects are in the public interest. Responsibility for evaluating Three Sisters' proposed development was transferred to the NRCB under the *NRCB Act* at the time it was proclaimed. The NRCB issued its Decision Report on November 25, 1992. On January 6, 1993, the Lieutenant Governor authorized the NRCB to grant Approval No. 3 in the form set out in Appendix "C" of the NRCB Decision Report.

Section 619 Retrospectivity

[49] In 1994, Alberta Municipal Affairs circulated a document entitled "Alberta Planning Act Review '94 – Proposals". The document included a proposal to divide responsibility between the provincial government and municipalities with respect to development projects; to give effect to the division of responsibilities, Alberta Municipal Affairs suggested amendments to s. 2.1(1) of the *Planning Act*. The proposed amendment to the *Planning Act* did not take place, since it was repealed and replaced by Part 17 of the *Act* in 1995. However, Part 17 introduced s. 619, which was based on the proposed *Planning Act* amendment. Section 619 was enacted to clarify the relationship between provincial and municipal approvals, and to ensure consistency by granting paramountcy to provincial approvals and limiting local autonomy to that extent. Quoting from *Hansard*, TSMVPL noted it was contemplated that the MGB would handle disputes that arose where municipal decisions were arguably not consistent with provincial approvals:

> What this government wants is to have local areas have local control over their affairs with the province laying down some guidelines for consistency. … Some municipalities have asked for a clarification of the relationship between NRCB, ERCB, and Alberta Energy and Utilities Board approvals and municipal approvals. The amendments in Bill 32 do just that. Municipalities will be able to deal with legitimate municipal concerns in the normal approval process while respecting NRCB and ERCB approvals. Dispute resolution may be referred to the municipal government board should municipal decisions not be consistent with NRCB and ERCB approvals. It is expected that only a few municipalities will be affected by these provisions.

[50] There is no retroactive or retrospective effect of s. 619 on the NRCB Approval or the rights the NRCB Approval grants TSMVPL. A statute can modify the future legal effect of a fact that occurred prior to its passage without being retrospective or retroactive. This is the case with s. 619. The NRCB Approval is an ongoing fact, and was intended to apply to a project that would take decades.

[51] Section 619 recognizes the paramountcy of the decisions of provincial boards, including those that no longer existed at the time s. 619 was introduced. The Legislature intended parties to have a right to appeal decisions of municipalities that were inconsistent with provincial approvals, even where the provincial approval pre-dated the addition of s. 619 into the *Act*. Alternatively, even if s. 619 were found to operate retrospectively, legislation that provides a benefit to a party does not offend the presumption against retrospectivity. The Town's argument fails to recognize that the Town is a decision maker in the ASP approval process; it is not a "party" whose rights are adversely affected.

[52] Section 619 is not retrospective; it has "immediate effect." *The Interpretation of Legislation in Canada*, describes immediate effect as:

> Where a new statute is declared applicable, for the future, to ongoing situations, it is said to have immediate effect. This notion encompasses situations in which it is either the facts contemplated by the rule or the legal effects of the rule which are ongoing.

[53] This rule is codified in the *Interpretation Act*, which requires that enactments "be construed as always speaking and shall be applied to circumstances as they arise." The Supreme Court of Canada in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 stated:

> Professor P.-A. Côté writes in *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 169, that "retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule". He adds that "[a] statute has immediate effect when it applies to a

> legal situation that is ongoing at the moment of its commencement: the new statute governs the future developments of this situation" (p. 152). A legal situation is ongoing if the facts or effects are occurring at the time the law is being modified (p. 153). 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. [emphasis added]

[54] Section 619 has immediate effect and applies to the NRCB Approval (which exists as a continuing fact) and Town Council's decision not to approve the Smith Creek ASP. The MGB rejected the same argument concerning retrospective legislation when the Town raised it in 1997. MGB 35/97 stated:

> The Town challenged the MGB's authority to hear and decide this appeal which was lodged under Section 619 of the Act. The MGB does not agree with the Town's contention that Section 619 operates retrospectively or retroactively with regard to the 1992 NRCB Approval for the Three Sisters project. The NRCB Approval is a continuing fact and is not isolated to the year the Approval was granted. This is evidenced by the ongoing requirement for local approvals and the fact that the Approval was in respect of a project estimated to continue over a 20 year period. Further, any decision made by the MGB under Section 619 does not have a retrospective or retroactive effect on the Approval of the NRCB....
>
> ... The MGB considers that the legislation on its face, by necessary implication, reflects that the Legislature did intend Section 619 to apply to the Three Sisters NRCB Approval of 1992. Furthermore, the passing of Section 619 provided a remedy not otherwise available. Without it the NRCB Approval granted rights and authority to Three Sisters which it could not effectively enforce. The Courts could hear a motion by Three Sisters that the redesignation process by the Town was not carried out in accordance with the law. However it is not clear that the type of remedy sought by Three Sisters would be available through the Courts.

[55] The MGB was correct in addressing the Town's arguments in 1997, and that same reasoning applies today. There is no compelling reason for the LPRT to depart from this reasoning; indeed, to ignore the reasoning would be an error. As the Supreme Court of Canada has held in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide.

[56] The language of s. 619 supports the interpretation that s. 619 applies to provincial approvals, which pre-date it. Five provincial bodies are listed, including the Energy Resources Conservation Board (ERCB). At the time s. 619 came into effect, the ERCB no longer had any power to issue licences, permits, approvals or other authorizations. As all decisions of the ERCB would predate s. 619, it must be interpreted to apply to provincial approvals that predate it.

[57] Should the LPRT find s. 619 does have a retrospective effect despite the reasoning in MGB 35/97, the presumption against retrospectivity still does not apply to s. 619. That presumption does not apply to legislation that creates a "benevolent consequence." As stated by the Town, the guidance from the Supreme Court of Canada shows the presumption against retrospectivity applies only to prejudicial statutes. A party's right of appeal where a municipality has not acted in accordance with a section of the *Act* is a "benevolent consequence to a past action" and does not attract the presumption against

retrospectivity. The MGB identified the beneficial consequence of s. 619 in MGB35/97 noting it provided a remedy not otherwise available.

[58] There is societal benefit to establishing clear paramountcy of provincial approvals. The Court of Appeal described this benefit in the municipal law context in *Love v Flagstaff (County of) Subdivision and Development Appeal Board* 2002 ABCA 292:

> The need for predictability is equally imperative. The public must have confidence that the rules governing land use will be applied fairly and equally. This is as important to the individual landowner as it is to the corporate developer. Without this, few would wish to invest capital in an asset the value of which might tomorrow prove relatively worthless. This is not in the community's collective interest.

[59] To assess whether s. 619 provides a "benevolent consequence" – i.e. a benefit or a prejudice, the LPRT must determine the party whose rights are affected by s. 619. The only party whose rights are affected by s. 619 is a party that holds a provincial approval. A plain reading of s 619(1) states that provincial approvals prevail "over any statutory plan, land use bylaw, subdivision decision or development decision by a development appeal board, subdivision and development appeal board or the [LPRT]." These words reflect a legislative intention to protect the rights of the approval holder and to limit local autonomy in some cases.

[60] The Town's argument that s. 619 is prejudicial and imposes a new obligation or duty on the municipality misconstrues whose rights are affected. The municipality is inserting itself as a recipient of rights under the NRCB Approval. The NRCB Approval does not provide any rights to the Town. The Town is an administrative decision maker in the ASP approval process. It has an obligation to comply with s. 619 and must act in accordance with the statutory regime. Acting in accordance with the Legislation is a legal obligation and cannot be considered prejudicial.

<u>New ASP or Amendment</u>

[61] The second jurisdictional question is whether s. 619 provides TSMVPL with a right of appeal. In 1987, pursuant to Ministerial Order No 285/87, the South Corridor Area Structure Plan was adopted. It covered 6,400 acres of land stretching from the Town of Canmore Urban Fringe Boundary up to the Pigeon Mountain recreation area. This area includes the plan area of the Smith Creek ASP.

[62] In 2004, the Town approved the 2004 Resort Centre ASP for lands that include the Three Sisters ASP plan area. In 2017, TSMVPL applied to amend the 2004 Resort Centre ASP. On May 2, 2017, Town Council denied first reading of the bylaw and cited a lack of clarity on the resort, the extent of the amendments, and development phasing of Smith Creek and the Resort as key reasons why the ASP did not move forward. TSMVPL had to undertake a new ASP process to provide a holistic vision for the balance of the undeveloped Three Sisters Lands, comprising the Smith Creek ASP and Three Sisters ASP plan areas. The Town and TSMVPL agreed to Terms of Reference that provided the foundation, process, and expectations for the development of the Smith Creek and the Three Sisters ASPs. Council approved the Terms of Reference on October 2, 2018 and TSMVPL spent the next several years collaborating with the Town under the Terms of Reference. In December 2020, TSMVPL applied for approval of the two ASPs. Town Council rejected both in the spring of 2021.

[63] TSMVPL argues the two ASPs are an amendment, leaving no question as to whether the LPRT has jurisdiction under s. 619(5). The Smith Creek ASP is the latest attempt to update the area structure plan for these lands and is, in fact, an amendment to an existing statutory plan, the 1987 South Corridor Area Structure Plan, which the Town acknowledged at the time of its 1991 annexation application.

Similarly, the Three Sisters ASP is an amendment to an existing statutory plan, the 2004 Resort Centre ASP.

[64] Alternatively, even if the ASPs are new statutory plans, a proper interpretation of s. 619 provides TSMVPL the right to appeal to the LPRT. The Legislature intended s. 619 to provide a complete code to deal with the interrelationship between provincial approvals and the municipal planning process. To give effect to this intention, the LPRT's jurisdiction must be interpreted textually, contextually and purposively as summarized by the Court of Appeal in *Edmonton (City of) Library Board v Edmonton (City of)*, 2021 ABCA 355:

> [29] The question before this Court involves the scope of an appeal board's variance power under the *MGA*. The words in the *MGA* must be read in their entire context, in their grammatical and ordinary sense and in harmony with the legislative scheme, its object and the intention of the Legislature: ...
>
> [30] A contextual approach recognizes that what words mean depends on the entire context in which they have been used: ... However, in addition to considering the text and context, "legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision": ... Therefore, the meaning of a provision must have regard to its text, context and purpose: ...

[65] The modern approach is consistent with the *Interpretation Act*, which provides:

> 10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its object.

[66] These principles imply s. 619 must be read as a whole, in the context of Part 17 and the rest of the *Act*. Similarly, the subsections within s. 619 must be read together to form a rational, internally consistent framework. An interpretation that excludes applications for new statutory plans from s. 619(2), (5) and (8) would undermine the coherence of s. 619, and would not advance the purposes for which s. 619 was enacted.

[67] The Court of Appeal endorsed an interpretation that favours reading the whole of s. 619 in *Borgel*. The Court determined that s. 619 is to be interpreted broadly and purposively and rejected a narrow reading of the term "municipality" in s. 619, concluding that it included an "SDAB". The Court stated:

> Considering the text of s 619 in the context of the *MGA* as a whole and its legislative history, and having regard to lower court judicial and tribunal interpretation, it is apparent that the purpose of s 619 is to reduce regulatory burdens and increase administrative efficiency and consistency. Section 619 achieves this 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.
>
> Section 619 is aimed at distinguishing between provincial and local planning authorities. Section 619(1) explicitly includes the "subdivision and development appeal board" and s 619(2) refers back to s 619(1). Section 619(4) is engaged where a municipality holds a hearing, and the SDAB is the only local planning body required to have hearings. Nothing in the text of the *MGA* (including the broad definition of "municipality" in s 1(1)(s)) excludes the SDAB from the purview of s 619. Moreover, to do so would defeat the purpose of the legislation.

> The SDAB correctly concluded that it was included in the definition of "municipality" for the purpose of s 619 of the MGA.

[68] Despite the fact that neither the term "SDAB" nor "Municipal Planning Commission" are explicitly mentioned in the text of 619(2), the Court took a broad and purposive approach and endorsed the SDAB's conclusion that "SDAB" was included in the definition of "municipality" even though the plain language of s. 619(2) alone does not refer specifically to SDABs. Similarly, a broad and purposeful reading of s. 619(5) should take into consideration the broad wording in s. 619(2), which refers to "other authorizations under this Part". This wording shows the Legislature's intent was to provide a catch all right of appeal to a party whose application does not otherwise fit into another category of municipal approval provided by 619(2).

[69] Nothing in the text, context, or purpose of s. 619 suggests the Legislature intended to direct appeals of new statutory plans to the Courts rather than the LPRT. The Town's proposed interpretation defeats the purpose of the legislation by creating an artificial distinction between "new" and "existing" statutory plans. The result would be that any provincial approval concerning lands without a statutory plan in place would be excluded from appeal to the LPRT. As well, a municipality could frustrate the purpose of s. 619 by inserting a requirement for a statutory plan into the land use bylaw, and then insisting an applicant prepare a "new" statutory plan before any rezoning, subdivision or development on lands. This is precisely what has happened with the two ASPs. If the Town's interpretation is accepted, a developer who seeks to work with a municipality to develop a new statutory plan would have its right of appeal to the LPRT extinguished; the applicant would have no recourse except judicial review if a municipality decided not to approve a "new" statutory plan.

[70] The proper interpretation of s. 619 supports two conclusions: first, s. 619 provides a complete code that governs the relationship between certain provincial approvals, which prevail over municipal decisions; second, s. 619 provides a broad right of appeal to the LPRT. Limiting the right of appeal to amendments to statutory plans and land use bylaws would be contrary to the purpose of the legislation, which is to "reduce regulatory burdens and increase administrative efficiency and consistency" by ensuring provincial authorizations prevail over other decisions.

NRCB's Position on Preliminary Issues

[71] The NRCB explained its jurisdiction and authority under the *NRCB Act*, and argued that s. 619 is not retrospective. It took no position on the other preliminary issue concerning the LPRT's jurisdiction.

[72] The NRCB is a corporation established under section 12 of the *NRCB Act*. The purpose of the *NRCB Act* is

> 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.

[73] The process for NRCB decision-making under the *NRCB Act* involves the NRCB making a finding as to whether a project is in the public interest - this is the "public interest decision." In the case of the subject NRCB Approval, the reasons for the public interest decision are set out in the NRCB Decision Report No. 9103 dated November 25, 1992. If the NRCB finds a project not to be in the public interest, it will generally refuse to grant an approval; in contrast, if it finds the project is in the public interest, it

generally makes a recommendation to the Lieutenant Governor in Council to approve the project. The recommendation may be accompanied by conditions "that the Board considers appropriate."

[74] The Lieutenant Governor in Council (LG) considers the NRCB's recommendation, and may authorize the approval, authorize with prescribed terms and conditions, or not authorize the approval. If the LG authorizes the approval (with or without terms and conditions), the LG makes an Order in Council. After receiving an Order in Council authorizing the approval, the NRCB then issues a formal approval. In the case of Three Sisters Approval, this took place in January 1993.

[75] Section 10 was added to the *NRCB Act* in 1997 and provides the NRCB with authority to amend an approval that it has granted. The NRCB may take action to effect the purpose of the *NRCB Act* (with approval of the LG), and may do necessary or incidental things to exercise a power or duty under the NRCB Act, or another enactment. The NRCB also has various powers that assist with its project reviews. An order or direction of the NRCB may be appealed to the Court of Appeal only on a question of jurisdiction or law, and only with leave (if filed and served within 30 days). The *NRCB Act* also contains a privative clause at section 32.

Section 619 Retrospectivity

[76] The NRCB argues s. 619 is prospective in nature. It applies to all existing NRCB approvals regardless of whether they were granted prior to or after September 1, 1995. Section 619 places restraints on municipalities, SDABs and the LPRT, and requires them to bend their decisions around existing approvals, licences, or permits; however, it has no impact on the legal effect of decisions of the NRCB. As the MGB noted in its 1997 decision, the MGB "had no authority to alter the decision originally issued by the NRCB."

[77] Section 619 states that an approval "granted by" the NRCB "prevails" over various instruments that a municipality, SDAB or LPRT may produce (Municipal Instruments). Although the wording "granted by" suggests the granting has occurred before the Municipal Instrument comes about, nothing in the text, context, or purpose of s. 619(1) suggests that s. 619 applies only to NRCB approvals granted after the coming into force of the provision. Had the Legislature intended that restriction, it could have said so. The present tense of "prevails" speaks to a state going forward, which is to be expected since s. 619 is intended to govern the actions of municipalities, SDABs and the LPRT going forward after September 1, 1995. The legal effect of s. 619 is upon the Municipal Instrument, rather than an existing ("granted") NRCB approval.

[78] An NRCB approval is an example of what R. Sullivan calls a "continuing situation" of fact in *Sullivan on the Construction of Statutes, 6th ed*:

> Continuing situations consist of a fact that endures over a period of time, such as residing in a place, possessing a thing or being a parent. The duration of a continuing situation is sometimes set out in legislation … Otherwise, the situation continues until the underlying fact comes to an end. Many continuing situations consist of having a legal status, such as citizenship or ownership and could be thought of as an ongoing legal effect rather than an ongoing fact.

[79] For an NRCB approval, the fact begins when the approval is issued and the situation continues until the approval is cancelled, or, presumably, when a project is decommissioned. The 1993 Three Sisters Approval existed in 1995, applied in 1995, and still applies in 2022. As long as s. 619 is in its present form, a municipality will, whenever it takes action in relation to a statutory plan, need to ensure

its action is consistent with any approvals, licences and permits issued by the five statutory bodies identified in s. 619.

[80] The Three Sisters project is still being built out; nearly 30 years after the NRCB granted the approval. However, s. 619 binds a Municipal Instrument in relation to any NRCB approval that pre-dates it, and the impact of s. 619 after September 1, 1995 is the same whether or not the approved project is complete. The impact is also the same whether the approval was "granted by" the NRCB before or after September 1, 1995. The salient fact is that an NRCB approval has been granted.

Findings

1. The NRCB Approval has effect under s. 619 notwithstanding that s. 619 was enacted after the NRCB Approval was issued.
2. Both the Smith Creek ASP and the Three Sisters ASP amend a statutory plan for the purposes of s. 619.
3. Even if the Smith Creek ASP and Three Sisters ASPs were new statutory plans, s. 619 provides for an appeal to the LPRT.

Decision

[81] The LPRT has jurisdiction to hear the appeal.

Reasons

Section 619 Retrospectivity

[82] The LPRT agrees with TSMVPL 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.

[83] Having found that s. 619 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.

New ASP or Amendment

[84] 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.

[85] 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.

[86] 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.

[87] 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.

[88] The above considerations are sufficient to conclude the LPRT has jurisdiction to proceed with the appeals in the current circumstances. However, even if the South Corridor ASP and the 2004 Resort Centre ASP were not already in place and the ASPs under appeal were completely new ASPs for land where no prior statutory plan had existed, the LPRT would still have found it has jurisdiction to hear the appeals. As already noted, the purpose of s. 619 is to promote efficiency by establishing paramountcy of provincial authorizations. When the Legislature enacted this provision, it would have recognized that land use bylaws and municipal development plans were mandatory for most municipalities; further, there would be a need to amend the existing regulatory backdrop in any given municipality to allow provincially approved developments to proceed.

[89] Obvious potential amendments to this backdrop would include changes to the existing MDP and/or LUB; in other cases, the existing framework might also involve addition of ASPs or other statutory plans. Given this context, the reference to "amendments" in s. 619 should not be interpreted as amendments or changes to the existing land use-planning framework in a municipality. To interpret s. 619(8) as preventing appeals respecting new statutory plans would not serve any discernable or reasonable policy intent. This finding becomes even clearer given the observation that a municipality - as part of its internal planning practice or policy – can adopt a requirement for a "new" ASP (or Area Redevelopment Plan) before amendments to the LUB and/or MDP are considered. Such a requirement would thwart the appeal mechanism under s. 619; this absurd consequence follows from an interpretation of s. 619 that limits appeals under s. 619(8) to exclude new ASPs.

[90] In this case, the Town's LUB requires an ASP as a first step in the municipal development approval process. This requirement is reasonable and consistent with good land use planning; however, the LPRT notes that if a new ASP is not appealable under s. 619, the proponent could still apply for an LUB amendment to effect the development, along with an amendment to waive the requirement for an ASP. The Town agreed that such an application could be appealed under s. 619. In the LPRT's view, the legislature could not have intended to encourage procedures that circumvent good land use planning practices in order to preserve the right of appeal. The better interpretation recognizes that the statutory intent is to allow a broader right of appeal that encompasses applications for new statutory plans.

[91] In conclusion, while the LPRT found that the Smith Creek and Three Sisters ASPs are, in fact, statutory plan amendments, it also finds that on a purposive reading of s. 619, the LPRT would have authority to consider the appeals even if there were no pre-existing ASPs.

PRELIMINARY MATTER 2 – DISPUTED EVIDENCE

[92] At the outset of the Town's cross examination of TSMVPL's planner, J. Karpat, the Town sought to put to the witness a document that had not been disclosed previously, which purported to be a summary of the applicant's comments at the NRCB hearing. TSMVPL objected to the document and the LPRT considered submissions from the parties as a preliminary matter before proceeding.

Town's Position

[93] The document is a 19-page summary of comments made during the NRCB hearing, and is titled "Undertakings of Three Sisters Golf Resorts, Inc. re. application 9103." The hearing took 28 days and it is reasonable to rely on a summary that someone had prepared. It is stamped "NRCB COPY" and dated December 14, 1992 in handwriting at the top. The Town seeks to put to the witness certain sections of this summary document because the sections speak to the representations made on behalf of Three Sisters during the hearing. Condition 1 of the NRCB Approval indicates it is based not only on the submissions but also the representation of the parties. The Town argued this document is relevant, and is a practical way to address undertakings made at the hearing. It should be allowed into evidence, as it will facilitate cross examination of the Appellant's witness regarding oral commitments made during the NRCB hearing.

[94] In response to TSMVPL's objection, the Town suggested it could go through the transcripts to obtain the specific transcript references cited in the summary document. The Town also argued that it is not the Town's role to do a consistency analysis. Whether or not the transcript excerpts factored into the Town's decision not to adopt the ASPs is not relevant to whether the LPRT should consider them in its analysis of consistency.

TSMVPL Position

[95] This document was not included in the exhibits that were received from the NRCB; it is not marked as an exhibit and is merely stamped "Received" by the NRCB. TSMVPL objected to the document given that it is somebody's unattributed interpretation of what was said at the NRCB hearing. Asking the witness to interpret this interpretation is highly prejudicial. If the Town were to submit the transcript references to provide the statements in context, TSMVPL would have no objection. There was an extensive pre-hearing disclosure process and the Town had ample opportunity to submit this document previously. It is unreasonable to question the witnesses about oral evidence given in a hearing 30 years ago. It was not contained within the exhibits from the NRCB that were noted to be undertakings of the applicant.

[96] Further, since this information was not discovered until the day before it was tendered as an exhibit at the subject hearing, it could not have been considered in the Town's consistency analysis; therefore, the LPRT should not consider it in the proceedings.

NRCB Clarification

[97] The NRCB did not have a position on the matter but provided information in response to questions and provided the Town with the transcript to assist in the specific transcript references. The date noted on the document is after the date of the decision report, and fell during the time the NRCB was

awaiting Cabinet consideration. The NRCB did not always stamp documents it received, but if it did, it would generally have been stamped on the date it was received by the NRCB.

Decision

[98] The LPRT allowed the document of excerpts from the transcript of the 1992 NRCB hearing into its record; however, in the interests of procedural fairness, offered the Appellant additional time to review the materials if necessary.

Reasons

[99] The LPRT notes the parties agreed to the disclosure deadlines set after the preliminary hearing, and this document was submitted well after the agreed to timelines. However, the LPRT recognizes this document was a printed copy in the Town's files and accepts it was not found until the commencement of the hearing. In hearings of this type, the LPRT generally prefers to accept as much relevant or potentially relevant information as is available, and evaluates the weight it should be given. Under the circumstances, the LPRT determined the transcript extracts should be admitted, as they would provide insight into representations made at the NRCB hearing. Nevertheless, the LPRT recognizes the witnesses being questioned were not present at the 1992 hearings and that answers to some questions might not be possible.

[100] The document that was entered into evidence, accepted by the Appellant, consisted of specific extracts from the transcript of the 1992 NRCB hearing, and did not include the unattributed commentary.

ISSUES

[101] The overarching issue to be decided in this appeal is whether the Smith Creek ASP is consistent with the NRCB Approval, and, if it is, whether the LPRT 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 *Act*. Generally, the Town argues that overall consistency should be the basis of evaluation, while TSMVPL argues that consistency should be considered on a section-by-section basis. There were many arguments and submissions, with TSMVPL presenting seven witnesses who presented reports detailing consistency with each section of the NRCB Approval and the Town presenting two witnesses who provided general testimony with respect to overall consistency in several areas of interest to the Town. Y2Y presented one witness and Stoney Nations provided argument.

[102] The Town and intervenors provided a single submission to apply to both ASPs under appeal. Where possible, the LPRT separated the evidence that applied to only the Smith Creek appeal; however, some evidence was combined, and was identified as such where applicable.

[103] In the subject appeal, the matters to be considered are whether the Smith Creek ASP is consistent with the NRCB Approval in the following respects:

1. The NRCB Approval provides the Town with authority to deny the ASP even if it is consistent with the NRCB Approval.
2. The NRCB Approval was for a Recreational and Tourism Project, whereas the Smith Creek ASP is predominantly residential, with commercial and light industrial development that is not located within the land that was the subject of the NRCB Approval.
3. The Smith Creek ASP includes the lands of the Thunderstone quarry but they were not included in the NRCB Approval.
4. The fiscal impact on the Town is not as beneficial as noted in the NRCB Approval.

5. The amount of housing, unit density and total population is not consistent with the NRCB Approval, nor is the affordable housing provided in the Smith Creek ASP consistent with the NRCB Approval.
6. The wildlife corridor provided is not consistent with the direction in the NRCB Approval.
7. The NRCB's finding that the project is in the Public Interest may no longer be valid given the passage of time and intervening events.
8. Overall consistency with the NRCB Approval in other respects.

Issue 1 – Authority of Town to Deny the ASP

SUMMARY OF TOWN'S POSITION

[104] The NRCB Approval does not provide carte blanche to TSMVPL to develop on the lands covered by the NRCB Approval, to effectively fill in the details later. The NRCB did not authorize development of any combination and proportion of industrial, commercial and residential development, over any period of time, and the ASPs provide for development well outside of what was considered by the NRCB. To interpret the NRCB Approval in such a way would give no meaning to the NRCB's direction that the detailed plans for development require approval from the Town and the parameters on which the NRCB relied in determining the project was in the public interest. The Town agrees that to the extent an application to amend an ASP is consistent with an NRCB approval, Council must approve it; but the inverse is also true: any matters not dealt with in the NRCB approval are subject to the usual review by Council, taking into consideration relevant planning and development concerns.

[105] The first question is whether the Smith Creek 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 Smith Creek 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 Smith Creek ASP; however, Council retains authority with respect to matters not addressed by the NRCB.

[106] The Town argues the project before the NRCB was very different from the development proposed in the ASPs, and the evidence relied upon by the NRCB is 30 years old and may not reflect the current circumstances. The NRCB Approval was granted in 1992 based on certain assumptions or parameters, and was premised on development occurring within the next 20 to 30 years. If the parameters relied on by the NRCB have changed or are no longer reliable, and to the extent development is occurring outside of the 20 to 30 year time frame contemplated by the NRCB, it cannot be said the issue has been conclusively determined by the NRCB. Development in the Town did not stand still for the last 30 years. Not only has the proposed development within the Three Sisters lands changed, so has the development surrounding it. Section 619 cannot be interpreted in such a way that undermines Council's responsibility to plan its communities in a manner, which achieves orderly, economical and beneficial development, use of land and patterns of human development, maintains, and improves the quality of the physical environment. This is the reason subdivision approvals must be endorsed within one year and most development permits require commencement of construction within 12 months. It is not good planning to have an approved subdivision or development sitting on the shelf indefinitely when changes to surrounding uses, demand for particular uses and servicing may change.

[107] The NRCB Approval is based on now 30-year-old social, economic and environmental evidence, which are the three key areas for consideration by the NRCB in determining if a proposed development is in the public interest, including demand for golf courses, hotels and residential development, population

projections and environmental policies. The evidence submitted by Three Sisters and relied upon by the NRCB may not be accurate or suitable today.

[108] Consistency with the NRCB Approval requires consistency in all respects, including the recognition by the NRCB that residents would have their opportunity to be heard at the municipal level and to completely reject the project approved by the NRCB. The NRCB Approval expressly preserved municipal discretion in section 7 of the NRCB Approval, stating it has no desire to see the interest of the local residents and stakeholders thwarted by sterilizing the effectiveness of the public process in local planning matters. The NRCB also recognized that it could approve the project but that the Applicant may not be successful in developing the parts of the project owing to failure to receive approval from the Town for more detailed plans for development in such areas.

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[109] A number of the conditions in the NRCB Approval also recognize and preserve the discretion of the Town. It allowed for changes to the design of the area north of Wind Valley, detailed timing and specific land uses and population densities, details of the locations of community services, transportation routes and public utilities for the Bow Valley portion of the project with the approval of the Town.

[110] The NRCB chose not to address matters it considered too detailed to be part of its process, because residents would be able to raise those issues during the planning process. If residents were precluded from raising these issues at the planning stage by s. 619, the public would be deprived of their opportunity. It would be inequitable for TSMVPL to take the position it has received a high-level approval which now permits them to simply change the details as they see fit, given the NRCB expressly preserved the right of the local planning authority to refuse the project based on those details. The Town argued that the NRCB's direction that the detailed timing, specific land uses and population densities and the location and design densities of community services, transportation routes and public utilities may be changed with the approval of the Town means, in effect, that these aspects of the project may only be changed with the approval of the Town.

SUMMARY OF THE APPELLANT'S (TSMVPL) POSITION

[111] TSMVPL presented a detailed section-by-section comparison of the Smith Creek ASP and the NRCB Approval and argued this analysis is appropriate to determine consistency. The reasons the Town identified for rejecting the Smith Creek ASP are not within areas the NRCB expressly reserved to the municipality's authority. The Town's failure at the public hearing to comply with s. 619(4) resulted in Council rejecting the ASPs for reasons outside their jurisdiction. The Town is required to approve the Smith Creek ASP to the extent it is consistent with the NRCB Approval. The NRCB Approval and s. 619 of the *Act* limit the Town's jurisdiction to refuse the Smith Creek ASP to circumstances where the Town has determined inconsistency between the Smith Creek ASP and the NRCB Approval or within areas specifically reserved to the Town by the NRCB.

[112] In the Reasons for Decision, the NRCB reserved the following matters to its own jurisdiction:

a. Overall structure of the development;
b. Phasing of the project;
c. Land uses;
d. General location of open spaces;
e. Density ranges;
f. General location of major transportation routes and public utilities;
g. Constraints due to undermining;
h. Constraints due to environmental and social effects; and
i. Location of wildlife corridors and buffer zones.

[113] TSMVPL argued the Town has no jurisdiction to refuse the ASP for these matters, unless the Smith Creek ASP is inconsistent with the NRCB Approval. The NRCB reserved only design guidelines and architectural controls for the Town's independent planning jurisdiction, and granted certainty to the applicant for all of the matters listed. The only changes the Town could grant to the items approved by the NRCB would be to increase the development rights of the applicant; it cannot decrease them. The NRCB granted the applicant the development rights provided for in the NRCB Approval, and left flexibility for changes to certain details to be approved by the Town.

[114] The Town has attempted to characterize the authority reserved to it by the NRCB broadly, by arguing the NRCB authorized the Town to deny the project on the basis of the flexibility granted subject to Town approval. However, this characterization is not correct. The NRCB Approval contemplated the Town allowing more than what the NRCB approved, but does not allow the Town to approve less.

FINDINGS

1. If the Smith Creek ASP is consistent with the NRCB Approval, the Town does not have the authority to deny it.
2. The NRCB Approval did not specify a time after which the approval was no longer valid.

REASONS

[115] The NRCB Approval stated that the project was approved, but that certain details could be changed with the approval of the Town. This latitude does not allow the Town to refuse the project altogether if it complies with the NRCB Approval. Section 619 requires the Town to approve the application to the extent that it complies with the NRCB Approval.

[116] The LPRT agrees the *Act* provides for certain approvals to be of limited duration, and such approvals will expire if development does not commence during the requisite time period. The NRCB Approval had no such provision, nor does the legislation impose any such time limit. While it was anticipated that development would commence within a 20 to 30 year time frame, this timeframe was not a stated requirement. Although circumstances can and do change over three decades, this fact does not imply the elapsed time authorizes the Town to deny the application if it is consistent with the NRCB Approval.

Issue 2 – Recreational and Tourism Project

SUMMARY OF TOWN'S POSITION

[117] The development proposed in the Smith Creek ASP is conceptually very different from what the NRCB approved 30 years ago, including the concept, overall design, location, land uses and overall timeframe. The NRCB approved a Destination Resort Project with 4 golf courses, 6 hotel complexes and some residential development. The NRCB concluded that sufficient demand exists, and that the project would bring in tourists, create jobs, and provide appropriate residential development for new employees as well as for second-home buyers. This project was intended to be constructed over a 20-year period. What is being proposed in the Smith Creek ASP almost 30 years after the NRCB Approval is predominantly residential with less commercial development and an anticipated build-out of a further 20 to 30 years. This timeframe will bring project completion around 50 to 60 years from the NRCB Approval.

[118] The 1994 Implementation Plan showed two commercial areas, one of which was the Lodge district. The Smith Creek ASP has no commercial area other than on the Thunderstone Lands, which were not part of the NRCB Approval. The Town argues the nature of the uses proposed makes the Smith Creek ASP inconsistent with the NRCB Approval; therefore, the Town is not required to approve it pursuant to s. 619 of the *Act*.

SUMMARY OF THE APPELLANT'S (TSMVPL) POSITION

[119] The NRCB Approval references recreational and tourism projects because they are one of the project types reviewable pursuant to the *NRCB Act*. If it had not been a reviewable project, the application would not have been before the NRCB. It is clear the project before the NRCB was not only for recreational and tourist facilities, but also included a significant residential component. The NRCB Approval must be viewed for the lands as a whole. Originally, the resort centre had been proposed to be located in the Wind Valley; however, the NRCB did not approve development in the Wind Valley.

[120] The 1994 Implementation Plan relocated the resort facilities to the Three Sisters Village District. The plan area of the Smith Creek ASP generally aligns with the Stewart Creek and Dead Man's Flats Districts in the 1994 Implementation Plan. It was contemplated that the Dead Man's Flats District would be primarily low-density single and multi-family housing with a highway commercial component. The proposed uses in the Smith Creek ASP are consistent with uses contemplated in the 1994 Implementation Plan.

[121] The NRCB had confirmed the 1994 Implementation Plan accurately reflects the NRCB Approval; therefore, the Appellant submits that the uses in the Smith Creek ASP are consistent with the NRCB Approval.

FINDINGS

3. Consistency with the 1994 Implementation Plan means consistency with the NRCB Approval. The LPRT finds that the predominantly residential uses proposed in the Smith Creek ASP are consistent with the NRCB Approval.

REASONS

[122] The LPRT agrees the land uses approved by the NRCB must be considered for the project as a whole in evaluating consistency. The NRCB confirmed the 1994 Implementation Plan accurately reflected the NRCB Approval, and none of the parties suggested this determination was inaccurate; therefore, the LPRT determined that if the Smith Creek ASP is consistent with the 1994 Implementation Plan, it is also consistent with the NRCB Approval. In this respect, the LPRT agrees that the plan area of the Smith Creek ASP does generally correspond to the Stewart and Dead Man's Flats Districts of the 1994 Implementation Plan, and that the two districts were indicated to be predominantly residential with some community service and commercial uses.

[123] The LPRT notes that although the original concept of development pods within each district through which wildlife could pass is no longer considered best practice for managing wildlife movement, the uses proposed in the Smith Creek ASP align with the uses proposed for those areas in the 1994 Implementation Plan. While some specific uses changed, such as the provision of a school site in the Smith Creek ASP, which was originally contemplated in the Stewart District, the overall uses are consistent.

Issue 3 – Inclusion of Thunderstone Lands

[124] The Thunderstone lands are the site of an operating Rundle stone quarry located on the west side of George Biggy Sr. Road uphill from the Dead Man`s Flats interchange. These lands are included in the Smith Creek ASP with the agreement of the owner, and the uses in the land use concept include light industrial, commercial and some residential. Two roadways in the transportation network traverse these lands, and were indicated in the NRCB Approval.

SUMMARY OF THE TOWN'S POSITION

[125] The Thunderstone lands were not included in the NRCB application and were not part of the NRCB Approval. They fall within the Wildlands Conservation District, outside of the Town's urban growth boundary. The Town argued the Smith Creek ASP is inconsistent with the NRCB Approval due to the inclusion of the Thunderstone lands in the plan area.

SUMMARY OF TSMVPL'S POSITION

[126] The Thunderstone lands were included due to strong suggestions from members of Council, including the former Mayor, as the Town wished to increase the availability of land for business park and industrial uses. There is limited land for such uses within the Town, and the location near the Dead Man's Flats interchange was highly desirable for such uses. TSMVPL included the Thunderstone lands in the Terms of Reference for the Smith Creek ASP and the Three Sisters ASP. The Terms of Reference were approved by Council at its October 2, 2018 meeting, and it included a map showing the study area of both ASPs as Appendix A. TSMVPL approached Thunderstone owners to have them agree to participate, and they voluntarily gave up land to be included in the wildlife corridor.

[127] The NRCB Approval did not allow development in the Wind Valley, but stated the design of the project in the area immediately north of it may be changed with the approval of the Town, provided that the changes are satisfactory to AEP with respect to the provision of wildlife corridors. TSMVPL argued that in approving the Terms of Reference which included the Thunderstone lands in the study area of the Smith Creek ASP, the Town approved a change in the design of the project in the area immediately north of the Wind Valley; therefore, the inclusion of the Thunderstone lands in the Smith Creek ASP does not make it inconsistent with the NRCB Approval.

[128] TSMVPL agrees the Town is not required to approve development on the Thunderstone lands, except to the extent that the NRCB approved a road through the Thunderstone lands connecting the Smith Creek ASP plan area to Hwy 1. Should the LPRT allow the appeal but decide that the Thunderstone lands should be excluded, it should also take into account that the transportation network in the NRCB Approval clearly traversed these lands; therefore, the roadways in the Thunderstone lands should still be included.

FINDINGS

4. The Thunderstone lands are in the area immediately north of the Wind Valley boundary. The Terms of Reference approved at the October 2, 2018 Council meeting constitutes the Town's approval of the change, as contemplated in the NRCB Approval.

REASONS

[129] The NRCB Approval did not approve development in the Wind Valley, which was a significant portion of the development proposed. In making that determination it was clear that the NRCB

contemplated that there would need to be modifications to the project applied for, and that it provided means to make such modifications in stating:

> 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.

[130] The LPRT agrees with TSMVPL that when Council approved the Terms of Reference, which clearly showed the Thunderstone lands, included in the Smith Creek Plan ASP Study Area, the Town was approving a change to the design of the project in the area immediately north of the Wind Valley boundary. It was a Council decision to approve the plan area of the Smith Creek ASP; therefore, the inclusion of the Thunderstone lands in the Smith Creek ASP is consistent with the NRCB Approval. The Town did not make submissions requesting removal of the Thunderstone lands if the LPRT were to determine the balance of the Smith Creek ASP is consistent with the Approval. The LPRT accepts the ASP was prepared in light of many supporting reports and studies, and considers it unwise to make modifications without supporting information. Accordingly, the LPRT decided not to remove the Thunderstone lands from the Smith Creek plan area.

Issue 4 – Fiscal Impact on the Town

SUMMARY OF THE APPELLANT'S (TSMVPL) POSITION

[131] P. Shewchuk of Nichols Applied Management Inc. testified with respect to the Three Sisters Mountain Village Municipal Fiscal Impact Assessment (MFIA) prepared in October 2020 in support of the ASP applications. The purpose of the MFIA was to assess the fiscal impacts of the two ASPs on the Town and its existing ratepayers. At the request of the Town, during the preparation of the report, the two ASPs were considered together.

[132] The Town's assessment base is currently 13% non-residential, a decrease from approximately 22% in 2000. The MFIA listed the Town's 2019 mill rates (the last full year before the analysis), which ranged from 2.36 for residential and vacant services, 6.84 for tourist homes, and 7.58 for non-residential and machinery and equipment. Using 2019 as a base year, the budget balancing mill rate would be 12.6 percent lower following full build-out of both ASPs. The analysis developed a financial model of the Town and then forecast the revenues and expenditures, including capital related to growth resulting from the project. The projected revenue deficiencies were linked with the anticipated assessment base to calculate budget balancing mill rates, simulating the budgeting process of a municipality. The analysis then determined if the budget balancing mill rates are above or below those in the base year. If the mill rates are lower, the project would be said to have a positive fiscal impact on the Town.

[133] During preparation of the MFIA, the Town had input and questions regarding assumptions. That feedback resulted in two key modifications to the report: the evaluation of the minimum design scenario, and a break-even analysis. In the maximum and minimum design scenarios, the non-residential assessment could be reduced by approximately 31 and 35 percent respectively and still have a neutral fiscal impact on the Town. This suggests the analysis is robust - a small change in the amount of non-residential assessment does not fundamentally alter the outcome of the study.

[134] After the MFIA was complete, the Town requested the analysis be split for the two ASPs. The result was added to the appendix as tables A-7 and A-8. It shows the revenues and expenditures for Smith Creek result in a shortfall of $50,000; however, to fully analyze the two ASPs in isolation, it would be necessary for the Town to provide parsed capital and operating items, which could not be done in the time

available. Mr. Shewchuk also noted that the shortfall is occurring at a budget balancing mill rate that is 12.6 percent below the 2019 rate, which indicates a positive impact across the municipality.

[135] If the commercial and non-residential area on the Thunderstone lands, comprising about 200,000 square feet was removed from the study area, it would constitute roughly 15 percent of the non-residential assessment base being pulled from the project, which is within the 31 to 35 percent tolerance identified in the break-even analysis.

[136] Mr. Shewchuk noted that the fiscal analysis did not include the impact of the commercial development at Stewart Creek, which is currently being developed. Overall, the development of the two ASPs will have a positive impact on the Town at full build-out.

SUMMARY OF TOWN'S POSITION

[137] The Town's MDP aspires to a 33/66 non-residential/residential split, and the Smith Creek ASP does not achieve this. Under the 1994 Implementation Plan, the Resort Centre should have proceeded as the second phase, and the Resort Centre ASP has been in place since 2004. There has been significant commercial development in the Town, but very little of that has been on the TSMVPL lands. Land can be identified as commercial in an ASP and districted in the LUB; however, this does not mean it will be developed. The commercial development in the Stewart Creek ASP, approved in 2004, is only now starting to be constructed. In the Smith Creek ASP, the majority of the non-residential land is within the Thunderstone lands, which are the site of an active quarry that has decades of remaining rock.

[138] The Town noted the NRCB Approval stated the revenue generation at build-out would exceed any front-end infrastructure costs as well as any ongoing related costs; however, the table in the MFIA shows net revenues for the Smith Creek ASP are $11,200,000 and expenditures are $11,250,000 resulting in a $50,000 shortfall. This shortfall is not consistent with the NRCB Approval.

FINDINGS

5. The fiscal impact of the Smith Creek ASP is consistent with the NRCB Approval.

REASONS

[139] The LPRT understands the isolated fiscal impact analysis indicates the Smith Creek ASP has a $50,000 shortfall; however, this fact should not be considered in isolation. The NRCB concluded the required front end and ongoing infrastructure and service costs would be covered by the projected economic benefits if the project as proposed - or as reflected in any of the alternative scenarios - proceeded through to conclusion, and if demand for the facilities materialized more or less as projected. It is clear the NRCB considered the entire development and not isolated portions in arriving at that conclusion. The combined ASPs have a net positive impact.

[140] Further, the revenues are based on a mill rate 12.6% lower than 2019 mill rates. If the mill rates were to remain unchanged, the net municipal property taxes of $4,590,000 estimated for the Smith Creek ASP would increase by $550,000 and eliminate the shortfall. Additionally, the community services proposed in the Smith Creek ASP, such as the school site, would not contribute to Town revenues but would nevertheless provide a positive impact.

Issue 5 - Housing

[141] The NRCB Approval referenced total number of dwelling units, unit density and population. In the description of the Proposed Development, it stated:

> At build out, some 15,000 persons are expected to be added to the total population of the Town of Canmore. along with an additional 2,425 hotel rooms, and 6,085 housing units, including 700 staff housing units.

[142] The NRCB Approval also referenced the need for affordable housing throughout the document. The project description quoted the applicant as stating:

> … affordable housing is included in the proposal in order to ease existing and long-term housing problems anticipated in the Canmore area. It was stated that low and modest cost housing would make up over 60 percent of all proposed residential units. Three Sisters would require hotel operators to provide accommodation for 50 percent of their staff close to the facility. Additional rental and permanent housing for staff would be distributed throughout the development.

[143] In the section discussing the economic and social effects of the proposed project, the NRCB noted the representations of the applicant and presenters at the public hearing and made recommendations in its Decision Report with respect to affordable housing.

[144] The Three Sisters Mountain Village project (TSMV), comprising both Smith Creek and Three Sisters ASP areas, proposes 20% attainable units (1,068 of 5,450 total) with 33% in the Smith Creek ASP (580 of 1,750 units) and 13% in the Three Sisters ASP (488 of 3,700 units). Affordable forms of housing in the Smith Creek ASP consists of the following:

- 5% Affordable Ownership/Rental – This refers to housing available to Town residents at below-market purchase prices/rental rates. Currently restricted by occupancy, resale price, buyer or tenant eligibility criteria and managed by Canmore Community Housing (CCH) or another agency. A minimum of 10% of all multi-residential units within Smith Creek shall be provided as affordable housing, with the ownership/rental mix to be based on need. The amount of affordable housing may be increased based on bonusing
- 1% Employee Housing (EH) – The ASP has a requirement for one EH bedroom per 6 to 10 units of visitor accommodation (based on size of development) with a maximum of 6 EH bedrooms with shared access bathroom and kitchen facilities per residential unit.
- 11% Community Lands - Government road allowances within the Smith Creek ASP area comprise approximately 2.32 ha (5.74 acres) that can be closed and comprehensively planned and serviced. An equivalent amount of developable land will be provided to the Town for affordable housing.
- 16% Accessory Dwelling Units (ADU) - self-contained living units on the same site, attached to or within a dwelling that is the primary use of the site. All single-detached, semi-detached and townhouse units will have ADUs enabled, either constructed at initial development or designed to be “suite ready” with exits, fire separations and roughed in services to allow later implementation at minimal cost.

[145] The Smith Creek ASP also encourages entry-level housing, which includes ownership and rental opportunities provided at the lowest market cost without any direct or indirect subsidies to an occupant. This provides alternatives for those residents whose income exceeds the maximum level established for affordable housing under existing programs.

SUMMARY OF THE TOWN'S POSITION

[146] The Town argued that the overall housing provided exceeds the NRCB Approval. The NRCB Approval contemplated 6,085 dwelling units, while the total in the two ASPs along with units built to date will be 6,632 to 9,782. This translates to a total population increase of 13,992 to 20,817 compared to the 15,000 in the NRCB Approval. Unit density in the Smith Creek ASP is 5 to 15 units per hectare compared to 6 in the NRCB approval, mostly due to removal of the golf course.

[147] Two witnesses, Mr. A. Fish, senior planner and Ms. L. Miller, Manager of Planning, testified regarding consistency of housing in the ASPs with the NRCB Approval. Lack of affordable housing is one of the biggest challenges in the Town. The MDP has direction to create an action plan to achieve 20% of housing as affordable in the community, especially in future growth areas. The Town had requested 20% of the housing units in the ASP to be perpetually affordable. This is greater than what was requested in the recent past for other ASPs, but the Town argued that the other developments were not the subject of the NRCB Approval in which 50 to 60% affordable dwelling units had been identified in the project description.

[148] The Town argued that the representations of the applicant with respect to affordable housing were not only for lower-cost forms of housing, as suggested by TSMVPL. The NRCB Decision Report quoted R. Melchin, President of TSGR, stating: "… Three Sisters undertook to ensure a balanced supply of affordable housing to assist Canmore with this recognized need."

[149] The transcript excerpts from the NRCB hearing that was accepted into evidence by the LPRT indicate that TSGR made representations with respect to working with the Town to provide affordable housing:

> R. Melchin: The most fundamental commitment that I can make is that we will dedicate a significant amount of land to lower-income housing if our project is approved. We are prepared to have the Town, if they have a mind to, to put that into their public land use bylaw by zoning.
>
> … The Town, in fact, has a Housing Authority, and it may choose to increase the number of units that Housing Authority manages. If they were to make a request of us that some of our lands be made available to that authority, that would be fine. ... There are compensations that we could work out between us. For example, they demand of us acreage assessments or capital up front or perhaps some mitigation on operating costs. All of these things we think it is fair to sit down and trade. So there is an opportunity for the Town to take a position that they have a need, and if they wish, we would be prepared to enter into such an agreement.

[150] The Town argued that providing community lands does not satisfy this commitment as the road rights of way already belong to the municipality. Also, the Town's experience is that accessory dwelling units are not offered for rent, they often remain unused. The suite-ready accessory dwelling units will not get developed to provide affordable housing and also do not satisfy this commitment. The Town concluded that the affordable housing proposed by TSMVPL is not consistent with the representations to the NRCB that informed the NRCB Approval.

SUMMARY OF APPELLANT'S (TSMVPL) POSITION

[151] TSMVPL argued that the Town's characterization of overall number of housing units proposed is a range where the higher number depends on getting the Bonusing Incentive, which is entirely within the power of Council to accept or reject at the conceptual scheme stage of development. The Town's calculation also includes Tourist Homes in the Three Sisters ASP as dwelling units instead of Visitor Accommodation (this is detailed in that appeal). If the Tourist Homes are not included, the lower end of the range (without bonusing) is 6,105 - a negligible difference from the 6,085 in the NRCB Approval. The unit density of 6 units per hectare in the NRCB approval is based on the total land area, including a significant amount that was included in the wildlife corridors. The overall housing provided is consistent with the NRCB Approval.

[152] I. Gray of Nichols Applied Management prepared the Three Sisters Mountain Village Socio-Economic Impact Assessment (SEIA) in October 2020 to support both of the ASP applications, to identify if and to what degree the development of TSMV may have on the socio-economic fabric of the community. He stated that the direction in the ASPs with respect to affordable housing was informed by the SEIA and the 2019 Bow Valley Region Housing Needs Assessment. Findings from the SEIA focused on the need to provide a range of market and below-market housing options across the housing spectrum to create a more inclusive community. In the home ownership market, options such as townhouses and multi-residential units are the most attainable forms of market housing.

[153] TSMVPL argued that the NRCB discussion with respect to affordable housing related to affordable forms of housing that could be built at lower cost, described as houses on less than 50-foot lots or multi-family units, not a control on the market price of housing as the Town suggests. The NRCB noted that while the issue of affordable housing is a problem throughout society it did not believe that any one proponent for one project can be expected to solve such problems. The NRCB recommendation was for TSGR to commit to participate in the development of an affordable housing plan.

[154] Perpetually affordable housing (PAH), as the Town uses the term, was not included in the NRCB Approval, and the housing proposed for the Smith Creek ASP is above and beyond what the NRCB required. The Smith Creek ASP proposes 10% of multi-residential to be PAH, as well as providing the community lands. The NRCB Approval referenced employee housing requirement for 50% of direct resort employees, but the scaled-down resort results in fewer employees and fewer employee beds. There is no hotel proposed in the Smith Creek plan area, but the ASP policies require employee housing should a hotel be developed. It also provides for employee housing for commercial businesses such as food service and retail on a 1 bed/5,000 sq. ft. of commercial floor area, which will result in 28 to 40 employee-housing beds.

FINDINGS

6. The references in the NRCB Approval to the Applicant committing to providing affordable housing means lower-cost forms of housing, not below-market housing.
7. The amount and nature of housing, including affordable housing, contemplated in the Smith Creek ASP is consistent with the NRCB Approval.

REASONS

[155] The NRCB was of the opinion that providing lower cost forms of housing would contribute to improved affordability. The meaning of affordable housing has evolved in the years since the NRCB Approval was issued; however, it is clear that the NRCB did not intend for the project to provide 50 to 60% affordable housing in accordance with current perceptions to mean providing below-market housing.

The dwelling unit mix proposed, with 55% multi-family, satisfies the intent to provide lower-cost forms of housing. Further, it would be expected that increased supply will ease pressure on housing prices.

[156] The LPRT notes that the NRCB was alive to the issue of affordable housing, and addresses it at numerous points in the decision report:

> The Board believes that the question of affordable housing is a critical element in any assessment of socio-economic issues. If housing problems exist, efforts to address and mitigate other social problems may be somewhat pointless. Similarly, if there are not housing problems, other social shortcomings may not be as serious as they would otherwise be.
>
> At the same time, the Board recognizes that the issue of affordable housing is a problem throughout society and does not believe that any one proponent for one project can be expected to solve such problems. A fair test is whether a proponent has adequately provided for the matter in its proposal, and whether the proponent is prepared to work with others on an ongoing basis in an attempt to ensure that, as a minimum, the problem would not be made more serious.

[157] The LPRT considered the transcript excerpts, and it is clear that there were commitments made at the hearing with respect to the affordability issue, but the LPRT gives more weight to what was included in the NRCB's report, which stated:

> A number of specific commitments were also made by the President of Three Sisters, Mr. Richard Melchin. ... Three Sisters undertook to ensure a balanced supply of affordable housing to assist Canmore with this recognized need.

[158] The policies for affordable housing contained in the Smith Creek ASP – the PAH and community lands, as well as employee housing for commercial floor area, are above the specific requirements of the NRCB Approval and honours the commitments made. The accessory dwelling units and encouragement of entry-level housing further improves affordability. Overall, the housing provisions in the Smith Creek ASP are consistent with the NRCB Approval.

Issue 6 – Wildlife Corridor

[159] The NRCB approval was clear from Condition 14 and the refusal of development in the Wind Valley that the preservation of wildlife movements was an important aspect of the approval. Condition 14 stated:

> 14. Three Sisters shall incorporate into its detailed design, provision for wildlife movement corridors in as undeveloped a state as possible, and prepare a wildlife aversive conditioning plan, both satisfactory to Alberta Forestry, Lands and Wildlife.

[160] In February 1998, AEP approved the wildlife corridor along a portion of the southern and western boundary of TSGR land. In May 2003, AEP approved a revised corridor alignment on a western portion of the 1998 corridor with a 35m-wide conservation easement agreed to as a buffer around the west and south sides of lands outside the corridor to provide for fire thinning and a potential public trail. The delineation of the wildlife corridor and the conservation easement was included in the 2004 Resort Centre ASP.

[161] In January 2017, TSMVPL applied for approval from AEP for the remaining portion of the wildlife corridor to the east of the portion approved in 2003. The application was supported by reports by Golder Associates, including the initial report and two reports in response to AEP requests for additional information. AEP reviewed over 400 letters from the public and attended two public information sessions. In June 2018, AEP determined that the proposal was unsatisfactory and specified two areas of deficiency: the width of the proposed wildlife corridor at the eastern end of the Smith Creek property, and the width of the Stewart Creek Across Valley wildlife corridor. TSMVPL and AEP worked to identify a suitable corridor, taking into account comments and feedback from the public, additional data and analysis since 2017 regarding wildlife use, and more recent research. On January 28, 2020, TSMVPL submitted a proposal along with an evaluation by Golder Associates for a revised wildlife corridor.

[162] AEP issued its decision on February 26, 2020 approving the proposal. The decision noted the NRCB Approval had also required TSMVPL to prepare a wildlife aversive conditioning plan to the satisfaction of AEP; however, the *Wildlife Act* generally prohibits threatening or harassing wildlife. Instead of undertaking wildlife aversive conditioning, TSMVPL proposed developing a Wildlife Human Interaction Prevention Plan (WHIPP). The WHIPP was approved in February 1999 and revised with further approval from AEP in September 2004. Since that time, many of the initiatives overlap with reports regarding the understanding of co-existence with wildlife in the Bow Valley, and Town bylaws for managing human-wildlife interaction. AEP encourages TSMVPL to be involved in these initiatives and is satisfied that TSMVPL has complied with Condition 14 regarding a wildlife aversive conditioning plan.

[163] With respect to developing a detailed design for wildlife movement corridors, AEP's review was informed, in part, by Appendix D of the NRCB Approval, Recommendations to Alberta Forestry, Lands and Wildlife:

> It is recommended to Alberta Forestry, Lands and Wildlife that locations for wildlife corridors be legally designated and that in determining their locations and widths, primary corridors should not be narrower than 350 m except in unusual circumstances, that widths and locations be reviewed with the full range of species that may make use of them in mind, that corridors be located to allow movement across adjacent properties, that measures such as bundling road, utility line and pathway crossings be adopted, and that corridors correspond with known movement routes of the animals.

[164] AEP noted the primary purpose of the wildlife corridor as identified in the NRCB Approval is to ensure that the development would be built in a way that enables wildlife movement along the valley as a primary goal (east to west) and across the valley as a secondary goal (north to south). Having regard to the NRCB Approval and relevant scientific literature, AEP determined that a wildlife corridor will generally be considered satisfactory if it can fulfill the following purposes in the Bow Valley:

- Allow wildlife to access important seasonal habitats in order to meet year round life requirements within the Bow Valley;
- Reduce the potential for negative wildlife/human conflicts by providing safe movement options around developed portions of the valley, thereby minimizing wildlife movement through human development within the Bow Valley.
- Delineate boundaries of Bow Valley's wildlife corridors.
- Allow for dispersal of young from their natal areas to other areas in order to establish new home ranges

[165] AEP developed wildlife corridor principles and criteria to evaluate the TSMVPL proposal from scientific literature, guiding documents and expert opinion as follows:

- Corridors are designed to provide movement for wildlife, while enabling human development to proceed which is in keeping with the 1992 NRCB decision.
- Corridors are designed to maintain the most direct, unimpeded route, while avoiding human disturbance.
- Corridors that are shorter are more effective than longer corridors as wildlife are able to [move] efficiently from one habitat patch to the next. Longer corridors should generally be wider to provide more efficacy for wildlife movement. Corridors and patches should not include topographical barriers that would block movement and should be designed for year-round function and not be hindered by adverse conditions such as deep snow, impermeable vegetation, larger waterways.
- Where possible, corridors should include existing natural habitat features, such as wetlands, licks, or other known wildlife sites.
- The optimal corridor width is a function of how animals respond to the boundary of the corridor. The NRCB recommended a 350m minimum width for primary corridors. Wider corridors should be better than narrower corridors but how much wider has not been clearly demonstrated by science. Wolf behavioral response to disturbance can be used to guide corridor width that should accommodate other species. Wolf behavior responded to human activity at 400m, therefore, an average corridor width of 600m should ensure functioning corridor effectiveness of at least 50%. This also indicates that corridors less than 400m wide may not function effectively for wildlife movement for all species, and 400m was a desired minimum width for corridors.
- In some cases, it may not be possible to achieve the desired average widths, in which case functionality will be maintained through other management approaches such as human use management and habitat enhancements.

[166] AEP determined that the January 28, 2020 TSMV Wildlife Corridor proposal is satisfactory to AEP, as required by Condition 14 of the NRCB Approval, and also made a number of additional recommendations to TSMVPL to further support and enhance the functionality of the proposed corridor and address potential issues with respect to human-wildlife interaction in the Bow Valley. TSMVPL confirmed that they accept these recommendations and committed in writing to implementing each of the recommendations within the next 24 months. AEP and TSMVPL agreed that if the recommendations cannot be successfully completed within this timeframe, they will continue to work collaboratively to bring them to completion as quickly as possible.

SUMMARY OF THE Y2Y'S POSITION

[167] Y2Y presented testimony from Dr. H. Young, evidence and argument, and requested that it be applied to both appeals. Y2Y was created in 1993, shortly after the NRCB Approval, when a group of conservationists and scientists met to discuss the problem of wildlife habitat fragmentation. Connecting habitat along the spine of the Rocky Mountains was recognized as the best way to ensure that populations of large mammal species would continue to thrive into the future. Conservation on a larger, continental scale led to the Y2Y vision of an interconnected system of wildlife habitat stretching from Yellowstone National Park in the United States to the Yukon in Canada's north. This vision brought Y2Y to seek intervenor status in the two appeals.

[168] At the time of the NRCB Approval, the Town had a population of 6,000, which has grown to 16,000 in 2021. The residential development proposed in the two ASPs will double the current population once development is complete. The growth, location and popularity present unique planning challenges, the largest of which is environmental constraints with respect to preserving effective wildlife habitat and connectivity through this important region. Gravel bed river floodplains such as that of the Bow River are

the primary wildlife movement corridors in the Rocky Mountains, but the Town and Dead Man's Flats are built on the floodplain of the Bow River and have taken up the vast majority of terrain that is suitable for wildlife movement.

[169] Wildlife movement corridors were a new area of concern in 1992; however, the NRCB concluded that tourism and recreation projects would have an unacceptable impact on wildlife unless effective wildlife movement corridors were retained. The NRCB required that Three Sisters retain corridors in as undeveloped a state as possible to allow wildlife movements to continue, and that the location and width of the corridors be approved by what is now known as Alberta Environment and Parks.

[170] The AEP approval with respect to wildlife corridors dated February 26, 2020 (AEP Approval) is not consistent with the NRCB Approval in the following respects:

1. The articulated purpose of a wildlife corridor is not consistent. The NRCB Approval articulates the purpose of a wildlife corridor designation as retaining corridors in as undeveloped a state as possible for wildlife movement to continue. In contrast, AEP articulates the purpose as providing for the movement of wildlife, while enabling human development to proceed. The NRCB Approval considers the design of a wildlife movement corridor from the perspective of existing wildlife needs, while the AEP Approval considers the design of a wildlife movement corridor from the perspective of human interests. Development comes first, and the needs of wildlife are addressed to the extent reasonably possible. The AEP corridor approval speaks of incorporating flat and gently sloped terrain (the movement terrain that wildlife prefer and use) as is reasonably possible. The addition of the adjective "reasonably" that is absent in the NRCB decision indicates it is acceptable for the corridor design to compromise the needs of wildlife in the face of development interests.

2. The terrain of the wildlife corridor is not consistent. It is well established that wildlife movements happen primarily on flatter slopes rather than sloped terrain; therefore, when the NRCB Approval speaks of retaining movement corridors in as undeveloped a state as possible, it can only mean development must retain undeveloped flat terrain in existing movement corridors. In contrast, the AEP Approval is clearly framed around the principle of no blocks and no absolute barriers, fundamentally different from preserving existing movement for the full range of species. The result is that the AEP Approval has tight pinch points and includes terrain that most species actively avoid. Y2Y presented maps that overlay topographical features onto the development footprint, showing that the proposed development occupies what remains of the flat terrain used by wildlife to move along the Bow Valley on the south side of Hwy 1. TSMVLP’s wildlife expert, Dr. K. Knopff, stated that an effective wildlife corridor was defined as one that permits movement of wildlife, but the NRCB Approval requires that the corridor meets the needs of all species expected to use it, and that the corridor follows the known movement patterns.

3. The suite and needs of species considered are not consistent. The NRCB decision clearly mentions the need to accommodate the needs of a full range of species in corridor design, including elk, bighorn sheep, grizzly bears, black bears, wolves, cougars, wolverines and other mammals not as prevalent in the area. In contrast, the AEP Approval only makes reference to wolves, and assumes they are a proxy species for which the behavioral response can be expected to reflect those other species. This proxy assumption is not made by the NRCB, is unsubstantiated in the AEP Approval, and is not scientifically supported generally. The NRCB decision also places significant importance on the need for mitigation measures to address the impacts of the project on grizzly bears while the AEP Approval makes no mention of grizzly bears, particularly noteworthy given that AEP designated the grizzly bear as a threatened species in 2010. AEP’s Grizzly Bear Recovery Plan prioritizes recovery actions in major transportation corridors like

Hwy 1 through the Bow Valley because it is widely known and understood that grizzly bear mortality in the Bow Valley is correlated with human activity and residential development. The Grizzly Bear Recovery Plan emphasizes the need for cooperation and coordination among responsible provincial and municipal agencies to ensure that grizzly bear movement needs are considered in development decisions.

4. The regional context is not consistent. The NRCB Approval lists Banff National Park, the Bow Corridor, the Spray Valley and the Kananaskis Valley as the regional study area to be considered in future studies and in decision-making concerning the project. In contrast, the AEP wildlife corridor describes a much narrower geography: the existing 1998 wildlife corridor east of Smith Creek with the existing Wind Valley Habitat Patch in the west, and the existing Bow Flats Habitat Patch through the G8 Legacy wildlife underpass at Dead Man's Flats - a clear inconsistency between the two documents.

[171] Y2Y argued that the wildlife fencing proposed, for the purposes of managing human-wildlife interaction, was untested and should not be needed in order to make the development work. The existing undeveloped wildlife habitat in the Smith Creek and Three Sisters ASPs is the best connectivity habitat of what is left on the south side of the Bow Valley. The question is how to maintain that connectivity, given current knowledge of wildlife needs, movement and behavioral responses to human activity, with a housing project of the size proposed. Y2Y argues that this context was not considered by the NRCB 30 years ago, whereas this context was considered by the Town and informed its decision to deny the ASPs.

SUMMARY OF TOWN'S POSITION

[172] The Town did not have a position on the wildlife corridor proposed, but provided background information. Mr. Fish was involved in the preparation of the Resort Centre and Stewart Creek ASPs in 2003 and stated that the 2002 Golder report spoke of a soft edge to the wildlife corridor. The approach in the mid-2000s considered a golf course to provide a transition between intensively developed and natural areas, and the Stewart Creek Golf Course is part of the approved wildlife corridor.

SUMMARY OF APPELLANT'S (TSMVPL) POSITION

[173] TSMVPL submitted that the NRCB expressly imposed a condition dealing with wildlife movement and a wildlife aversive conditioning plan, and required the proponent to obtain AEP approval. The NRCB delegated to AEP the power to assess and determine wildlife corridors, and TSMVPL obtained the AEP Approval.

[174] Dr. K. Knopff of Golder Associates had prepared the application for the wildlife corridor approval in the area of the Smith Creek ASP. He described the recommendations in the NRCB Approval, the requirements of AEP and the evaluation of the proposed wildlife corridor to obtain the AEP Approval. Dr. Knopff noted the alignment of the wildlife corridor that had previously been approved, and the proposed corridor.

[175] Dr. Knopff agreed that many wildlife species select habitats with gentle slopes, especially during winter; therefore, slope has been identified as a surrogate for corridor efficacy, using a threshold of 25 degrees. Over 89% of the proposed wildlife corridors consist of areas with slopes less than 25 degrees, with 11% consisting of small patches of isolated and discontinuous slopes with no substantial cliffs or other topographical features that would create barriers to movement. In this case, slope as a surrogate for corridor efficacy is less important because substantial wildlife movement data are available. Golder's evaluation focused primarily on determining whether wildlife data identified movement routes in the proposed wildlife corridors, using evidence from various data sources such as snow tracking, telemetry,

GPS collars, and remote cameras. The evidence indicates regularly used movement routes for a wide range of wildlife species such as elk, mule deer, white-tailed deer, black bears, grizzly bears, lynx, cougars, wolves through areas of discontinuous slopes great than 25 degrees, used in all seasons when the particular wildlife species are active.

[176] The proposed changes to the Along Valley corridor east of the existing approved corridor result in a defined corridor that exceeds 635 m at its narrowest point. The southern boundary will remain undeveloped and protected as a provincial park, and, although use declines at higher elevations, wildlife move through these areas, substantially increasing the effective width of the proposed corridor relative to those constrained by development on both sides. Several mitigations will be implemented to increase the effectiveness of the Along Valley wildlife corridor, including habitat enhancements in areas away from human developments, installing a wildlife fence around the Smith Creek ASP and Three Sisters Village ASP, and providing education about attractant management and appropriate use of wildlife corridors.

[177] A new alignment of the Stewart Creek Across Valley Corridor is not required for the development but is a value-added component. It has a minimum width of 401 m and average width of 640 m over its approximately 600 m length. The average width over such a short distance is expected to be sufficient to maintain wildlife movement and would be an improvement over the currently approved, narrower Stewart Creek Across Valley Corridor. Development on both sides of the Stewart Creek Across Valley Corridor will have a wildlife fence, with signage to promote responsible use of the wildlife corridor by residents. A new wildlife crossing will be installed for the extension of the Three Sister's Parkway that will bisect the Stewart Creek Across Valley Corridor. These mitigations are expected to further improve the functionality of the Stewart Creek Across Valley Corridor and wildlife population connectivity in the Bow Valley.

[178] The wildlife corridors in the AEP Approval are an improvement over previous proposals. Wildlife movement is more constrained in a north-south direction than in an east west direction in the Bow Valley because of the arrangement of development at the valley bottom, the highway and rail line. The increased width of the Stewart Creek Across Valley corridor, along with an additional crossing structure at Hwy 1, fencing and crossing structures associated with roads crossing the corridor represents a substantial improvement over the existing approved Stewart Creek Across Valley Corridor and over the version of the 2017 proposal.

[179] Along valley, movement by wildlife in the Bow Valley remains a substantial concern but is more easily achieved than across valley movement. The amendments and extensions to the Along Valley corridor will complete the wildlife corridor network on the south side of Canmore. An evaluation of the large and diverse set of data available in the area indicates the proposed corridor network is appropriately located for maintaining wildlife movement between designated wildlife habitat patches in the Bow Valley around TSMV properties and for maintaining existing regional connections between Kananaskis Country and Banff Nation Park in the Bow Valley. With appropriate management of human use, the proposed wildlife corridors are predicted to maintain connectivity at a local spatial scale, maintain the genetic diversity of wildlife by connecting habitat patches at large spatial scales and to maintain wildlife movement over the very long term.

[180] TSMVPL argued that the wildlife fence will be effective in mitigating human-wildlife interactions. It has been used along Hwy 1 for decades, and will control human use of the wildlife corridor much more effectively than signage. On obtaining AEP Approval, Condition 14 was satisfied, and is a full response to Y2Y's concerns; however, even on the details, with respect to the four areas of inconsistency alleged by Y2Y, Dr. Knopff had worked with AEP on the corridor approval, and his evidence should be preferred. Y2Y made submissions to AEP, knew of AEP's decision and did not challenge it.

[181] Under these circumstances, TSMVPL argued Y2Y's submission is a collateral attack on the AEP Approval. If Y2Y was unhappy with the AEP Approval, the appropriate remedy is judicial review. The role of the LPRT is to determine the consistency of the ASP against the NRCB approval, and it has no authority to alter an AEP approval.

FINDINGS

8. The AEP Approval is consistent with the NRCB Approval.

REASONS

[182] It is clear that the NRCB had significant concerns with respect to the preservation of wildlife habitat and movement in the face of development, and to that end refused development in the Wind Valley; however, it is also clear that the NRCB left the final delineation to AEP. Scientific research and knowledge with respect to wildlife movements have significantly changed since 1992; however, the AEP evaluation considered the most recent work and data on wildlife movements. The LPRT is satisfied that the review by AEP was thorough and diligent. The first proposal in 2018 was found to be deficient and the revised proposal was determined to be satisfactory. There were also a number of recommendations, which were agreed to by TSMVPL. The LPRT also notes that general views with respect to human wildlife interactions have evolved since the NRCB Approval, and the AEP analysis takes this into account.

[183] With respect to Y2Y's four areas of inconsistency, it is obvious that no development at all would best protect existing wildlife habitat and movement; however, the NRCB Approval clearly did allow development in the Bow Valley. The LPRT finds the words used by the NRCB: "incorporate into its detailed design, provision for wildlife movement corridors in as undeveloped a state as possible" means essentially the same thing as the AEP interpretation requiring development to be built in a way that enables wildlife movement in accordance with certain criteria.

[184] The LPRT accepts that wildlife prefers flat or gently sloped terrain, but Y2Y did not present compelling evidence that when unavailable, areas of sloped terrain in a wildlife corridor would create an impediment to wildlife movement. The LPRT accepts the AEP report and the testimony and report of Dr. Knopff that the discontinuous slopes in the proposed wildlife corridor do not create a barrier. The wildlife movement data presented in the Golder report considers multiple species as contemplated in the NRCB Approval. The LPRT considers the regional context to have been necessary to be considered in the early stages of the project, as the wildlife corridors were being identified. At this stage, only the wildlife corridor in the east portion of the project remained to be delineated; therefore, the LRPT does not consider the study area to be inconsistent with the NRCB Approval.

[185] The NRCB allowed the development subject to provision for wildlife movement corridors in as undeveloped a state as possible and a wildlife aversive conditioning plan, both satisfactory to AEP. The condition was satisfied and AEP Approval was granted.

Issue 7 – Public Interest

SUMMARY OF STONEY NATIONS' POSITION

[186] The Stoney Nations were granted limited intervenor status with respect to how the ASPs and NRCB approval are to be interpreted given changes since 1992 affecting the Stoney Nations – and in particular how such changes may affect the consistency of these documents. The Stoney Nations do not

challenge the constitutional validity or applicability of the legislation relied upon by the TVSMPL; however, they argue the LPRT must consider, when interpreting the 1992 NRCB Approval and the two ASPs, whether they are consistent with the Honour of the Crown and the constitutional obligations owed to the Stoney Nations pursuant to section 35 of the *Constitution Act*, 1982.

[187] The Stoney Nations are comprised of the Bearspaw First Nation, Chiniki First Nation and Wesley First Nation, direct descendants of the Stoney Indian Nation and Tribe who were parties to Treaty No. 7 of 1877, which covers southern Alberta. The Stoney Nations have Indian Reserves in the lands contemplated by Treaty No. 6 and Treaty No. 7; in addition, they assert both Aboriginal title and rights to portions of lands within the western half of the province of Alberta. Both the Smith Creek ASP and the Three Sisters Village ASP lie within this territory. In the spirit of reconciliation, the Stoney Nations were participants in the 1992 NRCB Approval hearing and the Town's public hearings for the ASPs.

[188] The Stoney Nations noted that TSMVPL's submissions did not address how the passage of time between the 1992 NRCB Approval and the Town's refusal to adopt the two ASPs may impact the LPRT's interpretation of consistency. TSMVPL relies on *Love v. Flagstaff (County of) Subdivision and Development Appeal Board*, 2002 ABCA 292, in support of the general proposition that project proponents should be entitled to develop lands, subject only to an overall greater public interest precluding development. This decision does not address the Honour of the Crown or Aboriginal interests protected by s. 35. The Stoney Nations argue that the principles of reconciliation and the Honour of the Crown recognize that conditions that may benefit the overall general public interest in a proposed development of lands may not be sufficient to adequately accommodate or compensate the impacted interests of the Stoney Nations; that is, the Stoney Nations *sui generis* interests are not the same as the interests of the general public.

[189] Aboriginal law principles have continued to advance and be refined since 1992 with all levels of government, boards, tribunals, agencies and project proponents having a significantly greater appreciation and understanding of what may constitute adequate consultation, as the Crown and First Nations balance the reconciliation of Aboriginal and Treaty interests with the development of lands. Honour of the Crown is a constitutional principle, which is always at stake in the Crown's dealings with Aboriginal people. Honour of the Crown is the principle that the Crown must conduct itself honourably with Aboriginal peoples, and has long been identified as a key principle in assessing the Crown's relationship with Indigenous peoples. Since 1982 and more recent Supreme Court decisions, it has become more certain that Honour of Crown is engaged in many situations in the Crown's dealing with Indigenous groups where the Crown has an obligation to do something (or not to do something), and not just in situations where there may be an obligation on the Crown to "consult" with First Nations.

[190] While the 1992 NRCB Approval may have considered the historic component of the Stoney Nations and recognized past Aboriginal rights and Treaty rights, there is also an implicit requirement that rights be determined so that the forward-looking goal of reconciliation can be achieved. TSMVPL requests that the LPRT order the Town to pass the two proposed ASPs, on the basis that the 1992 NRCB Approval and the two ASPs are in the public interest. However, to assess whether the 1992 NRCB Approval is in the public interest requires the LPRT to consider whether the NRCB Approval is in breach of the Stoney Nations constitutionally protected Aboriginal and Treaty rights. If it is, the 1992 NRCB Approval cannot be said to be in the public interest and there can be no basis on which the LPRT may order the Town to pass two ASPs that are also not in the public interest. Development of lands for the public interest does not lessen the impact of the Honour of the Crown, as this principle infuses the performance of every treaty obligation and stresses the ongoing relationship between the Crown and First Nations brought on by the need to balance the exercise of treaty rights with development of lands subject to Treaty.

[191] In *AltaLink Management Ltd. v. Alberta (Utilities Commission)*, 2021 ABCA 3424, the Court of Appeal provides further guidance on what factors need be considered when assessing the public interest and reconciliation, and made the point that education and jobs must be a central component of any long-range plan - the very factor that the NRCB refused to address and include in the 1992 NRCB Approval. Since the 1992 NRCB Approval, all levels of government, tribunals and project proponents now have the benefit of the Report of the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission to help assess whether a project is in the public interest. For example, call to action No. 92 calls on the corporate sector to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework to ensure free, prior, and informed consent before proceeding with projects, as well as ensuring Aboriginal peoples have access to jobs, training and education and ensuring the Aboriginal communities gain long-term sustainable benefits from development projects.

[192] The NRCB Approval failed to address the Stoney Nations' s. 35 rights as well as the Crown's constitutional obligations owed to the Stoney Nations. Instead of considering whether the Stoney Nations Aboriginal or Treaty rights and title were potentially impacted by the proposed development, the NRCB viewed the Stoney Nations role as "historic", and merely as one of many components of the "overall public interest"; in addition, it was of the view that the grant of accommodations to the Stoney Nations would not serve the "the overall Alberta public" interest. In contrast, the views of the NRCB today are vastly different. The NRCB's Aboriginal Consultation and Participation Fact Sheet addresses the Crown's duty to consult and accommodate, and identifies the principles that guide the NRCB's assessment of this duty. This document recognizes that if the NRCB determines that a project is in the public interest, accommodation measures designed to minimize impacts and respond directly to the concerns raised by affected Aboriginal peoples must be considered.

[193] There is no evidence that even these minimum guiding principles have been satisfied. As a result, the LPRT cannot conclude the NRCB Approval fulfills the principle of Honour of the Crown and reconciliation; therefore, it cannot find that the NRCB Approval is in the public interest.

[194] The Stoney Nations note the NRCB stated it wishes to provide "a degree of certainty to the Applicant regarding its approval of the general plans but recognizes a need for flexibility" this would be "a recognition that the developments would take place over a 20 year period and would provide flexibility to accommodate changing circumstances." The Stoney Nations argue that this indicates NRCB Approval was intended to be amended as necessitated. The statement that the NRCB Approval would provide to the project proponent only "a degree of certainty" instead of "certainty" is telling, and any assessment of the consistency between the NRCB Approval and the two ASPs requires an assessment of whether the ASPs have, in fact, accommodated changing circumstances. A significant change is the parties' understanding of the principles of Honour of the Crown and reconciliation of the Stoney Nations Aboriginal and Treaty rights. Thus, for any ASP to be considered "consistent" and in "compliance" with a "flexible" 1992 NRCB Approval, it must address Honour of the Crown and reconcile the proposed development with the Stoney Nations' impacted Aboriginal and Treaty rights.

[195] In conclusion, with the passage of time and changing circumstances, the project can no longer be considered to be in the public interest. Accordingly, the Stoney Nations request the two appeals be dismissed.

SUMMARY OF NRCB'S POSITION

[196] The LPRT has no jurisdiction to consider whether the NRCB Approval is in the public interest. The NRCB considered and determined this question in 1992 under the mandate given to it in the *NRCB Act* by the Legislature. No appeal of the public interest determination was sought, and the LPRT process cannot revisit a decision for which the NRCB was the deciding body. The only authority the LPRT has is

to decide whether or not subsequent applications made to the Town are consistent with the NRCB Approval.

[197] The Stoney Nations acknowledge this, but in terms of relief, are asking for the public interest determination to be reconsidered in the context of the changing Aboriginal law over time. The public interest decision was made by the NRCB in 1992, and the jurisdiction and consistency to be considered is of that 1992 decision. The case law quoted by the Stoney Nations reflects current Aboriginal law, and it applies to decisions that were appealed and were the subject of those appeals, and any decisions made subsequently. The case law does not change decisions that were made previously. When the NRCB issued its decision, there was an opportunity to appeal that decision, and the Stoney Nations did not appeal. The public interest determination was made and stands. That is what the LPRT has before it in terms of measure of consistency with the current area structure plan.

[198] Some of the references within the case law the Stoney Nations cited were to the *Responsible Energy Development Act*, which does not apply to the NRCB and applies exclusively to the Alberta Energy Regulator (AER). Other references were to the *Administrative Procedures and Jurisdiction Act*; while this Act does apply to the NRCB, the provisions that now apply to questions of constitutional law are treated very differently. Under the *Administrative Procedures and Jurisdiction Act*, the AER has authority to consider constitutional questions and the NRCB does not. However, in 1992, it was the *Administrative Procedures Act*, and there were no provisions related to authority to consider questions of constitutional law. Honour of the Crown and the approaches that are appropriate now and reflect the law and governing all tribunals is different than it was in 1992, when the NRCB was reviewing the project. That difference does not make the approach wrong, either in fact or at law. The NRCB decision issued in 1992 reflected the law that was current at that time, and it was not appealed. The LPRT's measure of consistency applies to the NRCB Approval as it was issued.

SUMMARY OF THE APPELLANT'S (TSMVPL) POSITION

[199] The LPRT is not a constitutional decision maker and the constitutional questions raised are outside the scope of the LPRT's authority. The scope of a tribunal's jurisdiction is grounded by the statute, and it would be an error of law for the LPRT to consider the constitutional issues raised by the Stoney Nations.

[200] The LPRT does not have jurisdiction under the *Act* to determine whether the NRCB Approval is in the public interest. As stated by the NRCB, it has already determined in 1992 that the proposed development is in the public interest. The LPRT has no jurisdiction to assume the role given to the NRCB to consider the broader public interest.

[201] The Stoney Nations seek to collaterally attack the NRCB Approval. In 1992, the Stoney Nations made submissions to the NRCB including submissions about their traditional use of the Three Sisters Lands and asked the NRCB to order the applicant to enter an agreement with the Stoney Nations to document and report on the historical and cultural significance of the Three Sisters Lands in the period before contact with Europeans. The Stoney Nations concerns about Honour of the Crown and s. 35 of the Constitution Act existed in 1992. The Stoney Nations appear unhappy with the outcome of the 1992 determination and are looking for another opportunity to present their case. The NRCB did not grant the Stoney Nations the relief they sought, but the Stoney Nations did not appeal the NRCB Approval. The NRCB Approval stands unimpeached. There is no expiry date on the NRCB Approval, and despite the passage of time, it continues to apply to the Three Sisters Lands.

[202] TSMVPL acknowledges that Honour of the Crown is a constitutional principle at stake in the Crown's dealings with Aboriginal people, but the Stoney Nations do not specify who the "Crown" is. If

the Stoney Nations submission is that the Crown is the NRCB, then the Stoney Nations seek to collaterally attack the 1992 NRCB Approval, as set out above. The Stoney Nations provided no authority to support the assertion that the enactment of an ASP triggers a duty to consult on behalf of the municipality or the applicant. There are no provisions of the *Act* that delegate any aspect of the Crown's duty to consult to municipalities.

[203] It is inaccurate for the Stoney Nations to submit that the provision for flexibility in the NRCB Approval allows a reconsideration of the project as a whole. The NRCB had stated it was mindful of the monumentality of the process undertaken by the Applicant, and did not wish any applicant to be forced through unnecessary duplicative proceedings. The Stoney Nations' position that the 1992 NRCB Approval was intended to be amended as necessitated, undermines the principle of certainty and the legislative scheme of s. 619. Applicants are entitled to rely on provincial approvals. The NRCB Approval provided certainty of use for the Three Sisters Lands. The flexibility provided was for the owner of the Three Sisters Lands and the Town to revise details of timing, land uses, and with respect to the location of transportation and other services. The NRCB did not provide flexibility to amend the approval at the request of any party.

FINDINGS

9. The LPRT does not have authority to consider Honour of the Crown or to reconsider the NRCB's 1992 public interest determination.

REASONS

[204] The *Act* empowers the LPRT to determine appeals filed pursuant to s. 619(5), which concern refusals by municipalities to amend municipal land use planning bylaws when the applications are consistent with provincial approvals. As previously discussed, this right of appeal is intended to reduce regulatory burden and increase administrative efficiency and consistency so projects are not blocked at the municipal level for issues already considered and approved at the provincial level.

[205] The right of appeal under s. 619 is limited and is not intended to allow the LPRT to revisit matters already considered by the NRCB. The LPRT recognizes that approaches and principles of reconciliation, Honour of the Crown and Aboriginal law have changed since the NRCB issued its decision. However, to view such changes as introducing new matters that have not been considered by the NRCB (and hence available for examination by the LPRT) would imply provincial approvals can be challenged before the LPRT whenever legal principles evolve after an approval has been issued. This interpretation would effectively allow the LPRT to usurp the role of the provincial regulator, and is difficult to align with the purpose of s. 619, which is intended at least in part to provide certainty to holders of provincial approvals.

[206] In this case, the legal principles in question raise constitutional questions, which the LPRT is not designated as a body empowered to decide under the *Administrative Procedures and Jurisdiction Act* and its Regulations. In this respect, the LPRT has no greater authority than the NRCB. The LPRT cannot determine constitutional questions or questions concerning whether the approval is in the public interest - nor can it vary the NRCB Approval. The only matter within the jurisdiction of the LPRT is a determination of whether the ASP is consistent with the NRCB Approval as issued.

Issue 8 –Areas of Consistency not disputed by other parties

[207] TSMVPL's section-by-section analysis of consistency for the Smith Creek ASP included the following areas that were not commented on or disputed by the Town or the intervenors.

Undermining

[208] J. Tod of Wood Environment & Infrastructure Americas, presented the Area Mining Impact Overview Report Smith Creek Area Structure Plan prepared in November 2020. He provided an overview of undermining due to former coal mines in the area, and the NRCB condition that required the applicant to complete the four stages assessment of the safety of the area for development and take any remedial action required by the Town. Mr. Tod described the four stages at the time of the NRCB Approval:

Stage 1. Desk top study based on mine records: to establish the mining conditions, where mining occurred, the geology, where and to what the depths the seams were. There is a wealth of knowledge available, meticulous recordkeeping over the years. Mine plans are available for all of the mines present in the valley, and a lot of investigative work has been done since 1992 to assemble the information and compile it into one location. The information is evaluated and used to define a preliminary constraint zone map for the property. And the constraint zone map identified whether there was no restriction, and areas with low, medium and high risk potential.

Stage 2. Ground truthing to check Stage 1 - Once preliminary constraint zones are established the next stage is reconnaissance, called ground truthing. It consists of walking the ground to look for evidence of mining impact or activity in the form of subsidence, cracking, ground deformations, as well as drilling and coring to confirm that the mine location and depth.

Stage 3. Report summarizing Stages 1 and 2 and any mitigation required.

Stage 4. Additional ground truthing before construction

[209] The Canmore Undermining Review Regulation was enacted in 1997 and updated in 2020. As part of the 2020 revision, guidelines were developed for the Canmore area with more detail reflecting changes developed since 1992. The work that has been done corresponds to Stage 1. With respect to the Smith Creek ASP, there is no undermining.

Transportation and Infrastructure

[210] A. Newcombe of WSP presented the Three Sisters Mountain Village Global Transportation Impact Assessment prepared in January 2021 to support both of the ASP applications. Mr. Newcombe stated that he reviewed the NRCB Approval and application documents as well as relevant documents the Town had prepared since the original application in 1991, including the 2018 Integrated Transportation Plan and the 2017 Utilities Master Plan. The original application had included three connections to the existing transportation network at the time: one to the west to the existing Town network, a mid-point connection to Hwy 1 (which is now constructed) and one at Dead Man’s Flats. There were two routes out of the development to the Dead Man’s Flats interchange, including one that circled the Thunderstone lands. The ASPs also show the three connections and the road through the Thunderstone lands.

[211] Other characteristics include the meandering, low speed arterial road in the original application that is the Three Sisters Parkway. Policies in the ASP relating to Three Sisters Parkway employ traffic calming, reduced vehicle speeds, and traffic safety, consistent with the original application and also consistent with the Town's integrated transportation plan that is in effect. The original application talked about narrow roadways, reduction in right-of-way with trees set close to the right-of-way to minimize ground disturbance. This is in direct alignment with the intent in the ASPs to minimize pavement widths to reduce the amount of land impacted by roads.

[212] The NRCB also recommended taking into account the desirability of reducing nitrogen oxides emissions when designing roads in the project, which could be accomplished by encouraging alternate forms of transportation. The Canmore Integrated Transportation Plan focuses on alternative transportation modes: cycling, walking, and public transit. The ASPs are consistent with that, and have an extensive network of pathways, trails, cycling routes, and transit options that are proposed. There is a large desire in the transportation world today to have alternate modes of transportation. and one of the effects is to reduce or mitigate nitrogen oxides emissions. This directly correlates back to the recommendation in the NRCB Approval.

[213] Mr. Newcombe also discussed utility infrastructure in the ASPs compared to the utility infrastructure before the NRCB. The original application through the 1991 EIA described utility servicing for the project area as being done by municipal services and not being standalone. Those are the policies that are contained within Section 9 of the ASPs and include statements that describe that the plan areas will be serviced with municipal water, sanitary, stormwater, utilities. Utility alignments would be determined at the subdivision stage, and that would be done in conjunction with the Town at the time of subdivision. Similarly, the shallow utility statements are very much the same, locations to be done to the satisfaction of the Town and the utility companies. The 2017 Utilities Master Plan in the Smith Creek area were and still are proposed to be serviced by municipal water, sewer, and stormwater. Although some of the concepts may have changed slightly since 1992, they are consistent with the Town's Utility Master Plan. The Utilities Master Plan in 2017 shows these areas included within future growth areas and incorporated within the long-range utility planning. The concepts being presented are very similar to the original application and are consistent with the NRCB Approval.

FINDINGS

10. The reports and testimony indicate the Smith Creek ASP is consistent with the NRCB Approval with respect to undermining, transportation networks and utility infrastructure.

REASONS

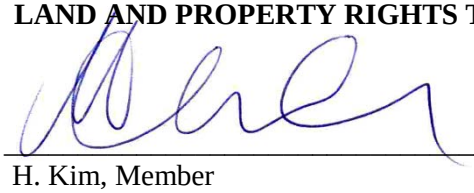
[214] There was no evidence disputing the reports and witness testimony, and the reports were prepared by qualified professionals; therefore, the LPRT accepts the evidence of the Appellant’s witnesses that the Smith Creek ASP is consistent with the NRCB Approval.

CONCLUSION

[215] The Smith Creek ASP is consistent with the NRCB Approval and the LPRT orders the Town to adopt the Smith Creek ASP as submitted and considered by Council on April 27, 2021.

Dated at the City of Edmonton in the Province of Alberta this 16th day of May, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL



H. Kim, Member

APPENDIX A

PARTIES WHO ATTENDED, MADE SUBMISSIONS OR GAVE EVIDENCE AT THE HEARING:

NAME	CAPACITY
G Stewart-Palmer	Counsel for TSMVPL Appellant, Shores Jardine LLP
J. Redman	Appellant, Shores Jardine LLP
K. Elhatton-Lake	Appellant, Shores Jardine LLP
C. Ollenberger	Appellant, Witness, QuantumPlace Developments Ltd.
J. Karpat	Appellant, Witness, QuantumPlace Developments Ltd.
P. Shewchuk	Appellant, Witness, Nichols Applied Management Inc.
I. Gray	Appellant, Witness, Nichols Applied Management Inc.
A. Newcombe	Appellant, Witness, WSP
J. Tod	Appellant, Witness, Wood Environment & Infrastructure Americas, a Division of Wood Canada Limited
K. Knopff	Appellant, Witness, Golder Associates Ltd.
K. Becker Brookes	Counsel for Town of Canmore Respondent, Reynolds Mirth Richards Farmer LLP
L. Miller	Respondent, Witness, Town of Canmore
A. Fish	Respondent, Witness, Town of Canmore
F. Vance	Counsel for NRCB, Intervenor
B. Kennedy	Counsel for NRCB, Intervenor
B. Barrett	Counsel for Stoney Nakoda Nations, Intervenor
T. Osvath	Counsel for Stoney Nakoda Nations, Intervenor
S. Fluker	Counsel for Y2Y, Intervenor
H. Young	Y2Y, Intervenor, Witness

APPENDIX B

DOCUMENTS RECEIVED AND CONSIDERED:

NO.	ITEM
PA1	TSMVPL Submission on Preliminary Matter re: Y2Y Submission
PY2	Y2Y Submission on Preliminary Matter re: Y2Y Submission
PA3	TSMVPL Response re Y2Y Submission
1A	Notice of Appeal Smith Creek 619 and Attachments (1617 pp)
2A	#8 Technical Review of the Environment Impact Statement Smith Creek ASP (25 pp)
3R	Letter to LPRT from RMRF July 23, 2021 (4 pp)
4N	NRCB Letter September 15, 2021 (1 pp)
5S	Stoney Nakoda Nations Letter September 17, 2021 (1 pp)
6S	Stoney Nakoda Nations Intervention Memo (5 pp)
7S	Snow Affidavit sworn 2021-09-16 (188 pp)
8Y	Yellowstone to Yukon (Y2Y) Letter September 17, 2021 (1 pp)
9Y	Y2Y Written Argument (12 pp)
10Y	Jodi Hilty Statement 09-17-21 (4 pp)
11Y	Hilary Young Statement 09-17-21 (7 pp)
12Y	Human-Wildlife Coexistence Report (86 pp)

13R	Letter RMRF re Submissions of Town of Canmore (2 pp)
14R	Submissions of the Respondent Town of Canmore (80 pp)
15A	2021-09-24 Letter GJSP to LPRT, K. Becker Brookes (1 pp)
16A	Letter GJSP to Intervenors re Preliminary Applications for Intervenor Status (1 pp)
17A	TSMVPL BRIEF re Holding Preliminary Jurisdictional Hearing and Consolidation (183 pp)
18A	TSMVPL Brief re Intervenors (194 pp)
19A	2021-12-02 Letter GJSP to LPRT (4 pp)
20N	2021-12-03 NRCB Submission re schedule (1 pp)
21Y	Y2Y December 3, 2021 Letter (1 pp)
22R	Letter to LPRT re Hearing Dates and Disclosure Dates (2 pp)
23S	Stoney Nakoda Nations Schedule Submissions (3 pp)
24A	Smith Creek Merits Argument (88 pp)
25A	Smith Creek Binder of Legislation and Authorities (314 pp)
26A	Smith Creek Evidence Binder (464 pp)
27A	Smith Creek Town materials Binder (1233 pp)
28A	Smith Creek NRCB Exhibits Binder (2791 pp)
29A	Smith Creek Evidence Witness Statement Binder (914 pp)
30A	Smith Creek List of Witnesses (1 pp)
31R	Letter regarding Town Submissions re Jurisdiction (1 pp)
32R	Submissions on Jurisdiction of Town (399 pp)
33Y	Y2Y Letter February 3, 2022 (1 pp)
33Y Tab A	Y2Y Argument (375 pp)
33Y Tab B	Y2Y List of Witnesses (1 pp)
33Y Tab C	Witness Statement of H. Young February 2022 (1 pp)
33Y Tab D	Statement of H. Locke January 5, 2022 (40 pp)
33Y Tab E	Statement of J. Jorgenson January 6, 2022 (15 pp)
33Y Tab F	Statement of A. Ford (131 pp)
34S	Stoney Nakoda Nations Arguments 2022-01-07 (13 pp)
35A	2022-01-21 Letter Re Service Smith Creek ASP (1 pp)
36A	2022-01-21 TSMVPL Jurisdictional Brief – Smith Creek (20 pp)
37A	2022-01-20 TSMVPL Jurisdictional Binder (125 pp)
38A	2022-01-21 C Ollenberger Witness Statement Smith Creek Jurisdiction (59 pp)
39A	2022-01-21 J Karpat Witness Statement Jurisdiction (57 pp)
40N	2022-01-27 NRCB Cover Letter on Jurisdiction (1 pp)
41N	NRCB Submission on Jurisdiction (38 pp)
42R	Letter from RMRF re Submissions of Town on Merit re Smith Creek ASP (1 pp)
43R	Written Submissions of Town on Merit re Smith Creek ASP (29 pp)
44R	Authorities re Smith Creek ASP (669 pp)
45R	List of Witnesses re Smith Creek ASP (2 pp)
46R	Witness Statement L. Miller Smith Creek ASP (2 pp)
47R	Witness Statement A. Fish Smith Creek ASP (2 pp)

48R	Reply Submissions of Town to NRCB on Jurisdiction (122 pp)
49A	February 15, 2022 Letter from TSMVPL (1 pp)
50A	TSMVPL Smith Creek Reply Brief (60 pp)
51A	TSMVPL Smith Creek Supplemental Legislation and Authorities Binder (63 pp)
52A	TSMVPL Smith Creek Supplemental Witness Statement Binder (104 pp)
53A	TSMVPL Smith Creek ASP Supplemental Evidence Binder (164 pp)
54R	*Contours Limited v Mathers and Son Limited*, 1993 NSCA 145 (13 pp)
55A	2022-02-21 C. Ollenberger Direct Examination Jurisdiction Slides (22 pp)
56A	2022-02-23 C. Ollenberger Direct Examination Merits (81 pp)
57A	2022-02-27 J. Karpat Direct Examination (60 pp)
58A	Updated Maps from Exhibit 28A Tab 8 (Exhibit 12 NRCB) (14 pp)
59N	NRCB Exhibit List (17 pp)
60R	NRCB Transcript Excerpts (8 pp)
61A	Pearce Shewchuk Testimony (11 pp)
62A	2022-02-3-01 Gray PowerPoint (32 pp)
63A	J Tod PowerPoint (17 pp)
64A	A Newcombe PowerPoint (20 pp)
65A	Dr. Knopff PowerPoint (45 pp)
66R	Land Use Concept Map with Thunderstone (1 pp)
67A	Town of Canmore Land Use Bylaw Excerpts (8 pp)
68Y	Y2Y PowerPoint Presentation (22 pp)
69Y	Y2Y RSA Comparisons (1 pp)
70A	Appellant Closing Argument PowerPoint (86 pp)
71S	Authorities_Stoney_Nakoda_Nations_bates (835 pp)
72Y	Approximation of Lidar Map Smith Creek (1 pp)

APPENDIX C

LEGISLATION

The *Act* and associated regulations contain criteria that apply to appeals to the LPRT. While the following list may not be exhaustive, some key provisions are reproduced below.

Municipal Government Act

Purpose of this Part

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

(a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and

(b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,

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

Section 618.3 and 618.4 direct that all decisions of the LPRT must be consistent with the applicable regional plan adopted under the *Alberta Land Stewardship Act* or the Land Use Policies (LUP).

ALSA regional plans

618.3(1) Anything done by any of the following under a provision in this Part or a regulation under this Part must be done in accordance with any applicable ALSA regional plan:

(a) a municipality;
(b) a council;
(c) a municipal planning commission;
(d) a subdivision authority;
(e) a development authority;
(f) a subdivision and development appeal board;
(g) the Land and Property Rights Tribunal;
(h) an entity to which authority is delegated under section 625(4).

(2) If there is a conflict or an inconsistency between anything that is done under a provision of this Part or a regulation under this Part and an applicable ALSA regional plan, the ALSA regional plan prevails to the extent of the conflict or the inconsistency.

Land use policies

618.4(1) Every statutory plan, land use bylaw and action undertaken pursuant to this Part by a municipality, municipal planning commission, subdivision authority, development authority or subdivision and development appeal board or the Land and Property Rights Tribunal must be consistent with the land use policies established under subsection (2).

(2) The Lieutenant Governor in Council, on the recommendation of the Minister, may by regulation establish land use policies.

Provincial approval prevails

619(1) A licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC 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 Land and Property Rights Tribunal or any other authorization under this Part.

(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).
(3) An approval of a statutory plan amendment or land use bylaw amendment under subsection (2)
(a) must be granted within 90 days after 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, AER, AEUB or AUC.
(4) If a municipality that is considering an application under subsection (2) holds a hearing, the hearing may not address matters already decided by the NRCB, ERCB, AER, AEUB or AUC except as necessary to determine whether an amendment to a statutory plan or land use bylaw is required.
(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.
(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.
(9) Section 692 does not apply when the statutory plan or land use bylaw is amended pursuant to a decision of the Land and Property Rights Tribunal under subsection (8)(a).
(10) A decision under subsection (8) is final but may be appealed by the applicant or the municipality in accordance with section 688.
(11) In this section, "NRCB, ERCB, AER, AEUB or AUC" means the Natural Resources Conservation Board, Energy Resources Conservation Board, Alberta Energy Regulator, Alberta Energy and Utilities Board or Alberta Utilities Commission.