BUYER BE VERY AWARE – THE RETURN OF CHICKEN LITTLE

The Alberta Court of Appeal's decision in *Focaccia Holdings Ltd v Parkland Beach (Summer Village Subdivision and Development Appeal Board)*[1] continues to raise concerns, not just to developers, but to purchasers who acquire lots or homes in a subdivision for which municpal improvements have been installed by a developer pursuant to a development agreement. This includes virtually every subdivision of residential lands since 1975.

In *Focaccia*, the developer sold a number of the lots in its new subdivision to a non-arms length corporation prior to placing asphalt on the roadways as required by the development agreement between the municipality and the developer but subsequent to issuance to the developer of a stop order pursuant to s. 645 of the Municipal Government Act . Alberta (the "MGA"). The non-arms' length purchaser and the developer had common shareholders and directors. The municipality then issued a stop order as well to the non-arms' length purchaser but not to any of the other lot owners. The Alberta Court of Appeal held that both the developer and the non-arms' length purchaser were obligated to comply with the provisions of the development agreement as set out in the stop order A just result was achieved since a developer should not be able to avoid its' responsibilities simply by transferring the lots to a related person - but where there is justice, there is also injustice.

S. 645 of the MGA provides in part as follows:

(1) Despite section 545, if a development authority finds that a development, land use or use of a building is not in accordance with (a) this Part or a land use bylaw or regulations under this Part, or (b) a development permit or subdivision approval, the development authority may act under subsection (2).

(2) (2) If subsection (1) applies, the development authority may, by written notice, order the owner, the person in possession of the land or building or the person responsible for the contravention, or any or all of them, to (a) stop the development or use of the land or building in whole or in part as directed by the notice, (b) demolish, remove or replace the development, or (c) carry out any other actions required by the notice so that the development or use of the land or building complies with this Part, the land use bylaw or regulations under this Part, a development permit or a subdivision approval, within the time set out in the notice.

According to Focaccia, the specific provisions of the development agreement entered into under s.655 are themselves conditions of subdivision approval for which a stop order can be issued to "the owner [of the property], the person in possession of the land or building or the person responsible for the contravention, or any or all of them." An earlier case review of *Focaccia*, "Has Anyone Here Seen Chicken Little?"[2], focused on the effect the *Focaccia* decision may have on a developer's ability to finance the construction required by the development agreement. While it was initially feared that the decision would undermine the ability of the developer to finance construction of the municipal improvements within its new subdivision, it seems, at least for the time being, that lenders remain oblivious to the risks created by the *Focaccia* decision or are otherwise comfortable assuming such risks.

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[1] *Focaccia Holdings Ltd v Parkland Beach (Summer Village Subdivision and Development Appeal Board)*, 2014 ABCA 132, leave to appeal denied, 2014 CanLII 63801 (SCC) [*Focaccia*].

[2] "Has Anyone Here Seen Chicken Little?", Dentons Canada LLP, (copy at the link).

However, the *Focaccia* decision has also created a risk to purchasers who purchase lots or homes within subdivisions for which the improvements are required to be installed by the developer pursuant to the provisions of the development agreement. If a stop order can be issued to subsequent owners of lots in the subdivision, the privilege of homeownership brings with it the risk that such owners may be liable for each of the obligations of the developer set out in the development agreement, including the obligation to build and maintain roads and utilities. In essence, the property owner inadvertently becomes the guarantor of the developer's obligations to satisfy the terms of the development agreement, notwithstanding such property owner does not have the skill, resources or legal entitlement to do what is required to remedy the stop order. If the subdivision approval (which, as a result of *Focaccia*, includes the development agreement) runs with the lands, all homeowners in a subdivision registered after 1975 have assumed this risk. Certainly, this is not what the legislature intended when enacting s. 645 of the MGA.

Development Agreements

Development agreements were introduced into the *Planning Act* (Alberta) in 1975 to enable municipalities to relieve themselves of the obligation, costs and risks associated with the installation of municipal improvements and utilities required to accommodate new subdivisions and new developments. Developers were prepared to assume these obligations provided that arrangements could be made to finance such construction. Financing requires security and a vacant field offers little in the way of collateral when compared to the considerable expense required to pave roads and install utilities. The solution was to enable registration of the plan of subdivision under the *Land Titles Act* (Alberta) (the "**LTA**") concurrently with the execution of the development agreement with the resultant lots providing the security required by the lender.

Section 655(1) of MGA states, among other things, that the subdivision authority may impose a condition on a subdivision approval issued by it that:

> "the applicant enter into an agreement with the municipality … (i) to construct or pay for the construction of a road required to give access to the subdivision; [and] (ii) to install or pay for the installation of a public utility that is necessary to serve the subdivision." [Emphasis added]

By entering into a development agreement with the municipality which sets out the developer's construction obligations, the developer has satisfied such condition. Additionally, s. 657(2) of the MGA states:

> "On being satisfied that the subdivision …complies with the subdivision approval and any conditions imposed have been met, the subdivision authority must endorse the plan or other instrument in accordance with the subdivision and development regulation." [Emphasis added]

Satisfaction of the conditions of subdivision approval (including the execution and delivery of the development agreement) should entitle the applicant to proceed with the registration of the subdivision plan under the LTA.

After the registration of the subdivision plan, the construction of the municipal improvements is to be undertaken in accordance with the development agreement (not the subdivision approval). The development agreement itself sets out the remedies available to the municipality in the event the developer defaults in its obligations under the agreement. The municipality, developer and its lenders were all comfortable with this arrangement provided the municipality received security from the developer to ensure

performance of its obligations under the development agreement. In effect, upon execution of the development agreement and delivery of required security, the conditions of subdivision approval were fulfilled. If the developer defaults under the development agreement, the municipality has available to it the remedies agreed to by the municipality and the developer under the development agreement as well the security it received from the developer which it can use to remedy the default. Had the S.V. of Parkland Beach taken sufficient security to complete the paving of the roads, there would not have been any need to pursue a stop order

Development Agreement Caveats

Pursuant to s. 655 of the MGA, a caveat respecting the development agreement may be registered under the LTA against the certificate of title that is subject of the subdivision; however, there is nothing in the MGA which addresses the purpose of the caveat and the status of a development agreement caveat "is unsettled."[3]

Typically, a caveat provides notice that a person is claiming an interest in the land. Development agreements generally do not contain an interest in land. Development agreements may include a requirement for the provision of rights-of-way; however, this requirement is generally satisfied at the time of plan registration. Development agreements sometimes questionably also contain a provision that purports to charge the lands with all liabilities under the agreement. A charge for unliquidated claim is arguably contrary to the LTA. If the legislative intent was that subsequent home owners were to observe and be bound by the development agreement, a clear statement to that effect would be expected. It is hard to conceive that the legislative draftsperson intended to have the lot/home purchasers perform the multi-million dollar construction obligations under the development agreement – particularly without express language to that effect. Arguably, the caveat was designed to allow politicians to deflect responsibility for deficiencies in the construction and to direct complaints to the developer.

In *Focaccia*, the Court held that the caveat was a charge on the lands. The Court stated "since the development agreement was protected by caveat, any purchaser [of a lot] was put on notice that there was an outstanding agreement between the developer and the municipality that was a charge on the lands."[4] In fairness to the court, there was a charging provision contained in the development agreement not referenced in the caveat; however, it is not clear how a charging provision fits into a construction contract. If challenged before signing of the agreement, it is likely that the Court would have ruled that the charging provision was unlawful since a charging provision is not normal in a construction contract.[5]

The presence of the caveat gives rise to the argument that the subdivision approval runs with the lands. The subdivision plan registration redefines the lands. Utility rights-of-way granted on subdivision approval will run with the lots created by the subdivision. If the conditions of subdivision approval run with the lands, arguably the municipality could require additional utility rights-of-way required as a condition of subdivision approval be granted at any future date by the then owner, or could require subsequent owners of the lands to enter into development agreements.

A development agreement is a construction contract which essentially imposes positive covenants which normally do not run with the lands. It is hard to conceive that the legislative drafts person intended

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[3] *Focaccia* at para 12.

[4] *Focaccia* at para 24.

[5] For a discussion respecting the validity of unlawful provisions in a development agreement, see "Development Agreements - A Shield or a Sword" (copy at the link).

that multi-million dollar covenants for construction of municipal improvements would run with lots each worth a fraction of the cost of the improvements.

Absent a caveat pursuant to the development agreement, could a stop order be issued? There is nothing in s. 645 which expressly authorizes stop orders to be issued pursuant to agreements entered into pursuant to s. 655 which would be expected if that was intended. Moreover, assuming the intent was to have stop orders issued to cure deficiencies under a development agreement, there is nothing in s. 645 that requires the registration of a caveat. If the subdivision approval as well as the development agreement run with the lands, and assuming the lands include the resulting lots, the caveat is merely a convenience or inconvenience depending on perspective.

Development agreement caveats often survive the registration of the plan for years and the practice of Municipalities relative to discharging such caveats is inconsistent and haphazard and may require a request by the homeowner for such discharge.

Stop Orders

The issue to be decided in *Focaccia* was whether or not a stop order could be issued to enforce the terms of the development agreement.[6] Essentially, the Court was tasked with determining whether a stop order, being a public law remedy available to the municipality, should apply to a contract normally governed by private law.[7] Section 646(3) of the MGA allows the municipality "to enter on the land or building and take any action necessary to carry out the order."[8]

The lots resulting on registration of a subdivision plan must conform to the conditions of the subdivision approval - ensured by the endorsement of the plan by the subdivision authority under s. 657(2) of the MGA which states:

> 657 (2) "On being satisfied that a plan of subdivision or other instrument complies with a subdivision approval and that any conditions imposed have been met, the subdivision authority must endorse the plan or other instrument in accordance with the subdivision and development regulations."

It cannot be said that the use or development of any of the lots in the subdivision is contrary to the subdivision approval. The original certificate of title for the lands to which the subdivision approval was granted is cancelled on plan registration. New certificates of title are issued for the lots created upon registration of the subdivision plan. A certificate of title for the lands within the subdivision plan comprising roadways is not issued (s. 84(5) of the LTA). The roadways are owned either by the city in which they are located or by the Crown in right of Alberta for all municipalities other than cities (s.16 of the MGA).

All of the utilities and roadways are constructed upon public lands or within public rights-of-way. If the roads are not completed in accordance with the development agreement, the municipality or Crown would be the owner as well as the person in possession of such lands. Certainly it is not the lot owners.

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[6] *Focaccia* at para 1.

[7] Failure to comply with a stop order is an offense under s. 557(a.3) of the Act punishable by a fine not exceeding $10,000 or imprisonment for one year or both (s. 566(1) of the Act). It has been some time since breach of contract could result in imprisonment.

[8] Query whether the failure to pay legal fees owing under a development agreement is a use of the land not in accordance with the subdivision approval and which can support a stop order. The Summer Village of Whispering Hills issued an uncontested stop order to recover legal fees incurred by the Summer Village seeking to enforce a development agreement.

Therefore, pursuant to s. 645 of the MGA, the stop order should only be issued to the developer as the person responsible for the default under the development agreement. However, the Court in *Focaccia* held that a stop order can be issued to subsequent lot owners for fulfilment of the developer's obligations upon the developer's default. This conclusion could be reached only by finding that: (a) entering into the development agreement did not satisfy the conditions of subdivision approval; (b) the lots resulting from the registration of the subdivision plan are the "land" referenced in s. 645(2) of the MGA; and (c) the use or development of the lots themselves is contrary to the subdivision approval because of some deficiency not upon or within the lot but in a public right of way.

***Focaccia* Reasons for Judgment**

In its interpretation of s. 645 of the MGA, the Alberta Court of Appeal applied the fundamental principal of statutory interpretation:

> "the words of the statute are to be read in their entire context and **in their grammatical and ordinary sense harmoniously** with the scheme of that statute, the object of the statute and the intention of the legislature".[9]

Grammatical and Ordinary Sense

In determining the grammatical and ordinary sense, the literal interpretation of a statute is to be followed except where it would result in an absurdity.[10] Section 655(1) of the MGA is clear that the condition of subdivision approval requires that the developer "enter into an agreement with the municipality." As Justice O'Brien states in his dissenting opinion in *Focaccia*: "Here the words of the statute are unambiguous, and there is no apparent error, gap or lacunae in the legislation which allows the court to imply power not expressed by the words of the statute."[11]

Words of a statute may be added or presumably overlooked if to not do so yields an absurd result. To confirm that the stop order should issue, the Court in *Focaccia* needed to overlook the plain language of the MGA that the required the applicant simply to "enter into an agreement" to satisfy the condition of subdivision approval which would limit the remedies available to the municipality upon the default of the developer to those remedies set out in the development agreement and to the security for performance provided by the developer. The court had to conclude that such a result was an unacceptable (absurd).

Moreover, if the intent of the legislature was to require the installation of the municipal improvements as a condition of the subdivision approval, language to that effect would have been very simple to express and would have to fit seamlessly into the operative provisions of the MGA. The legislature would have deleted the reference to entering into the agreement and simply required the roads and other municipal infrastructure to be completed or installed.

Moreover s. 645 of the MGA does not provide that a stop order can be issued for non-compliance with the terms of an agreement entered into under s. 655(1) of the MGA. The decision of the Court does not accord with the grammatical and ordinary sense of the words of the statute.

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[9] *Focaccia* at para 15.

[10] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 27-28.

[11] *Focaccia* at para 40; see also F. A. Laux, Q.C., Planning Law and Practice in Alberta, 3d ed (Edmonton: Juriliber), at 13-17 ff, on this issue.

Harmony

The obligation to enter into a development agreement as a condition of the subdivision approval does fit seamlessly with the other operative provisions of the MGA. The obligation to construct the municipal improvements as a condition of the subdivision approval does not.

Conditions of subdivision approval are subject to appeal under s. 678 of the MGA. If the conditions of subdivision approval include the obligations under the development agreement, then these conditions should likewise be subject to appeal. We assume that the reference to conditions appearing in s. 645 and s. 678 are to interpreted consistently. If the condition of subdivision approval is simply to enter into a development agreement, then the appeal body would have jurisdiction to determine if a development agreement was required but would not have jurisdiction to address the contents of the development agreement.

Section 680(2)(e) of the MGA states that the board hearing the appeal "may confirm, revoke or vary the approval or decision or any condition imposed by the subdivision authority or make or substitute an approval, decision or condition of its own." There is no express authority given to the appeal board to confirm, revoke or vary the terms of a development agreement.[12] Additionally, an appeal from the decision of the subdivision authority must be filed within 14 days following the decision of the subdivision authority. It is improbable that the development agreement will ever be prepared before the appeal period expires and any appeal of the terms of the development agreement would be clearly out of time.[13]

. The terms of the development agreement are not set by the subdivision authority but the result of negotiations between the municipality and the developer. In fact, the terms are substantially dictated by the municipality and negotiations seldom occur. Because municipal improvements are to be constructed for the municipality who will own the improvements and ultimately assume the obligation to maintain them, the subdivision authority should not interfere in this process.

Nor is a condition of subdivision approval that the improvements be constructed (rather than entering into an agreement to construct same) in harmony with s. 657(1) of the MGA which requires endorsement within one year of the decision of the subdivision authority. The ability to complete the improvements and to comply with the requirements of the development agreement within one year of approval by the subdivision authority is practically impossible, apart from the lengthy warranty period (extending well beyond the first anniversary of the approval) required by the agreement following construction of the improvements. Asphalt typically requires installation over two construction seasons and

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[12] While the Municipal Government Board on appeal of a subdivision approval made minor changes to a development agreement in *Keyland Development Corporation v Town of Cochrane*, [2005] MGB 041/05, this case was very fact specific. The Municipal Government Board was asked to assume jurisdiction to modify the terms of a development agreement. The Town took the position that the MGB lacked jurisdiction to do so. In this case, the subdivision authority expressly set out in its subdivision approval certain terms to be incorporated into the development agreement. While it is not clear whether the subdivision authority had jurisdiction to direct the contents of the development agreement, the Municipal Government Board used the fact that the subdivision authority had assumed this jurisdiction as its basis for making minor changes to the development agreement where it determined that the development agreement incorporated terms in excess of what the MGA authorized.

[13] See F. A. Laux, Q.C., Planning Law and Practice in Alberta, 3d ed (Edmonton: Juriliber), at 13-17 ff, on this issue. The only time that in my 40 plus years of practice that I have seen the development agreement produced within 14 days of the subdivision approval was when the municipality required the development agreement to be signed before subdivision approval was granted since the development agreement included provisions not authorized by the MGA and it would be impossible to appeal provisions of a signed agreement.

cannot be completed until the underground improvements have been installed. If the subdivision authority could impose a condition that the required work be done and the development agreement be complied with, it would be impossible to satisfy the conditions of approval within the time limited by s. 657 and would expose the developer to significant risk.

Focaccia Reasons for Judgment

There are a number of reasons upon which the Alberta Court of Appeal concluded that the subdivision approval incorporated the terms and conditions of the development agreement, including:

1. As s. 655(1)(b) of the MGA contemplates a subdivision condition that the developer enter into an agreement with the municipality to do specified things, the Court determined that it was unreasonable to interpret that as a condition "to agree to do but not actually do" those things.[14]

   The Court in effect disregarded the plain language of the statute and did so without an inquiry into the purpose for which s. 655(1)(b) only requires the developer to "enter into an agreement ". If the objective of s. 655 is not only to require the developer to install the municipal improvements at its cost, but also to enable it to finance such costs, then the plain language achieves its objective.

2. The Court, referencing Professor Laux, stated that the only time that a stop order is needed in the context of subdivision approval is with respect to matters like the installation of municipal improvements as pure conditions relating to the subdivision are enforced by refusing registration of the plan at the Alberta Land Titles Office. **(Focaccia at para 18) footnote**

   The stop order provisions relative to subdivision approval were introduced at the time that authority was given to the developers to carry out the construction of the municipal improvements. Commencing to do the work prior to entering into the development agreement, failing to provide security for its proper completion, or failure to provide insurance to safeguard the municipality would equally require a stop order. In *Focaccia*, while there was no attempt to issue the stop order to any owners other than the developer and the non-arm's length purchaser of the developer, it appears that the owners of the individual lots in the subdivision would also have been vulnerable to receiving the stop order and paying costs for the construction of the municipal improvements.

3. The Court rationalized that the issuance of a stop order was not precluded merely because the subdivision approval did not expressly state that it is was a condition of the approval that the developer pave the roads. Otherwise, the subdivision authority would be forced to place all of the details of the infrastructure specifications in the subdivision approval.[15]

   The subdivision authority can require the applicant enter into an agreement to do the work. it is not authorized to require as a condition approval that the work be done without distorting the plain language of s. 655 of the MGA. The obligation to do the work is set out in the development agreement which contains its own enforcement provisions. The municipality also has recourse to the security provided by the developer in respect of its completion of its obligations under the development agreement. Reading in the additional wording into s. 645 of the MGA, and

[14] *Focaccia* at para 17.

[15] *Focaccia* at para 19.

disregarding the plain language of s.655 as the Court did in *Focaccia*, is not necessary to avoid an absurd result.

4. The Court found that the wording of s. 645(1) of the MGA, which contemplates a stop order for a development that is "not in accordance with" a subdivision approval, is wide, as it does not "distort the statutory wording to say that the development is "not in accordance with" the approved conditions", if the approval contemplates a development agreement and the covenants of the development agreement have not been performed.[16]

   Arguably, "not in accordance with" was meant to encompass situations in respect of which the work was performed prior to entering into the development agreement or where there was no subdivision approval at all. While the subdivision of land requires registration of an instrument under the LTA (s. 652 of the MGA), the necessary work to complete a subdivision could be commenced prior to such registration. Additionally, there have been various attempts by owners of land to circumvent the requirement for subdivision approval by granting long term rights to persons to use only portions of the lands in a certificate of title.[17]

5. The Court recognized that it was not desirable to require the developer to wait until completion of all municipal improvements and performance of all obligations under the development agreement prior to registration of the subdivision plan.[18]

   Pursuant to s. 657 of the MGA, the conditions of the subdivision approval must generally be satisfied within one year after the date on which the subdivision approval is given and before endorsement of the subdivision plan by the subdivision authority. Endorsement by the subdivision authority confirms that the plan conforms to the approval and that all conditions have been or will be satisfied. If the condition required construction of the improvements, seldom if ever would the conditions of approval be satisfied within one year. The obligations under the development agreement, particularly relating to construction and placement of roadways, take a number of years. Generally, it takes a minimum of two years to complete roadways after the installation of the underground utilities as roadways typically require two lifts of asphalt. The installation of the first lift of asphalt is left for a year after construction so that if any subsidence within the roadway occurs over the following year it can be readily addressed when the second lift of asphalt is placed upon the roads. As such, the interpretation that the construction of the municipal improvements is a condition of subdivision approval is not in harmony with the requirements for submission of the subdivision plan for endorsement within the one year of approval.

Outstanding Issues not Addressed in Focaccia

Development agreements generally contain a number of provisions that are likely beyond the jurisdiction of the municipality, but which the developer willingly accepts to enable its subdivision to be completed. If a municipality can issue a stop order to enforce the development agreement, does the right to issue a stop order apply to obligations included in the development agreement by the municipality which

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[16] *Focaccia* at para 16.

[17] See, for example, *Half Moon Lake Resort v Strathcona County*, [2001] AJ No 220 (CA), in which the developer identified a number of sites which he then gave individuals the exclusive right to use for a lengthy period of time, thereby effectively achieving the results of subdivision without subdivision approval.

[18] *Focaccia* at para 20.

are beyond its statutory authority? Arguably, the use of a special and draconian statutory remedy such as a stop order should be allowed only to enforce obligations clearly authorized by the MGA.

Since a stop order can be issued when “development, land use or use of a building“ does not comply with the approval and the municipality can enter upon the lands to remedy the issue, does it follow that the stop order cannot be issued to enforce conditions that do not require entry upon the lands such as recovery of monies claimed by the municipality? It is the use or development of the lands that are the focus of the stop order and a stop order arguably should not be used as a summary method of debt recovery.

Must a caveat be filed against the lots in order to issue the stop order for non-compliance with the development agreement or can the stop order be issued to an owner if there is no development agreement caveat? The MGA does not address the requirement for registration of a development agreement caveat as a condition precedent to the issuance of a stop order so if Focaccia is correct, the presence or absence of the caveat regarding the development agreement is not relevant .

If the resulting lots replace the lands for which the subdivision approval was granted, must the stop order then be issued to every lot owner or just to those yet to be developed or owned by the developer – and at do all the warranty provisions and the need to additional provide security also apply to such lot owners? Is such obligation to be prorated amongst all owners?

Application of *Focaccia* to Subsequent Cases

***St Paul-Butler v Leduc (Subdivision and Development Appeal Board)*, 2018 ABCA 3**

Leave to appeal the decision of the Subdivision and Development Appeal Board was granted by the Alberta Court of Appeal on whether or not the City of Leduc has the authority to issue a stop order to enforce a restrictive covenant required as a condition of subdivision approval. The issue is whether the terms of the restrictive covenant are part of the subdivision approval.

The case raises the issue of whether or not the granting of the restrictive covenant satisfied the condition of subdivision approval, or if the terms of the restrictive covenant are incorporated into the subdivision approval and non-compliance at any time with such terms is a violation of the conditions of subdivision approval. There is no discussion as to whether or not the requirement for the restrictive covenant was a proper condition of the subdivision approval.

The City relies extensively on *Focaccia* in its submissions and a broad purposive approach to the interpretation of the MGA. The City argues that it was clearly intended that future lot owners should be bound by the conditions of subdivision approval - basically relying on *Focaccia*. Counsel for the City is the same counsel that represented Parkland Beach in *Focaccia.* Notably, in *Focaccia* there was no analysis respecting the reasoning behind the legislation requiring the applicant to entering into a development agreement as a condition of the subdivision approval rather than requiring completion of the improvements. Nor was there any any assessment of how the decision fit harmoniously into the scheme or intent of the MGA.

Fundamental to the decision in this appeal is whether or not the subdivision approval runs with the lands to bind all future owners and, consequently, allows the City to enforce the terms of the restrictive covenant by stop order, and to add the costs of carrying out the stop order to the tax roll. (It also remains to be seen whether the costs of carrying out the stop order include legal costs arising on the appeal). The restrictive covenant clearly runs with the lands but without more, the conditions of subdivision approval

which required only that the restrictive covenant be granted should not. There is nothing in the MGA which contemplates that a municipality can impose as a condition of subdivision approval that the lot owner maintain the developer fencing in perpetuity or to require a restrictive covenant at all. Nor can restrictive covenants impose positive obligations which effectively the restrictive covenant purports to do. The restrictive covenant should be enforced in the usual manner and not by stop order issued by the subdivision authority.

***Kneehill (County) v Harvest Agriculture Ltd*, 2018 ABCA 266**

The Saddle Up Estates Area Structure Plan (ASP) adopted by council of Kneehill County requires that each the owners of the 16 lots surrounding the land designated as a riding stable receive a membership package tied specifically to their lot, to include access to the trails and the riding arena. It was a condition of subdivision approval that the developer comply with the terms of the ASP. Additionally, the developer had made arrangements to pay money *in lieu* of reserves at the rate of $7000 per lot at the time of sale. Very few lots were actually sold and the riding stable could not sustain itself. Ultimately, a successor in title to the lands comprising the stable denied the lot owners access to the property. Because it was a condition of subdivision approval that the terms of the ASP be honoured, a stop order was issued to compel the owner (who received the land in a settlement from an owner who acquired it from the developer) to provide access to the riding stable and grounds. The County also stated in its notice to the owner that it was issuing the stop order to compel the payment of the cash *in lieu* of the required municipal reserve dedication.

The respondents in Kneehill argued that planning legislation is regulatory only and cannot compel a specific development to be constructed and used in a particular manner.[19]

On appeal to the Subdivision and Development Appeal Board (SDAB), the SDAB revoked the stop order. On application by the County, the Court granted leave essentially upon two grounds:

1. Did the SDAB correctly determined that the ASP could not impose positive obligations on landowners to develop or use their property in a particular fashion?[20]

2. Did the registration of the caveat respecting the development agreement without reference to the money *in lieu* of the required municipal reserve dedication bind future owners to payment of such amount?[21]

In 1998 the Court of Appeal stated;

"In the absence of a declaration of invalidity of the Bylaw, the SDAB was mandated to presume its validity. So too must this Court.". Arguably therefore the SDAB was bound to accept the validity of and to enforce the provisions of the ASP. In this case ("Coffman"), the challenge to the validity of the land

[19] Pursuant to s. 633 of the MGA, an Area Structure Plan (ASP) must describe the proposed sequence of development for the area, land uses, population density, general location of roads and utilities, and "may contain any other matters, including matters relating to reserves, as the council considers necessary." The application of the *ejusdem generis* rule suggests that the other terms of the ASP must be similar in kind, to those expressly authorized. Each of the authorized provisions of an ASP passively regulates the land uses.

[20] A bylaw adopted without legal authority is void and can be challenged at any time, as the passage of time cannot remedy its defect: *Wiswell v Winnipeg,* [1965] SCR 512 at p. 524.

[21] A caveat respecting the development agreement registered at the LTA which is silent respecting reserves should not achieve this result absent very express language in the caveat charging the lands.

use bylaw before the SDAB was based on procedural deficiencies in its' adoption, for which a challenge is specifically authorized under s.538 of the Act. A bylaw that is adopted with irregularities in procedure is voidable and therefore subject to attack on that basis provided that the action is commenced within the time limits prescribed in s. 538. If that action is not brought within the specified time, the bylaw is deemed valid by passage of time. On the other hand, a bylaw adopted without legal authority is void and can be challenged at any time, as the passage of time cannot remedy its defect.[22] The Coffman decision is correct insofar as it holds the SDAB and the Court must accept the validity of the bylaw where the challenge to the bylaw rests on procedural grounds and the time for such challenge has lapsed. . Only then would the court not have jurisdiction to review the validity of the bylaw.

Relying on the Coffman decision, in Mather v. Gull Lake 2007 ABCA 123 at para 21 the Court of Appeal states "The SDAB must comply with the bylaws in effect and has no authority to declare the bylaw invalid."

The issue in Mather was whether the land use bylaw could prohibit the removal of trees. It is reasonable to conclude that he SDAB as a quasi-judicial body must presume the bylaw to be valid - but the presumption must be rebuttable and challengeable by collateral attack.[23]

The respondents in Kneehill argued that planning legislation is regulatory only and cannot compel a specific development to be constructed and used in a particular manner. By s. 633 of the Act, an ASP can describe proposed sequence of development, land uses, population density location of roads and "such other matters as council considers necessary". The application of the ejusdem generis rule suggests that the other terms of the ASP must be similar in kind, to those expressly authorized. Each of the authorized provisions of an ASP passively regulates land uses.

The ability to defer the payment of money in lieu to be paid on sale of the lots as required by the stop order allowing recovery the funds as taxes should be dependent upon the terms of the caveat. A caveat filed pursuant to the development agreement which is silent respecting reserves should not achieve this result absent very express language in the caveat charging the lands. A separate instrument would be preferred.

Finding Reverse on *Focaccia*

If *Focaccia* is to stand as good law, it must be restricted to its facts. *Focaccia* presented a very specific w fact situation where there was a deliberate attempt to frustrate the requirement to pave the roads by transferring the property to a non-arms' length party after default was acknowledges and it would appear that a stop order had been issued. A party should not reap the benefits of a development agreement and avoid the obligations associated with it simply by transferring the lots to a related entity. But would Focaccia have been similarly decided if the property had been transferred to 20 *bona fide* purchasers for value intent on building their dream homes?

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[22] Coffmann v. Ponoka County 1998 ABCA 269 at para 10

[22] Wiswell v. Winnipeg 1965 SCR 512 at p.524.

[23] See F.A.Laux Planning Law and Practice in Alberta (3d) S.16.2 - Collateral Attacks

Agricultural Financial Services Corporation v. Redmond[24] sets out the basis upon which the court will entertain reconsideration of a prior decision. The factors taken into account by the Court in assessing whether leave should be granted to reconsider a prior decision include:[25]

1. the age of the decision;

2. the treatment of the issue by other appeal courts;

3. whether there is a simple, obvious and demonstrable flaw in the decision;

4. whether some binding statue or authority been overlooked;

5. whether the earlier decision created settled expectations or resulted in other cases being settled or decided in a particular way; and

6. whether the earlier decision was a "Memorandum of judgment delivered from the bench" or a reserved, circulated judgment.

While the fact that the judgment in *Focaccia* was “reserved” and therefore reviewed by the entire court and the Supreme Court of Canada declined to grant leave to appeal present major obstacles to a review of the decision, *Focaccia* holds that positive covenants can run with the land, contrary to generally accepted jurisprudence. This result was achieved without giving plain literal meaning to the statute (in fact disregarding the general principle that all words of a statute must be given meaning) and notwithstanding the resultant absence of harmony with the balance of the MGA.

While initial concerns raised by the *Focaccia* decision related to the inability of developer’s to secure financing for its subdivision project, the risks created by the *Focaccia* to lot purchasers surpasses this concern. General conveyancing practice does not generally contemplate that the conditions of subdivision approval must be examined and an estoppel certificate or release be obtained from the municipality with respect to these conditions prior to property being conveyed to the purchaser. While s. 61 of the LTA sets out the implied conditions to which a property is subject, it does not refer to the subdivision approval that created such property. The issuance of stop orders also gives rise to potential abuse like the enforcement of obligations which are included in the development agreement by the municipality and which are beyond its statutory authority or the recovery of amounts payable that are not referenced in the development agreement. It gives the municipalities a distinct advantage in enforcement.

Can you hear Chicken Little screaming yet?

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[24] *Agricultural Financial Services Corporation v. Redmond,* 1998 ABCA 189 [*Redmond*].

[25] *Redmond* at para 5.