



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Three Sisters Mountain Village Properties Ltd. v Town of Canmore, 2021 ABLPRT 483
Date: 2021-09-08
File No. P21/CANM/T-002
Decision No. LPRT2021/MG0483
Municipality: Town of Canmore

In the matter of a proceeding commenced under Part 17 of the *Municipal Government Act*, being Chapter M-26 RSA 2000, (*Act*)

And in the matter of an appeal under section 619 of the *Act* from a decision of the Town of Canmore respecting the Smith Creek Area Structure Plan (Smith Creek ASP).

BETWEEN:

Three Sisters Mountain Village Properties Ltd. (TSMVPL)

Appellant

- and -

Town of Canmore

Respondent Authority

BEFORE: H. Kim, Presiding Officer
(Panel)

K. Lau, Case Manager

DECISION

APPEARANCES

See Appendix A

This preliminary hearing was held by videoconference on September 3, 2021 after notifying interested parties.

BACKGROUND

[1] This is a preliminary hearing respecting an appeal by TSMVPL pursuant to section 619 of the *Act* because the Town did not approve the Smith Creek ASP. The appeal was filed to the Land and Property Rights Tribunal (LPRT) on July 9, 2021. The Appellant cited the Natural Resources Conservation Board Decision Report 9103 (NRCB Approval), respecting a large-scale recreation and tourism project in the Town, and stated that all the Smith Creek ASP land falls within the scope of the NRCB Approval. The Reasons for 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 defeated by the Town Council and will be the subject of a separate appeal.
4. In December 2020, TSMVPL made an application 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.
7. TSMVPL requests that the Land and Property Rights Tribunal order the Town to adopt the Smith Creek ASP to comply with the approval or other authorization granted by the NRCB.

[2] As noted in the reasons for appeal, the Town also did not approve the Three Sisters Village ASP and that appeal, also pursuant to section 619 of the *Act*, was filed on August 9, 2021. This hearing was set to consider preliminary matters with respect to the appeal related to the Smith Creek ASP.

[3] This matter was heard by a one member panel of the Land and Property Rights Tribunal (LPRT) as contemplated in section 4 of the *Land and Property Rights Tribunal Act* and there was no objection by the parties.

ISSUES

[4] The issues identified in this preliminary hearing were:

1. Should the LPRT consider submissions from persons other than the Appellant and Respondent?
2. Should the merit hearing be conducted in person, in Edmonton?
3. Should the hearings with respect to the Smith Creek ASP and the Three Sisters Village ASP be consolidated or heard consecutively by the same panel?
4. Should preliminary jurisdictional issues be heard at a preliminary hearing in advance of the merit hearing or considered at the outset of the merit hearing?

PARTY POSITIONS

[5] With respect to issue 1, while there was no agreement whether intervenors should have status at the merit hearing, both parties agreed that a second preliminary hearing on September 30, 2021 would be acceptable for the LPRT to consider submissions by potential intervenors with respect to whether they should be allowed status at the merit hearing. The parties agreed to suggested time lines of September 17, 2021 for potential intervenors to make submissions and September 24, 2021 for the parties to provide responses.

[6] With respect to issue 2, both parties requested a merit hearing, in person, on dates to be determined but tentatively in February 2022, at the LPRT offices in Edmonton. The specific dates and disclosure deadlines could not be determined at this time pending a decision on the other matters at issue that were not agreed to, but the parties agreed that two to three weeks in February 2022 could be accommodated and that typical disclosure deadlines would be acceptable.

[7] With respect to issue 3, TSMVPL submitted that the two ASPs were different and they should not be consolidated, but was agreeable to have them heard sequentially by the same panel to avoid duplication of the same evidence. The Town submitted that much of the evidence would be common to both appeals and that it would be more efficient and cost-effective for the two appeals to be consolidated. If the LPRT declined to consolidate the two appeals, the Town would be agreeable to have them heard sequentially.

[8] With respect to issue 4, in its response to the Notice of Appeal, the Town had requested the appeal be dismissed for the following reasons:

1. Section 619 of the *Act* does not apply to the Smith Creek ASP because the NRCB approval predates the addition of s. 619 to the *Act*;
2. Section 619 of the *Act* does not apply to the Smith Creek ASP because the Smith Creek ASP is not a statutory plan amendment but a new statutory plan;
3. Section 619 of the *Act* does not apply, in whole or in part, to the Smith Creek ASP because the Smith Creek ASP includes the Thunderstone Quarry Lands, which were not part of the NRCB approval area;
4. The NRCB approval expressly or implicitly preserves the Town's authority under the *Act* to adopt or not adopt the Smith Creek ASP for proper planning reasons;
5. The Smith Creek ASP is not consistent with the NRCB approval, in whole or in part; and
6. If the Smith Creek ASP is consistent with the NRCB approval, in whole or in part, Council was unable to approve it to the extent it complies with the NRCB approval.

[9] The Town requested the jurisdictional argument be heard at a separate preliminary hearing prior to the merit hearing, as there was significant cost to prepare for a merit hearing that might not take place. TSMVPL requested they be heard at the outset of the merit hearing, as the jurisdictional argument could not be decided without hearing the merit evidence. TSMVPL cited *Rau v Edmonton (City)*, 2015 ABCA 136 in which the Court of Appeal stated that the Subdivision and Development Appeal Board had to hear the evidence in order to determine whether it had jurisdiction. It related to a development appeal of a permitted use, but the principle is analogous to this jurisdictional argument.

DECISION

[10] A second preliminary hearing for the s. 619 appeal of the Smith Creek ASP, which will also be the hearing to open the s. 619 appeal of the Three Sisters Village ASP, will be held to consider the following items:

1. Submissions from potential intervenors and the parties with respect to whether the LPRT should hear from intervenors, and if so, the scope of intervenor submissions. The submission shall specify whether it relates to the Smith Creek ASP, the Three Sisters Village ASP, or both.
2. Submissions from the parties to determine whether some or all of the jurisdictional arguments raised by the Town should be the subject of a further preliminary hearing or considered as a preliminary matter at the outset of the merit hearing.
3. Submissions from the parties to determine whether the Smith Creek ASP and Three Sisters Village ASP appeals should be consolidated or heard sequentially at the merit hearing.

[11] The hearing is set for 9:00 AM on September 30, 2021 to be conducted by videoconference using WebEx. The LPRT orders the following deadlines for written submissions:

September 17, 2021 – Submission of any person or party wishing to seek intervenor status at the merit hearing as noted in item 1 above is due. Submissions must include the matters intended to be addressed and whether they are matters that can be considered by the LPRT in this appeal.

September 24, 2021 – Submission of the parties with respect to items 2 and 3, and response, if any, to item 1 is due.

[12] All submissions are due at 12 noon on the dates above. Submissions are to be made electronically to lppt.appeals@gov.ab.ca with a copy sent to kellie.lau@gov.ab.ca and in addition:

1. For persons seeking intervenor status, to TSMVPL and the Town, and
2. For the Appellant and Respondent, to the other party.

[13] The procedure at the hearing will be in the following order, subject to change if objections are raised, considered and decided by the panel at the outset of the hearing:

1. Consideration of Intervenor Status
 - Presentation of potential intervenors
 - Presentation of Town
 - Presentation of TSMVPL
 - Rebuttal if any
2. Application for dismissal
 - Presentation of Town
 - Presentation of TSMVPL
 - Rebuttal if any
3. Application for consolidation
 - Presentation of Town
 - Presentation of TSMVPL
 - Rebuttal if any

[14] The merit hearing will be held as a hybrid hearing at the LPRT offices in Edmonton, subject to public health measures that may be in place at the time. The hearing will be held in person; however, WebEx videoconference will be available for those that prefer to participate remotely. The specific date will be scheduled after the decision in the second preliminary hearing is issued and the required length of time better determined, but is expected to be in February 2022 for up to three weeks, with typical disclosure deadlines to be set for specific dates prior to the hearing by administration if both parties agree, or by a scheduling hearing to be set if the parties do not agree.

REASONS

Intervenors

[15] Section 619(6)(b) of the *Act* provides that the LPRT is not required to notify or hear from any person other than the applicant and the municipality against whom the appeal is launched.

There were no potential intervenors in attendance, but there was indication that two groups are intending to request intervenor status. The parties agreed that persons seeking intervenor status should be permitted to make such a request.

[16] The LPRT notes that there is no right to status, and hearing from parties who intend to address matters beyond the scope of the LRPT's powers under s. 619 would be unproductive. Nevertheless, the *Act* does not limit who may make submissions, and the LPRT determined that it is reasonable to hear from persons seeking status to decide whether it will hear from intervenors.

[17] Accordingly, the LPRT determined that it will convene a second preliminary hearing to consider submissions from persons seeking intervenor status, but required the submissions to include an indication of what matters would be presented, as well as an opportunity for the parties to comment on whether status should be granted.

Jurisdictional Matters Heard Separately

[18] The LPRT agrees with TSMVPL that some of the jurisdictional matters raised by the Town in its request for dismissal require the LRPT to consider evidence; however, it appears that some may be determined by review of the relevant legislation and other authorities. The LPRT agrees that it may be more efficient to have a preliminary hearing to determine whether it has jurisdiction prior to the merit hearing; however, in view of the objections of TSMVPL, and the decision to set a second preliminary hearing, the LPRT determined that arguments from the parties with respect to this matter would be better considered and decided with more fulsome argument.

[19] Accordingly, the LPRT decided this matter would be considered and decided after the hearing on September 30, 2021.

Consolidation of Appeals

[20] In the subject hearing, the LPRT had considered and received submissions with respect to whether the appeals for the Smith Creek ASP and the Three Sisters Village ASP should be consolidated, or heard separately but sequentially. The LPRT had indicated at the hearing that they should be heard separately but sequentially to avoid the need to repeat the same evidence in the two appeals; however, after the hearing, the LPRT determined that as the notice for the September 3rd hearing related only to the Smith Creek ASP, it may be inappropriate to decide on matters outside the subject of Smith Creek ASP. The date of the second preliminary hearing, September 30, 2021 is within the 60 days that s. 619 (6)(a) of the *Act* requires the LPRT to set a hearing upon receiving the s. 619 appeal of the Three Sisters Village ASP.

[21] In view of the setting of the second hearing, the LPRT determined that the September 30, 2021 hearing could also be the first preliminary hearing with respect to the Three Sisters Village ASP and that it would be more appropriate to consider submission with respect to the issue of consolidation of the two appeals at that hearing.

Merit Hearing Date

[22] Both parties agreed that they desired the merit hearing to be held in person, in Edmonton, at the LPRT hearing facility. Both parties also agreed that their schedules allow for a hearing in February 2022. Due to the matters still to be decided at the second preliminary hearing, the length of time required for the merit hearing is uncertain, and parties agreed that it would be preferable to set the specific dates after the decision in the second preliminary hearing is issued.

[23] The LPRT considers the parties' agreed requests to be reasonable, provided public health orders at the time permit. The LPRT notes that the hearing facility at its Edmonton office has provision for remote participation via video and allows flexibility for all participants, and determined that a hybrid hearing on the merits commencing on a date to be determined in February 2022 should be set. The hybrid hearing will allow a cost savings for the parties and ensure that all parties are still able to participate either in-person or by video/telephone conference.

[24] This panel is not seized with this matter, meaning a different panel may be assigned to further hearings.

Dated at the City of Edmonton in the Province of Alberta this 8th day of September, 2021.

LAND AND PROPERTY RIGHTS TRIBUNAL

(SGD) H. Kim, Member

APPENDIX "A"

PARTIES WHO MADE SUBMISSIONS OR GAVE EVIDENCE AT THE HEARING:

NAME	CAPACITY
G. Stewart-Palmer	Counsel for TSMVPL
K. Becker Brookes	Counsel for Town