Court of Queen's Bench of Alberta

Citation: Keyland Development Corporation v Rocky View (Municipal District No 44), 2016 ABQB 735

Date: 20161222
Docket: 0401 16761
Registry: Calgary

Between:

Keyland Development Corporation

Plaintiff

- and -

The Municipal District of Rocky View No 44, the Town of Cochrane, Julian De Cocq and Sandra Wong

Defendants

Docket: 0701 01325
Registry: Calgary

And Between:

Keyland Development Corporation

Plaintiff

- and -

Her Majesty the Queen in Right of Alberta

Defendant

Reasons for Decision of the
of the
Honourable Mr. Justice K.D. Yamauchi

I. Introduction

[1] On November 3, 2004, the Plaintiff Keyland Development Corporation ("Keyland") commenced an action against the Town of Cochrane (the "Town"), the Municipal District of Rockyview No. 44 (the "MDR"), the Town's Chief Administrative Officer Julian de Cocq, and Sandra Wong, a member of the Town's planning staff.

[2] The statement of claim raises numerous allegations against Mr. de Cocq and Ms. Wong, the Town, and the MDR, relating to Keyland's efforts to develop a new residential subdivision ("Cochrane Crossing") on property it owned within the Town (the "Lands") from 2000 to 2006.

[3] On February 5, 2007, Keyland commenced a related action against Her Majesty the Queen in Right of Alberta ("HMQ").

[4] In these applications, which this Court heard over a period of 3 days, the Town, the MDR, and HMQ (collectively, the "applicants") ask this Court to dismiss Keyland's actions against them by way of summary judgment.

II. Background

[5] In early 2000, Keyland acquired the Lands from Southland Development Corporation ("Southland") with a view to subdividing, developing and building residential homes on the Lands. The Lands are located in the Town, south of the Bow River and east of Highway 22. The property to the east of the Lands is owned by John Robinson. The Lands and the Robinson property are known as the "South Ridge" area.

[6] Immediately to the southwest of the Lands is the Bow Valley High School ("BVHS"), which was being built by the Rocky View School Division No. 41 ("School Division") when Keyland acquired the Lands.

[7] In December of 1999, there were 2 access points to the Lands. One was an old, one-way bridge over the Bow River, known as the River Avenue Bridge. Obtaining access from the River Avenue Bridge to the Lands had significant challenges, as the existing road, River Heights Rise, was closed and barricaded. A more direct road would have to go through a parcel of land between the Lands and the River Avenue Bridge owned by the Elliott family. The Elliotts were not amenable to having a road constructed on their land, meaning that Keyland could not build an access road through that parcel. The Town would not permit Keyland to build a road south of the Elliott's lands because of sloping issues.

[8] The other access point to the Lands was from Highway 22 along River Heights Drive ("RH Drive"). When Keyland purchased the Lands, the western portion of RH Drive was within

the MDR's jurisdiction, and not the Town's jurisdiction. Initially, RH Drive intersected with Highway 22, west of BVHS.

[9] Southland, as well as Mr. Robinson, the owner from whom Southland acquired the Lands, had the same difficulty in developing the Lands, *viz*, access to them. These difficulties were evident as early as 1995, when Mr. Robinson sought to develop the Lands, but was thwarted in his efforts. Although the Town supported Mr. Robinson's plans, the MDR and the residents along RH Drive opposed them.

[10] Mr. Robinson sold the Lands to Southland in 1996. After it purchased the Lands, Southland, as well, was thwarted in its efforts to develop the Lands because of inadequate access to them. Southland obtained conditional subdivision approval from the Town's subdivision approval authority, the Cochrane Planning Commission ("CPC"), but Southland was dissatisfied with the conditions, which included the following:

- resolving access from Highway 22, to the Town's satisfaction; and
- replacing the River Avenue Bridge before first occupancy of phase 1, or immediately provide construction access if access from Highway 22 is unavailable.

[11] Southland began proceedings to appeal these conditions, but did not proceed with the appeal because of its sale of the Lands to Keyland.

[12] Before it purchased the Lands from Southland, Keyland was aware of the access difficulties that Mr. Robinson and Southland had faced. A letter that Keyland had prepared, dated November 1, 2001, which attached a chronology dated October 29, 2001, includes a reference to Southland's "many delays, costs and frustrations" in its dealings with the Town, the MDR, and HMQ. As well, Keyland's consultant, IBI Group, was well-aware of the access challenges, as it had advised Mr. Robinson during his attempts to develop the Lands, and it had advised the Town during its preparation of the South Ridge Area Structure Plan ("SRASP") in relation to the Lands.

[13] Development of the Lands was, at all material times, regulated by the Town's planning policy documents, including its municipal development plan ("MDP"), the SRASP, and a land use bylaw ("LUB").

[14] Since May of 1995, the SRASP contained the following requirements:

- the Lands were accessible from Highway 22 and the River Avenue Bridge,
- additional access would be required as development proceeds, including new bridge crossings,
- initial access to the Lands would be by the River Avenue Bridge and a connection to the Bow Vista Road, which was the name by which RH Drive was then known,
- in the long term, a new Highway 22 connection would be required,
- an additional bridge crossing would be required when density approaches one-thousand units, and
- transportation infrastructure improvements outside the Town would be the subject of development agreements and negotiations with HMQ, the MDR, and affected landowners.

[15] Since October of 1998, the Town's MDP required the Lands' developer to replace the River Avenue Bridge, at the developer's cost, before it could proceed with development of the Lands. As well, it required a comprehensive transportation study before any further re-designation of the Lands for development. The other access challenge involved the residents who lived along RH Drive. They opposed any additional traffic along RH Drive. The MDR was also opposed to further traffic along RH Drive. These objections were not new, as they existed long before Keyland acquired the Lands.

[16] HMQ was as the highway authority for Highway 22. The Minister was responsible for the management and control of Highway 22, including the development of all access to and from Highway 22. HMQ considered the intersection of Highway 22 and RH Drive to be unsafe for increased traffic. HMQ's position existed well-before Keyland acquired the Lands.

[17] Before Keyland purchased the Lands, it conducted its due diligence as it related to the Lands. IBI Group conducted the due diligence on Keyland's behalf. During its due diligence, Keyland argues that it received certain assurances from Mr. de Cocq and Frank Wesseling, the Town's Director of Planning and Engineering in December of 1999, concerning the timing and nature of various approvals that Keyland required to facilitate its development of Cochrane Crossing. These included the following:

- the Town would "fast track" Keyland's development applications, and that all necessary approvals would be in place within 6 months;
- while the Town's MDP required the first developer in the South Ridge area to replace the River Avenue Bridge before any development could proceed, the requirements in the MDP were too onerous and they would be changed;
- an application was needed to build a new intersection from RH Drive on to Highway 22, but the School Division was working on that application; and
- while the residents along RH Drive and the MDR opposed increased use of RH Drive, the MDR could not legally deny access to a public road but, in any event, the Town's annexation of lands south of the Bow River would be completed, thereby giving the Town jurisdiction and control over RH Drive.

[18] Based on these assurances, Keyland argues that it completed its purchase of the Lands, which closed on March 6, 2000. Mr. de Cocq and Mr. Wesseling deny that they made any such assurances to Keyland, especially as they related to timing of the various approvals. In particular, they advised Keyland of the past history of attempts to develop the Lands by Southland and Mr. Robinson.

[19] Keyland proposed that it would upgrade RH Drive and build a new intersection and "Stub Road" connecting RH Drive to Highway 22, at its cost. The MDR initially responded favourably to this proposal. A transportation study by Morasch Transportation Consultants Ltd ("Morasch") concluded that the proposed upgrades would accommodate additional traffic generated by new residents during the first 5 years of Cochrane Crossing's development.

[20] On April 17, 2000, IBI Group applied to the Town for subdivision approval, and amendments to the MDP, the SRASP, and the LUB. It also sought approval of the Cochrane Crossing concept plan and approval of phase 1 of the subdivision, which dealt with the upper portion of Cochrane Crossing. The application sought to defer the additional bridge requirement

such that construction would be completed 5 years following the registration of the phase 1 subdivision. The Town's council was the authority responsible for amending the MDP and the SRASP. CPC was the subdivision authority that could provide subdivision approval.

[21] In May of 2000, IBI Group submitted an application to the MDR to permit Keyland to upgrade RH Drive, and to have the MDR apply to HMQ, on Keyland's behalf, to allow it to build a new intersection from RH Drive on to Highway 22. In July of 2000, the MDR advised IBI Group that the design must be done to a major urban collector standard and that it must meet HMQ's approval.

[22] Keyland made many other applications for various approvals and amendments to existing bylaws. All of these applications met with the same concerns about access to the Lands, which this Court will discuss further, without addressing the various applications particularly. Throughout, the MDR's major concern was the use of RH Drive by construction and additional residential vehicles. HMQ's concern was the safety of access to and from Highway 22.

[23] While Keyland was making its applications for subdivision approval and amendments to the MDP, the SRASP, and the LUB for its proposed development, the School Division was working towards completing construction of the BVHS. BVHS was constructed in 2000.

[24] The MDR had, at all material times, imposed road bans on RH Drive that restricted the weight of the vehicles that could use the roadway. These road bans were in force before Keyland purchased the Lands. Particularly, the road bans were in force as against the previous owners of the Lands, being the Robinson family and Southland. The MDR was opposed to the re-designation of Cochrane Crossing. In particular, it opposed any developer accessing the lands using RH Drive. RH Drive was intended to function as a local residential access road, and, since 1995, had automatic 75% road bans.

[25] The School Division wanted to use RH Drive for construction purposes and access. Initially, the MDR opposed this use, as well.

[26] Keyland argues that during a meeting it had with Mr. de Cocq and Mr. Wesseling in August of 2000, it was advised that once the Town's annexation of RH Drive was completed, access to the Lands from Highway 22 along RH Drive would no longer be an issue. As well, the timing of the River Avenue Bridge replacement would not be an issue.

[27] Keyland and the School Division wanted access to their properties from Highway 22 via RH Drive. During 2000, there were several meetings involving multiple parties on the subject. HMQ was concerned about the safety of the access from Highway 22 to RH Drive for either BVHS or Cochrane Crossing traffic.

[28] On October 17, 2000, Keyland applied to the MDR to have the MDR apply for a permit from HMQ to construct an upgraded intersection and road seven hundred metres south of the existing intersection (the "Stub Road"). This would allow for construction vehicles and a relaxation on the MDR's road ban, as it related to RH Drive. HMQ was in favour of the Stub Road upgrade as an interim solution, but still wanted a long term access arrangement involving Highway 22. The MDR, however, denied Keyland's request. Residents who lived on RH Drive were lobbying to preclude additional traffic on RH Drive for construction of Cochrane Crossing and the increase in traffic that would result from the development.

[29] Knowing that the MDR had denied its request to make an application to HMQ for a permit to construct the Stub Road, Keyland hoped that the MDR would approve the School

Division's application to construct the Stub Road. As a result, in October and November of 2000, Keyland asked the School Division to apply to the MDR to upgrade RH Drive and to construct the Stub Road. To assist the School Division, Keyland provided the School Division with its engineering designs and the work done by the IBI Group for construction of the Stub Road. The School Division and Keyland hoped that the MDR would allow the application if the School Division made the application, instead of Keyland. The MDR denied the School Division's application.

[30] By November of 2000, Keyland felt that the Cochrane Crossing development was in jeopardy because of the MDR's refusal to allow the construction of the Stub Road. In a letter to the Member of the Legislative Assembly for Banff-Cochrane, Keyland said, "The MD's position is delaying the inevitable and placing many of the stakeholders in jeopardy."

[31] By June of 2001, the issues regarding access to and from Highway 22 for BVHS and Cochrane Crossing remained unresolved. Keyland advised HMQ that it may have to abandon the Cochrane Crossing project if safe access could not be found.

[32] By July of 2001, BVHS had already been open for one year and traffic to and from BVHS was continuing to use the interim access arrangement to Highway 22, with elaborate signage at the intersection of highway 22 and RH Drive, that was originally intended to have been used for only 2 months. A safer access was necessary from HMQ's perspective. To resolve the safety issues for access to and from BVHS, HMQ facilitated a mediation among the MDR, the Town and the School Division. The Town argues that the sole purpose of the mediation was to resolve the issue of safe access to BVHS using RH Drive.

[33] The mediation took place July 30, 2001, without Keyland. The MDR was not in favour of Keyland's participation in the mediation, so Keyland was not invited; nor were the residents along RH Drive.

[34] Although the mediation itself was confidential, the fact of the mediation and its results were not. HMQ and the Town advised Keyland and the IBI Group of the mediation before the mediation took place.

[35] The mediation resulted in a memorandum of understanding entitled "Recommendations for Bow Valley High School Access" ("MOU"). The MOU provided the following:

> The Municipal District of Rocky View No. 44, the Rocky View School Division No. 41, the Town of Cochrane, Alberta Transportation and Alberta Infrastructure have a common concern to provide safer vehicle access to Bow Valley High School.
>
> The increased enrolment and resulting increase in traffic to Bow Valley High School exacerbates safety concerns and requires immediate action.
>
> After exploring several access options, the representatives of the parties agree to recommend to their governing bodies the following:
>
> > 1(a) A new access from Highway 22 to River Heights Drive will be built approximately 300 meters south of the existing access as soon as possible.
> >
> > (b) Upon completion of the new access, the existing River Heights Drive access will be closed.

> 2 The cost of the new intersection on Highway 22 will be negotiated by the Province of Alberta and the Rocky View School Division.
>
> 3 In order to address concerns over the volume and nature of vehicle traffic on River Heights Drive, the parties agree that the town will, as part of any development agreement relating to Cochrane Crossing subdivision:
>
> > Require a suitable public access road from River Avenue Bridge to Bow Valley High School before development starts;
> >
> > Require a new bridge to be built within five (5) years of commencement of development with irrevocable guarantees;
> >
> > Require the developer to use the old bridge subject to its structural limitations;
> >
> > Encourage phasing of development to promote use of River Avenue Bridge.

[36] The Town and the MDR adopted the MOU and disclosed it to the public. The MOU was not kept a "secret" from Keyland.

[37] Keyland argues that the MOU was contrary to the Town's representations that it had made to Keyland, and to the MDP and SRASP. Keyland was under the impression that RH Drive would be used for construction of and access to Cochrane Crossing. As well, it argues that the MOU was contrary to HMQ's representation that Keyland could use the new intersection and Stub Road that IBI Group had designed. In other words, Keyland argues that the Town, the MDR, and HMQ had bargained away Keyland's right of access to RH Drive to secure a more favourable access to BVHS.

[38] In September and October of 2001, Keyland sent letters to the Town and HMQ, respectively, seeking clarification of the MOU's terms. Specifically, Keyland asked the Town to clarify if the MOU meant that Keyland could not access the Lands for its development of Cochrane Crossing by using RH Drive. The Town's response on October 4, 2001, was as follows:

> The language agreed to in the mediation process does not exclude River Heights Drive from being used as a public access. More to the point, it removes the condition that the Developer provide safe access. What it does allude to is the current standard won't be changed to accommodate anything more than what is already moving along that road, which is generally light traffic but also includes school buses. Any traffic falling into this category will be able to use the road.

[39] HMQ's response on November 21, 2001, was as follows:

> The Minister believes the mediation process was successful and the affected parties are implementing the resulting agreement. However, the school board's decision to hire engineering consultants was not part of the agreement and did not involve the mediators.

> …
>
> Through the mediation process, it was decided to pursue an interim access arrangement for the 2001/2002 school year until a long term access arrangement is realized.
>
> …
>
> The new access route, which is only to be used for access to the Bow Valley High School and the residences along River Heights Drive, will be under the jurisdiction, control and management of the Municipal District of Rocky View No. 44.

[40] Keyland never applied to the MDR before or after the MOU for permits that would allow its construction vehicles to use RH Drive and the Stub Road.

[41] Keyland argues that the Town continued to express to Keyland that its annexation of the area, including RH Drive, would resolve the access issue, and that the Town would move the subdivision process forward. Based on these assurances, Keyland concluded that its best course of action was to continue to pursue approval of phase 1 of its subdivision.

[42] As part of its applications, Keyland provided the Town with its transportation studies. On November 20, 2001, the Town advised Keyland that it wanted its own transportation study, and that subdivision approval would be held in abeyance pending completion of that study. This delay caused Keyland concern, which it expressed to the Town.

[43] In early 2002, the School Division's consultant advised Keyland that the MDR instructed the School Division to downgrade the Stub Road and RH Drive to a rural standard to maintain a fifty percent road ban. This road ban would restrict potential construction traffic. This was, Keyland argues, contrary to the MDR's position in 2000, when the MDR insisted that Keyland construct the Stub Road and RH Drive to a highway standard. The School Division offered to pay for the cost to upgrade the surface and weight capacity of RH Drive, but the MDR refused the School Division's offer. Instead, the MDR insisted that the Stub Road and RH Drive upgrades be built to a rural standard. Keyland argues that the MDR did so because it wanted to prevent increased residential and construction traffic.

[44] On February 8, 2002, the Town assured Keyland that the Town's position remained that RH Drive would be part of the access to Cochrane Crossing and that the jurisdictional issues would be reduced following annexation.

[45] On July 4, 2002, HMQ granted the MDR a "Roadside Development Permit" so that the School Division could construct the new intersection and Stub Road. The first general condition for that permit provided as follows:

> The application involves a request for the permanent re-alignment of the Highway 22 / River Heights Drive intersection for school bus traffic destined for the Bow Valley High School and existing local area residents.

[46] Keyland did not receive a copy of the Roadside Development Permit until May 2004. Thus, Keyland was not aware of the conditions until that time.

[47] Late in 2002, the School Division built the new intersection and Stub Road at the location IBI Group had proposed. Keyland argues that the new intersection and Stub Road were

substantially based on the design that the IBI Group had prepared on Keyland's behalf, that HMQ had previously approved.

[48] The Town passed amendments to the MDP and SRASP in September 2002, and gave first reading to Keyland's proposed amendments to the LUB on October 15, 2002.

[49] The Town circulated the proposed LUB amendments for comment on November 6, 2002. On November 25, 2002, HMQ advised the Town that it could not support the proposed amendments because the MOU intended that the new intersection and Stub Road could only be used by existing residents and BVHS.

[50] Between August 2001 and November 2002, HMQ expressed concern about Keyland's intended use of the new intersection and Stub Road, but HMQ had not foreclosed such use. Further, at no time before November 2002, did HMQ indicate that its concern was based on the MOU. For example, in August 2002, HMQ provided the Town with its views in relation to its consent to the SRASP, by stating the following:

> 2. The department recognizes that the access to Highway 22 from River Heights Drive is currently being re-constructed to accommodate the Bow Valley High School. From the information provided, it appears that this new intersection of River Heights Drive and Highway 22 is intended to provide short-term access to the plan area. The use of this new access is not acceptable to Alberta Transportation, without some form of traffic study that has been completed by a qualified professional and accepted by the department.
>
> 4. If the Town wishes Ministerial consent for the SRASP, the document should be forwarded to this office prior to final reading.

[51] In 2002, the Town and the MDR began formal talks concerning the annexation of the MDR lands into the Town. These lands included, among other areas, RH Drive and the land along RH Drive between Cochrane Crossing and Highway 22. The Town and the MDR entered into an annexation protocol agreement, which would govern the annexation process. The parties agreed that the annexation mediation proceedings would be confidential. However, the fact that the mediation was taking place was not a secret and the resulting annexation agreement was publicly disclosed. On October 18, 2002, the parties issued a media release describing the goals of the annexation process and announcing a "public input opportunity" that they had scheduled for October 30, 2002.

[52] During the early stages of the annexation process, the Town's council and the MDR's council resolved that the processing of all subdivision applications in their respective jurisdictions within the annexation territory would be suspended until after the conclusion of annexation negotiations. The reason for the suspension was that some decisions reached during the annexation negotiations might directly affect the subdivisions.

[53] On November 12, 2002, the Town's council passed a resolution *in camera* that Keyland's LUB amendment and phase 1 subdivision applications would be postponed until it completed the annexation with the MDR. The Town advised Keyland. Keyland had been aware that an annexation was intended to take place, but was surprised when it learned of this postponement, given the Town's representations that the annexation process would not adversely affect Cochrane Crossing. Keyland expressed its concern to the Town with respect to this further delay as follows:

> The above application was submitted on September 9, 2002. To date we have not received the circulation comments. The time it takes Cochrane to deal with our applications and respond to letters is unnecessarily long and very costly to Keyland. This has affected the financial feasibility of this project substantially.

[54] Keyland argues that it continued to rely on the Town's representations that the access issues involving RH Drive would be resolved through the annexation. It learned, however, that one of the basic principles of the continuing relationship between the Town and the MDR was to minimize the impact of the annexation on RH Drive.

[55] HMQ did not take part in the annexation negotiations and had no role in the development of the resulting agreement.

[56] The Town and the MDR entered into an annexation agreement that the Town approved in principle in May of 2003 (the "Annexation Agreement"). The parties signed the Annexation Agreement on September 9, 2003. The Town and the MDR submitted the Annexation Agreement to the Lieutenant Governor for issuance of an order to annex the land as contemplated by the Annexation Agreement under section 125 of the *Municipal Government Act*, RSA 2000, c M-26 [*MGA*]. *Order in Council* 431/2004 effective July 4, 2004, annexing land was issued.

[57] One of the Town's objectives of annexation was to address the concern about the MDR's objections to the use of RH Drive for the Cochrane Crossing development. The Town thought it could resolve this concern by bringing RH Drive within its jurisdiction. After annexation the Town was given the ability to manage RH Drive through, among other things, appropriate road bans. The Town did not deploy road bans on RH Drive at any time. Annexation Agreement ss 13.1 and 13.3 provided as follows:

> 13.1 [The Town] shall provide a bridge for vehicles traveling between Cochrane lands located north and south of the Bow River and promote the use of the bridge for vehicular traffic rather than River Heights Drive, except as set out in Part 13 and Clause 14.1 herein.
>
> ...
>
> 13.3 [The Town] shall restrict South Ridge construction traffic on River Heights Drive to the transportation of large construction equipment and vehicles by permit, until the relevant road use conditions set out in the River Heights structure plan, as outlined in Clause 14.1 herein, have been met.
>
> [Emphasis added].

[58] Thus, at all material times after annexation, Keyland could apply to the Town for special use permits to allow it to use RH Drive for construction traffic. Keyland never made any such application for any special use permits. Others did, and the Town granted those permits.

[59] The Annexation Agreement restricted construction traffic on RH Drive, and provided that the Town and the MDR would promote the use of a bridge for vehicular traffic, rather than RH Drive. Keyland was troubled by the clauses of the Annexation Agreement that related to RH Drive. Keyland wrote to the Town expressing the concern that these clauses precluded construction vehicle access along RH Drive, and would force future residents of Cochrane Crossing to use the River Avenue Bridge. The Town responded in a letter dated August 5, 2003,

that it expected the majority of traffic generated by the first phases of Cochrane Crossing to use the River Avenue Bridge. This concerned Keyland, as the Town previously considered that the River Avenue Bridge to be unsafe, and it was only accessible by River Heights Rise, which did not connect to the Lands, and was also unsafe and therefore closed by barricade.

[60] In September 2003, the Town resumed its processing of Keyland's application to amend the LUB. In a report to the Town's council regarding those amendments, the Town indicated the following:

> The recent annexation agreement between the Town of Cochrane and the MD of Rocky View will allow limited access, by permit only, using the existing bridge at River Avenue. This bridge can be used to bring equipment into the construction area, where the equipment is to remain until the grading and servicing is complete. This construction equipment can then be removed from the site using the existing bridge. Prior to use of the existing bridge, improvements must be undertaken to prepare the bridge for this use. These improvements will be the responsibility of the developer.

[61] In a subsequent report dated October 29, 2003, the Town quoted Annexation Agreement cls 13.1 and 13.3 and stated that "these clauses are in keeping with a mediated agreement dated July 2001, accepted by the MD of Rocky View, the Town of Cochrane and Alberta Transportation."

[62] The Town passed the LUB amendments on November 24, 2003. Following the Town's adoption of amendments to its LUB, it circulated Keyland's application for phase 1 subdivision approval for comments. HMQ provided the following comments to the Town in its letter of January 5, 2004:

> From the information provided, it appears that the proposed subdivision is for Phase 1 of the Cochrane Crossing concept. It appears from this information provided that access for Phase 1 is proposed via Highway 22 by utilizing River Heights Drive. This access route, which includes the recently installed intersection onto Highway 22, was only intended to be used for access to the Bow Valley High School and the residences along River Heights Drive. <u>This was a key part of the mediation process</u> that occurred between the Rocky View School Division No. 41, the Town of Cochrane, and the Municipal District of Rocky View No. 44.
>
> [Emphasis added].

[63] Accordingly, HMQ declined to support Keyland's subdivision application. The Town advised Keyland that its consideration of the subdivision application would be put on hold because of the MDR's request to discuss the subdivision application in the light of the Annexation Agreement provisions. The Town advised Keyland that it could appeal the deemed refusal of the subdivision application to the Municipal Government Board ("MGB").

[64] Keyland decided to take this approach. Shortly thereafter, Keyland's vice-president received a telephone call from the Town's mayor, who said that if Keyland held off on its appeal, the Town would provide subdivision conditions that would allow Keyland's subdivision application to proceed. Among other things, the mayor agreed that construction and residential

access to Cochrane Crossing would be provided by way of RH Drive. Based on this, Keyland decided not to pursue its appeal.

[65] On February 18, 2004, CPC provided Keyland with its subdivision approval, which contained conditions. Among other things, the conditions required the Town to restrict construction traffic on RH Drive, and required Keyland to build an access road to the River Avenue Bridge. Keyland appealed this ruling to the MGB.

[66] By a letter dated April 23, 2004, Keyland advised HMQ that Keyland's legal counsel viewed HMQ as effectively closing RH Drive as an access point to Cochrane Crossing from Highway 22. Specifically, it stated the following:

> We have obtained numerous documents confirming that a 3 party agreement [presumably the MOU] exists amongst Alberta Transportation, The Town of Cochrane and The Municipal District of Rocky View #44 for the purpose of eliminating access to Keyland's property – as described in Alberta Transportation's letter of January 5, 2004 ...

[67] HMQ confirmed its position by a letter to Keyland dated May 5, 2004, that the new intersection and Stub Road was an interim access arrangement that was intended only to be in place until long-term access arrangement could be approved. HMQ's position in this regard was consistent from 2000 through 2004.

[68] The MGB declined to take jurisdiction to hear this appeal, as the parcel of land that was the subject of the appeal was not adjacent to the Bow River. Hence, it found that an appeal would properly be brought before Cochrane's Subdivision Development and Appeal Board. Rather than appealing to that board, Keyland decided to consolidate the Lands and, on August 24, 2004, re-applied for subdivision approval, so an appeal could be made to the MGB if it was not satisfied with its subdivision approval. The Town circulated Keyland's subdivision application for comment. The MDR did not object to the application "provided the provisions of Part 13 of Town of Cochrane/Municipal District of Rocky View No. 44 Annexation Agreement regarding the South Ridge Area Structure Plan Access and River Heights Drive are adhered to." HMQ declined to support the subdivision on the basis that the new intersection and Stub Road were only intended for access to BVHS and existing residences along RH Drive.

[69] On October 15, 2004, the Town drafted a report to the CPC concerning Keyland's subdivision application. The report said, "the annexation agreement between the MD of Rocky View and the Town of Cochrane has placed restrictions on River Heights Drive." It goes on to say the following:

> At present, the only legal access to the area is by way of River Heights Drive. Although River Heights Drive is now entirely within the Town's jurisdiction, the Town must still adhere to the intent of the annexation agreement…

[70] After quoting Annexation Agreement cls 13.1 and 13.3, the report goes on to say, "these clauses are in keeping with a mediated agreement, dated July 2001, which was accepted by the MD of Rocky View, the Town of Cochrane and Alberta Transportation."

[71] On October 20, 2004, the CPC provided its tentative approval of Keyland's phase 1 subdivision with conditions. Those conditions included the following:

> 3. Additional access to the Phase I Subdivision is to be obtained by means of a road to be constructed from the River Avenue bridge to the subject property at a location and to a quality satisfactory to the Subdivision Engineer prior to registration;
>
> …
>
> Notes:
>
> a) The Town of Cochrane may restrict South Ridge construction traffic on River Heights Drive to the transportation of large construction equipment and vehicles by permit, until the relevant road use conditions set out in the River Heights Area Structure Plan have been met.
>
> [Emphasis added].

[72] The difficulty with the condition that additional access to Cochrane Crossing would be over the River Avenue Bridge along a road that Keyland would be required to build prior to construction was that Keyland did not own and could not acquire the land for that road. As well, access along RH Drive would be restricted until the conditions of the River Heights Area Structure Plan ("RHASP") had been met. However, the RHASP had not yet been created. In fact, the committee to develop the RHASP would not be struck until October 2005 and its mandate was intended to last until June 2007.

[73] Keyland decided to appeal CPC's decision. Keyland wanted to know HMQ's position on the use of the new intersection and the Stub Road before the hearing in front of the MGB. On November 4, 2004, Keyland met with HMQ. At that meeting, the Deputy Minister stated that Keyland could not use the new intersection for construction of Cochrane Crossing or for future residents of Cochrane Crossing. HMQ then denied saying this in subsequent correspondence, but HMQ's own minutes of that meeting (first produced to Keyland during the course of this litigation) confirmed HMQ's stated position that "the existing interim access could not be used by the Cochrane Crossing development." The minutes explicitly state that HMQ had refused to provide that position in writing.

[74] On December 4, 2004, the Town's transportation experts, Urban Systems, issued a memorandum concluding that the new intersection and Stub Road would be sufficient for the increased traffic to and from Cochrane Crossing until 2010.

[75] On March 14, 2005, HMQ was provided with a report by DA Watt Consulting, which agreed with the earlier conclusions of Finn Transportation Consultants, that the new intersection and Stub Road could accommodate increased traffic.

[76] HMQ explained the following to the MGB:

> Due to the mediation agreement for the recent annexation bringing River Heights Drive from the jurisdiction of the MD to the jurisdiction of the Town, the second goal of the original 3-point plan [which was to make interim access arrangements for traffic to the High School and Cochrane Crossing] could not be realized and use of the intersection is now restricted to users of the High School and the existing residents along River Heights Drive.

[77] During the appeal hearing, HMQ advised the MGB that it had a report showing that the new intersection was unsuitable for additional users. HMQ was, however, unable to produce any

such report. Instead, HMQ produced a letter dated the day after it advised the MGB that a study was completed in February of 2005. There was no actual report.

[78] Keyland relied on a Finn Transportation Consultants' study to argue that the new intersection was safe and adequate for use during construction and by future residents of Cochrane Crossing. Keyland also argued that the use of the River Avenue Bridge for access to phase 1 would not be feasible because neither Keyland nor the Town had title to the lands necessary to build the required access road, and because the existing bridge might not be able to withstand the anticipated traffic.

[79] Even though the Town's transportation experts agreed with the Finn Transportation Consultants' study, the Town took the position that it could not support RH Drive for construction or residential access to Cochrane Crossing, because it was "honouring the terms of the mediated annexation agreement with the MD of Rocky View."

[80] On May 16, 2005, the MGB issued its decision on Keyland's appeal of the phase 1 subdivision conditions. The MGB concluded that the new intersection and Stub Road could accommodate traffic volumes in excess of those that would be generated by phase 1 of Cochrane Crossing, and that the intersection was safe to use. It went on to say the following:

> As the Subdivision Authority, the MGB is not bound by the annexation agreement and was not convinced that the use of River Heights Drive can be legally restricted to only those parties already living along the road and the users of the Bow Valley High School. Indeed, the annexation agreement carries no status as a statutory plan or other bylaw adopted by the Town and subject to public scrutiny. In the MGB's view, restrictions on the use of River Heights Drive are not enforceable even if it could be considered legal.

[81] The MGB also found that access to the River Avenue Bridge would be impractical and perhaps impossible.

[82] As such, the MGB deleted the subdivision condition requiring Keyland to build an access road via the River Avenue Bridge. Instead, the MGB required Keyland to contribute to the cost of any necessary upgrades to RH Drive, something that Keyland had always been willing to do. The Town also attached certain "Notes" to the conditions, one of which indicated that the Town may restrict construction traffic and other vehicles on RH Drive by permit. The MGB held that it did not have authority to rule on the Notes. Thus, the indication from the Town that access to RH Drive would continue to be restricted remained in the subdivision conditions.

[83] The subdivision conditions, as modified by the MGB, were operative for one year, meaning they would expire on May 16, 2006.

[84] Keyland argues that despite the MGB's ruling, its use of RH Drive remained in doubt during 2005 and 2006. The MDR maintained its opposition to the use of RH Drive by any additional users, including construction traffic. Indeed, the MDR continued to assert its position that the Town had committed to restrict traffic on RH Drive.

[85] HMQ also continued to object to Keyland's use of RH Drive and the new intersection to Highway 22. HMQ maintained that position through at least 2006.

[86] The Town's stated position was that Keyland would be permitted to use RH Drive. Having heard that promise several times, by 2005, however, Keyland argues that it had doubt

that RH Drive was and would remain available for Keyland's use. For example, the Town created doubt about its position when it indicated that it would require a further transportation study prior to proceeding with LUB amendments for phase 2 even though several previous transportation studies had confirmed that the new intersection and Stub Road could accommodate traffic well in excess of what was needed to accommodate phase 1 of Cochrane Crossing.

[87] Keyland argues that there were other conditions that attached to the subdivision approval of phase 1 of Cochrane Crossing that had to be met. Keyland was required to enter into a subdivision services agreement (often called a development agreement) with the Town. That development agreement would cover topics such as an off-site levy Keyland would pay, and the engineering details relating to the roads and sewer system within Cochrane Crossing. Keyland's solicitor indicated that the standard form development agreement would be suitable. The Town disagreed, and said that it would draft a different development agreement, which never occurred, despite numerous requests from Keyland throughout 2005. The parties never did finalize the development agreement.

[88] Keyland needed certain reports, such as geotechnical and storm water reports, which, it argues, the Town delayed in providing.

[89] In late 2005, the Town passed an off-site levy bylaw that included a levy to collect money for construction of the new bridge. Keyland informed the Town many times that it was unfair to expect Keyland to incur a disproportionate share of the cost of the new bridge. Yet, the 2005 off-site levy bylaw did so by charging a levy for the new bridge on the basis that only areas south of the Bow River would benefit from the new bridge. Keyland challenged the 2005 off-site levy bylaw, but the court's decision striking that part of the bylaw was not issued until 2007.

[90] As a result of these issues, the conditions that the MGB imposed expired before Keyland could obtain the information necessary to enter into a development agreement with the Town and register the phase 1 subdivision. Keyland continued to negotiate with the Town after that date, but they never reached an agreement on the development.

[91] Despite these set-backs, Keyland continued to push forward with the Cochrane Crossing development through 2005 and 2006. For example, it pursued finalization of the necessary technical reports, and obtained a grading and stripping permit. It commenced its grading and stripping of the Lands. It used RH Drive to transport the grading and stripping equipment to the Lands without a special use permit. The Town did not object to Keyland's use of RH Drive for this purpose.

[92] The MDR continued to oppose Keyland's use of RH Drive for Cochrane Crossing into November 2005. In a letter to the MDR dated November 4, 2005, the Town advised that Keyland had the right to use RH Drive. Keyland was provided with a copy of that letter. Keyland was sceptical of the Town's position because in mid-2005, the Town advised Keyland that it would require another transportation study before Keyland could obtain a land use bylaw amendment for phase 2. Further, Keyland was also made aware that HMQ continued to object to Keyland's use of the new intersection and Stub Road following the MGB's decision.

[93] Once the subdivision conditions, as modified by the MGB expired, Keyland had been attempting to develop the Cochrane Crossing subdivision for 6 years, but it had faced numerous delays and obstacles. Because of the difficulties Keyland encountered following the MGB's

decision, Keyland concluded that trying to work with the Town would continue to be a frustrating waste of time and money.

[94] As a result, Keyland decided to sell the Lands. It entered into an agreement of purchase and sale on December 6, 2006. As a result, Keyland argues, it was deprived of the opportunity to develop the Cochrane Crossing subdivision, including building and selling homes, and the profit that it would have generated from those activities.

[95] Keyland argues that it was also deprived of the opportunity to enter into the home building market because it lacked a portfolio of recently-built homes.

[96] On November 3, 2004, Keyland filed its statement of claim against the MDR, the Town, Mr. de Cocq, and Ms. Wong. The claim against the Town and the MDR alleges a breach of duty by restricting Keyland's access to the Land. The claim further alleges civil conspiracy and misfeasance in public office related to the MOU and Annexation Agreement, and claims that the parties have been unjustly enriched by the use of Keyland's engineering designs for the new intersection and Stub Road. The statement of claim further pleads negligence and gross negligence, bad faith, wilful misconduct, breach of common law right of access, and misrepresentation. Keyland has discontinued, or intends to discontinue, its claims against Ms. Wong and Mr. de Cocq.

[97] On February 5, 2007, Keyland filed a statement of claim against HMQ. Keyland claims that HMQ knew of all the alleged breaches that the Town and the MDR had committed, as more particularly set forth in its action against the Town and the MDR. In addition, Keyland claims that HMQ closed access to Highway 22, participated in civil conspiracy, committed misfeasance in public office, and was unjustly enriched by use of Keyland's engineering designs in construction of the new intersection and Stub Road.

III. Discussion

[98] There are many issues before this Court. The parties have provided this Court with many affidavits to support their arguments, and all parties have provided this Court with their briefs of law, as well as reply briefs. The briefs are extensive.

[99] This Court will begin with a discussion of the limitations arguments. It will then discuss the nature of the applications, and the standards the applicants must meet to satisfy this Court that they are entitled to the relief they seek. It will then discuss the arguments the parties have presented to determine whether they have met the tests for summary judgment.

A. Limitation of Actions

[100] The sections of the *Limitations Act*, RSA 2000, c L-12 [*Limitations Act*], that are important for the purposes of this decision are as follows:

> 1.(e) "injury" means
>
> …
>
> (iii) economic loss,
>
> (iv) non-performance of an obligation, or
>
> (v) in the absence of any of the above, the breach of a duty;

(i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes

…

(iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or other body in the exercise of a power conferred by statute or regulation, or

…

3(1) Subject to subsections (1.1) and (1.2) and section 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(5) Under this section,

(a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a) or (1.1)(a), and

…

6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding, and

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

(5) Under this section,

(a) the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of subsection (3)(c), if in issue, has been satisfied, and

(b) the defendant has the burden of proving that the requirement of subsection (3)(b) or (4)(b), if in issue, was not satisfied.

[101] Keyland commenced its actions against the Town and the MDR on November 3, 2004, through its filing of a statement of claim. Thus, the Town and the MDR argue, Keyland is barred from recovering any claim for an injury of which Keyland first knew, or in the circumstances ought to have known, before November 3, 2002: *Limitations Act* s 3(1). The alleged "injury" or injuries in the case at bar are Keyland's economic loss, the non-performance of an obligation to Keyland by the Town and the MDR, and their breach of a duty to Keyland.

[102] Although there are similarities between the claims that Keyland makes against the Town and the MDR, and those it makes against HMQ, the additional issue that involves HMQ is that Keyland commenced its action against HMQ on February 5, 2007. It seeks to add HMQ to the action it commenced against the Town and the MDR pursuant to *Limitations Act* s 6, and will discontinue its separate action against HMQ.

[103] Because Keyland seeks to join HMQ in the action against the Town and the MDR, this Court will examine that action as it relates to all the applicants.

[104] The Town argues that Keyland was aware that the mediation among the Town, the MDR, HMQ, and the School Division was going to occur before the mediation took place. As well, it was aware of the content of the MOU by the Fall of 2001. Keyland sought clarification of the MOU's terms from the Town and HMQ in the Fall of 2001. Keyland does not allege a separate conspiracy for the Annexation Agreement, but ties it to the MOU. Thus, it knew of the alleged injurious nature of both well before November 3, 2002, and made the Town aware of its concerns before that time. As for the claim for unjust enrichment, the new intersection and the Stub Road were completed before November 3, 2002.

[105] Similarly, the MDR argues that the issue of the road bans that it imposed on RH Drive existed from 1995 to 2001. Thereafter, the MDR's council had made a decision on October 17, 2000, not to upgrade RH Drive. It makes arguments similar to the Town's arguments with respect to the MOU and the Annexation Agreement. These were known to Keyland before November 3, 2002.

[106] In a nutshell, Keyland argues that its various claims against the applicants are not statute-barred because it had no way of knowing whether the applicants' conduct warranted bringing a proceeding until February 5, 2004, when it received its subdivision approval and the conditions on which the approval was granted. The approval crystallized the events leading up to it. Therefore, Keyland argues, it filed its claim well within time.

[107] A starting point for this discussion is contained in the Alberta Law Reform Institute report that contained recommendations on limitations. It said the following:

> The limitations strategy at law results in limitation periods which are too often unreasonable, either to claimants or defendants. A limitations period may be unreasonable if does not provide an adequate discovery period, or an adequate negotiation period within which to avoid legal action by settling differences. It should prevent a claimant from bringing a claim unduly late, but it should not require him to bring one with undue haste. A limitations system should not encourage unnecessary civil proceedings or unnecessary legal costs. All three of the essential elements on which the strategy at law is based – the commencement of the limitation period at the time of accrual, the use of different limitation periods of fixed duration, and the assignment of different limitation periods to different categories of claims - contribute to the unreasonable results.
>
> Alberta Law Reform Institute, *Limitations*, Report No. 55 (December 1989) [ALRI Report] at 24. [Emphasis added].

[108] Despite this, there are subjective and objective elements in an analysis of when a claimant must commence its action. Master Hanebury said the following in ***RP Choma Financial and Associates Inc v McDougall***, 2008 ABQB 359 at para 51, 451 AR 278, 94 Alta LR (4th) 191:

> The court cannot simply bow to the claimant's determination of when it thinks a proceeding is warranted. In the case of a mortgage, it cannot await the triggering of the acceleration clause by the plaintiff. That may never happen. The court must examine the fact situation from the plaintiff's perspective, which is the subjective part of the court's analysis, and then determine objectively when a proceeding is warranted. The plaintiff's decision that a proceeding was not warranted must be found to be reasonable.

[109] The ALRI Report goes on to discuss *Limitations Act* s 3(a)(iii), when it says the following:

> ... [T]he discovery period will not begin until the claimant first knew that his injury was sufficiently serious to have warranted bringing a proceeding, that is, there must be relatively serious harm. This criterion will protect litigants from incurring unnecessary legal expenses, and bringing unnecessary legal action. The discovery rule will, in effect, invite the judge to put himself in the claimant's shoes, to consider what knowledge he had at the relevant time, and to make the cost-benefit analysis which would be reasonable for the actual claimant.
>
> ALRI Report at 33. [Emphasis added].

[110] The Alberta Court of Appeal spoke of the cost-benefit analysis in ***Boyd v Cook***, 2013 ABCA 27 at para 13, 542 AR 160, 84 Alta LR (5th) 359, when it said the following:

> There might be a number of things which might mean that a lawsuit for an undoubted injury caused by a defendant would not be warranted. ... Some lawsuits are, or appear to be, uneconomical. The likely legal fees and disbursements may be less than the likely recovery. Maybe a big risk of paying costs to the other side is also relevant. And sometimes the amount of work which the plaintiff would have to put into the suit and preparing for it would be undue in relation to the likely recovery.

See also ***Condominium Plan 9421549 v Main Street Developments Ltd***, 2004 ABQB 962 at paras 71-72, 365 AR 162, 41Alta LR (4th) 386.

[111] In the case at bar, the applicants must establish that it is plain and obvious that Keyland's claim is barred by the provisions of the *Limitations Act*: ***Quadrangle Holdings Limited v Coady***, 2012 ABQB 22 at para 28; ***De Shazo v Nations Energy Company***, 2005 ABCA 241 at para 19, 367 AR 267, 48 Alta LR (4th) 25.

[112] Keyland was aware of the access issues involving the River Avenue Bridge and RH Drive even before it purchased the Lands. As well, it was aware of the MOU and the Annexation Agreement, and the limitations placed on its use of RH Drive before November 3, 2002. After the applicants entered into the MOU, Keyland was still hopeful that the annexation would resolve its problems of access inasmuch as the Town would have jurisdiction over RH Drive. Because the Annexation Agreement contained a provision that the applicants would, essentially, abide by the terms of the MOU, Keyland's hopes were deteriorating. Despite that, it was optimistic that the subdivision approval would allay its concerns about its use of RH Drive. It argues as follows:

> ... It remained possible that the CPC would follow the MDP and ASP, and/or sound engineering advice, and permit Keyland to use RHD for its subdivision. However, once the restrictions on RHD were incorporated into the subdivision conditions of February 18, 2004, the potential harm to Keyland from the Defendants' conduct crystallized into an actionable injury.
>
> Keyland's Brief filed on July 29, 2016, para 499.

[113] Before the conditional subdivision approval, Keyland could not proceed to develop the Lands, so it had suffered no injury. However, after the approval, the alleged injury became manifest.

[114] This Court finds that it is not "plain and obvious" that Keyland's claims are statute-barred.

[115] This Court will address the *Limitations Act* s 6 issue later in these reasons.

A. Summary Dismissal

1. *Rules of Court*

[116] Rule 7.3 of the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*] provides as follows:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.
>
> (2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

> (3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:
>
> > (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
> >
> > (b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;
> >
> > (c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

[117] The applicants rely on *Rules* r 7.3(1)(b) in their applications. The Alberta Court of Appeal has dealt with the test for summary judgment in many of its recent decisions. After citing several decisions that the Supreme Court of Canada has issued on this topic, the Alberta Court of Appeal provided the following principles in ***Windsor v Canadian Pacific Railway***, 2014 ABCA 108 [***Windsor***]:

(a) in summary judgment applications, the test is whether there is "a reasonable prospect that the claim will succeed," not whether it is "plain and obvious" that no claim is disclosed;

(b) a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial;

(c) the modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record;

(d) *Rules* r 7.3 calls for a more holistic analysis of whether the claim has "merit," and is not confined to the test of "a genuine issue for trial" found in the previous rules; and

(e) when the resolution of the dispute turns primarily on issues of law, summary judgment is often appropriate.

Windsor at paras 12-15.

[118] The Alberta Court of Appeal has not completely dismissed the “no genuine issue for trial” test. Rather, it said in ***Windsor*** that the test is not “confined” to that test. In ***Amack v Wishewan***, 2015 ABCA 147 at para 26, 24 Alta LR (6th) 44, 602 AR 62, it said the following:

> … Following the recent Supreme Court of Canada decision in *Hryniak v Mauldin*, [*Hryniak*], this Court has held that summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record: [citations omitted]. This does not, however, detract from the requirement that there be “no genuine issue for trial”: [citations omitted]. Rather, the two concepts are themselves linked, as noted in *Hryniak, supra*…
>
> [Emphasis added].

[119] What does it mean when a claim has “no merit”? In ***P (W) v Alberta***, 2014 ABCA 404 at para 25, 588 AR 110, 7 Alta LR (6th) 319, the Alberta Court of Appeal said the following, citing ***Access Mortgage Corporation (2004) Limited v Arres Capital Inc***, 2014 ABCA 280 at para 45, 584 AR 68:

> A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high.

[120] More recently, that court said the following:

> From the substantive perspective, summary judgment can be granted if, in light of what that fair and just process reveals, there is no merit to the claim. No "merit" means that, even assuming the accuracy of the position of the non-moving party as to any material and potentially decisive matters — matters which would usually require ordinary forensic testing through a trial procedure with viva voce evidence and which could not be resolved through the fair and just alternative — the non-moving party's position viewed in the round has no merit in law or in fact.
>
> ***776826 Alberta Ltd v Ostrowercha***, 2015 ABCA 49 at para 10.

See also ***Mraiche Investment Corporation v McLennan Ross LLP***, 2012 ABCA 95, 524 AR 151, 60 Alta LR (5th) 92 [***Mraiche***] at para 11.

[121] The Alberta Court of Appeal expanded on these principles in ***Condominium Corp No 0321365 v Cuthbert***, 2016 ABCA 46 at paras 27-29, 33 Alta LR (6th) 209, 612 AR 284 [citations excluded], when it said the following:

> When deciding a summary judgment application, there are two considerations. With respect to the process, the court must ask, "whether examination of the existing record can lead to an adjudication and disposition that is fair and just to both parties" … With respect to the substantive issues, the court must ask "whether there is any issue of merit that genuinely requires a trial or, conversely, whether the claim or defense is so compelling that the likelihood it will succeed is very high such that it should be determined summarily" … An issue of merit is established when the respondent's (non-moving party) case discloses a "genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the 'fair and just [summary] process'" …
>
> Summary judgment is not possible if opposing parties' affidavits and evidence conflict on material facts because a chambers judge cannot weigh evidence or credibility on a summary judgment application …
>
> Complex legal questions may be sufficient to deny summary judgment. A full trial is required when the summary record cannot be used to decide legal issues that are unsettled, complex or intertwined with facts … A trial is also required when an applications judge is not satisfied she can fairly resolve the dispute on the record before her …

[122] As mentioned at the outset of this discussion, the parties have provided this Court with volumes of materials. Does sheer volume create complex legal issues? It is this Court’s view that

it does not. What this Court must do is examine those materials to determine whether the issues are complex, whether there are conflicting points of material fact, and whether, in the end, summary judgment is fair and just in the light of Keyland's claims.

[123] For the purposes of these applications, this Court must examine the record before it, as it is Keyland's responsibility to "put its best foot forward." The Alberta Court of Appeal said the following:

> A party faced with an application for summary judgment must put its best foot forward, and present evidence to show sufficient "merit" to establish a genuine issue requiring a trial with respect to the outstanding issues … Speculating that evidence might be available at a trial is not sufficient to create a genuine issue requiring a trial.
>
> ***Windsor*** at para 21 [citation excluded].

[124] In the affidavits that the parties have presented to this Court, there is no doubt that there are many self-serving statements. The Supreme Court of Canada dealt with how this Court must deal with such evidence in ***Guarantee Co of North America v Gordon Capital Corp***, [1999] 3 SCR 423, 178 DLR (4th) 1 at para 31, when it said, "a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence."

[125] Of course, this Court may consider only admissible evidence. It will not consider inadmissible evidence, such as hearsay evidence: *Rules* r 13.18(3); ***1214777 Alberta Ltd v 480955 Alberta Ltd***, 2014 ABQB 301 (Master) [***1214777***] at para 17(3). As well, the affidavits and other evidence that contain argument, inferences, opinion, or conclusions, are not properly before this Court as "[a]ny conclusion based on the evidence is the function of the court": ***Alberta (Human Rights Commission) v Alberta Blue Cross Plan***, 1983 ABCA 207, 28 Alta LR (2d) 1, 48 AR 192 at para 8. See also ***Rau v Edmonton (City)***, 2015 ABCA 5 at para 19.

[126] As for the burden of proof, Master Schlosser summarized it as follows:

> ... The legal or persuasive burden is on the Applicant throughout. The Respondent is not obliged to furnish evidence. However, if an Applicant discharges the evidentiary burden imposed upon it on a balance of probabilities, the evidentiary burden then falls to the Respondent to show that there is arguable merit to the case: *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69 (Alta. C.A.), *Proper Cat* at paras. 66-7, 70, and *Dasilva v. McLean*, 2011 ABQB 618 (Alta. Master), and, now, that there is a compelling reason that it should go to trial.
>
> ***1214777*** at para 19

[127] Master Schlosser summarized his analysis, when he said, "[t]he court is to look at the record and the dispute to decide whether it is essential to the resolution of the dispute that the court see the witnesses. If the answer is yes, the matter must go to trial": ***1214777*** at para 17.

[128] Accordingly, this Court must consider each of the causes of action to determine whether the applicants have discharged their evidentiary burden to show this Court, on a balance of probabilities, that their positions are unassailable. If they discharge this evidentiary burden, the burden then falls on Keyland to show the arguable merit of its case.

2. Conflicting Evidence and Misrepresentations

[129] One of the key determinations that this Court must make is whether there is conflicting evidence concerning the material facts on which it, or a trial court, must make its decision. The Alberta Court of Appeal said that "Trials are for determining facts, and the facts underlying the dispute are not seriously in issue": ***Windsor*** at para 16. The Town argues that despite the substantial record, there is little conflict in the evidence. Keyland argues otherwise.

[130] Although Keyland chose not to argue the issue concerning the alleged representations that Mr. de Cocq and Mr. Wesseling made during their meetings in December of 1999, these alleged representations serve to illustrate whether there is a conflict in the evidence.

[131] Keyland alleges that Mr. Wesseling and Mr. de Cocq made the following representations:

(a) they would "fast track" the development;

(b) all necessary approvals would be in place within 6 months; and

(c) they and Cochrane wanted construction to commence within 6 months.

[132] Keyland argues that these representations were important in its decision to purchase the Lands. The Town says that it is not seeking summary dismissal on the basis that the representations were not made, although it denies that they were.

[133] For the representations that Mr. Wesseling and Mr. de Cocq made to be actionable, they must be of representations of facts, and not how they or the Town intended to act in the future. In ***Motkoski Holdings Ltd v Yellowhead (County)***, 2010 ABCA 72, 20 Alta LR (5th) 1, 474 AR 367 [***Motkoski***] the Alberta Court of Appeal said the following:

> Actions for negligent misrepresentation usually rest on misrepresentations of fact: *Queen v. Cognos Inc.* ... Sometimes representations are made about the future that depend on the facts as they exist at the time of the representation. If those existing facts are inaccurately and negligently stated, the words may be actionable, as in *Cognos*. Sometimes people are retained to give opinions about the future, and if those predictions are negligent (having due regard that perfection in future projections cannot be expected) they may be actionable, as in *Kelly v. Lundgard*, 2001ABCA 185 (Can LII), 95 Alta. L.R. (3d) 11, 286 A.R. 1.
>
> There is therefore some room for an action for negligent misrepresentation about the future, although it is more difficult to prove that predictions about the future are "inaccurate". However, an action for misrepresentation generally cannot be based on a representation about how the speaker intends to act in the future, unless the representation amounts to a covenant that the speaker will act in that way. As it was stated in *Arrow Construction Products Ltd. v. Nova Scotia (Attorney General)* (1996), 1996 CanLII 5552 (NS CA), 150 N.S.R. (2d) 241, 27 C.L.R. (2d) 1(C.A.):
>
> > . . . The Hedley Byrne Principle deals with representations, not promises. It is important to distinguish between a representation and a promise. A representation is a statement relating to some existing fact or past event. A promise is a statement of intention to do something in the future . . . .

> Unless consideration has been given, the plaintiff is generally not entitled to rely on a representation about how the defendant intends to conduct itself. That liability sounds in contract, if at all.
>
> ***Motkoski*** at para 43-44 [emphasis added].

[134] The alleged representation that Mr. Wesseling and Mr. de Cocq will "fast track" the development is a statement of intention of future conduct. It is not a statement of an existing fact or past event. Keyland gave no consideration for the alleged representation about how Mr. Wesseling and Mr. de Cocq intended to act.

[135] The alleged representation that all necessary approvals would be in place within 6 months is arguably also a statement of intention of future conduct, which, for the foregoing reason, would not be actionable. If it is not a statement of future intention, it might be actionable if Mr. Wesseling or Mr. de Cocq made the statement negligently. A person who makes a representation has a duty to ensure that they exercise such reasonable care as the circumstances require that the representation is accurate and not misleading: ***R v Cognos Inc***, [1993] 1 SCR 87 [***Cognos***, cited to SCR] at 121-22, 14 CCLT (2d) 113, 99 DLR (4th) 626. In ***Cognos***, the court provides the following quotation from Lewis N Klar, *Tort Law* (Toronto: Thomson Professional Publishing Canada) at 160:

> An advisor does not guarantee the accuracy of the statement made, but is only required to exercise reasonable care with respect to it. As with the issue of standard of care in negligence in general, this is a question of fact which must be determined according to the circumstances of the case. Taking into account the nature of the occasion, the purpose for which the statement was made, the foreseeable use of the statement, the probable damage which will result from an inaccurate statement, the status of the advisor and the level of competence generally observed by others similarly placed, the trier of fact will determine whether the advisor was negligent.
>
> ***Cognos*** at 121-22.

[136] In the case at bar, the circumstances relevant to this analysis are as follows:

- At the time Keyland was conducting its due diligence before purchasing the Lands, the MDP required the developer to provide a bridge over the Bow River to replace the River Avenue Bridge before development;
- Providing that bridge before development would avoid the conflict with the MDR about using RH Drive;
- The Town made Keyland aware of these requirements in the Town's MDP and SRASP, and Keyland, through its own due diligence, was aware of these requirements;
- Keyland, through its own due diligence and through the Town's advice, was aware of the history that had inhibited and delayed development of the Lands by Southland and Mr. Robinson;
- Southland had received conditional subdivision approval for the lower bench Lands;
- The lower bench Lands had already been re-designated for residential development under the LUB;

- Keyland knew or had the means to know that changes to the MDP and SRASP were policy matters that the Town's council decided.

[137] Keyland's knowledge of the actual state of affairs and damage it might suffer as a result of its reliance on this alleged statement would not be foreseeable by the Town. As well, because the Town did not know the content of Keyland's development proposal and the bylaw changes that it intended to seek, the Town could not have breached any standard of care by making the alleged representations. Thus, if Mr. Wesseling or Mr. de Cocq made the representations on the Town's behalf, they were not made negligently.

[138] The alleged representation "that Mr. de Cocq, Mr. Wesseling and the Town wanted construction within 6 months" is a representation of fact. That fact, however, is framed in the nature of a desire. It is not surprising that these individuals and the Town had that desire. This Court fails to see how Keyland can show that a statement of desire is an actionable misrepresentation.

[139] Had this Court found that the alleged representations were representations of fact, for the Town to be liable for its representatives' negligent misstatements, Keyland must show that it relied on those representations and its reliance was reasonable in all of the circumstances. In ***Serendipity Ventures Ltd v White Rock (City)*** (1990), 43 BCLR (2d) 90 (BCCA) [***Serendipity***], the plaintiff developer was unsuccessful in obtaining land use re-designation from the defendant city that would allow its proposed development to proceed. The developer alleged that city staff were liable for negligent misrepresentations they made during the course of working with the developer to put proposals before city council. The trial judge rejected the claim. The British Columbia Court of Appeal upheld the trial judge's decision against the developer. In so doing, the court emphasized the developer's awareness that city council was not bound by the recommendations of city staff, and that the city had its own and the public interests to consider. It said the following:

> It is clear that the developers were well aware that any proposal for rezoning required council's approval regardless of the recommendation of the City staff. It is also clear that the development of this particular parcel of land and its effect on the adjoining park lands was of considerable public concern, as evidenced by the community plan and the views expressed at the public meeting of April 21, 1981 when the proposal to construct 138 units was rejected. Furthermore, the circumstances were such that the developers must have been aware, from the time they considered applying for rezoning, that the City had its own interest to advance, namely, enhancing the quality of the park, which objective was likely to conflict with the developers' objective of obtaining a rezoning which would permit the maximum permitted residential density.
>
> The evidence of the participation of the City staff and the various proposals put forward cannot be characterized as representations that their efforts would result in the approval of a rezoning application - - rather, it was advice to the developers as to how they might frame their various proposals so that they would be more likely to receive favourable consideration by council. <u>There is no suggestion in the evidence that the advice of City staff members amounted to an assurance that any particular proposal would achieve a successful rezoning</u>. The developers were aware that any suggestions put forward by the planner or members of the City

> staff could not bind the individual councillors when it came for them to decide whether a certain proposal should be approved.
>
> In all the circumstances, therefore, it would be unreasonable for the developers to rely upon the advice proffered by the City staff members as if it were an assurance that any particular proposal would receive council's approval, let alone the approval of a public meeting.
>
> ***Serendipity*** at paras 93-94 [emphasis added].

See also ***Neufeld v Mountain View (County)***, 2014 ABQB 443, 26 MPLR (5^{th}) 184 (Master) [***Neufeld***] at para 117.

[140] That situation is not unlike the situation before this Court. The alleged representations, or statements, that Mr. Wesseling and Mr. de Cocq made could not amount to an assurance that the Town's council was of the same view as those of its staff members. As this Court will discuss later in these reasons, the Town and the MDR had other interests and constituents they had to consider in making their respective decisions.

[141] Besides, Keyland had retained the IBI Group, experienced consultants, to advise it of the potential for development of the Lands, the development process, and the timing during the due diligence period, before it concluded the purchase. Keyland relied on advice from its consultants. Neither the IBI Group nor Keyland anticipated that approval in 6 months was likely, and Keyland was familiar with the requirements of the SRASP and the MDP. Keyland had received "full disclosure" of documents from Southland and, through its due diligence, Keyland was familiar or had the means to be familiar with the past history and challenges that Southland faced when it was attempting to develop the Lands. Keyland was aware or had the means to be aware of the opposition of the MDR and the residents along RH Drive to construction traffic using RH Drive, and that RH Drive and the intersection at Highway 22 were outside of the Town's jurisdiction.

[142] Keyland was aware that its development proposal required land use re-designation of the upper bench lands and amendments to the MDP and SRASP before it received subdivision approval. Keyland was aware or had the means to be aware of the following:

- the Town's council and not Town staff would vote on bylaw amendments relating to the MDP, the SRASP, and the LUB and that it was the CPC that would grant subdivision approval;
- the Town and the CPC had discretion and were entitled to consider the interests of the Town and the public when granting or refusing any approvals; and
- its development proposal entailed 5 different applications involving 3 public bodies, each having its own issues, concerns, and positions, and that all of this added to the complexity of the development proposal and the amount of time that obtaining the necessary approvals would require.

[143] Thus, it was not reasonable for Keyland to rely on the alleged statements as representations that the applications could and would be "fast-tracked" so that the approvals Keyland needed would be in place in 6 months and construction would start within 6 months.

[144] For the alleged representations to be actionable as misrepresentations, Keyland's reliance "must have been detrimental to the representee in the sense that damages resulted": ***Cognos*** at 110. The record shows that Keyland was not injured as a result of the alleged representations. In fact, the value of the Lands increased almost six-fold in the 6 years that Keyland owned them. Keyland recovered that increased value, along with all the costs it had incurred during the process of seeking development approval. As well, however, Keyland claims its lost opportunity costs. There is little cogent evidence which supports that claim.

[145] Thus, even if there is a conflict in the evidence concerning this issue, there is no merit to the claim that the alleged misrepresentations caused any damage to Keyland such that a trial is required.

[146] Keyland also points to a number of areas in which the applicants' evidence contradict one another in key areas, such as on the intent and impact of the MOU and the Annexation Agreement. It provides one of many examples where Mr. Wesseling deposed that the Town "did not at any time for any purpose or by any means, illegally or otherwise, close RHD, restrict Keyland's use of RHD or bar Keyland from having access to the Lands for the purpose of development": Affidavit of Frank Wesseling, sworn on August 31, 2015, at para 302.

[147] By contrast, HMQ sent a letter to the town on November 25, 2002, which says the following:

> This access route, which includes the recently installed intersection onto Highway 22, was only intended to be used for access to the Bow Valley High School and the residences along River Heights Drive. This was a key part of the mediation process that occurred between the Rocky View School Division No. 41, the Town of Cochrane, and the Municipal District of Rocky View No. 44.
>
> [Emphasis added].

[148] These statements were made by different individuals for different purposes. Examining each in their respective contexts, they do not conflict.

[149] As will be seen in the discussion that follows on the substantive issues before this Court, this Court does not see that there is conflicting evidence, such that it cannot make a decision, or that this case is not appropriate for a summary judgment application.

3. Immunity for Policy-Based Decisions

[150] This Court's examination of the scope of immunity for policy-based decisions overarches the rest of the discussion that follows. The Supreme Court of Canada has narrowed the scope for which a municipality may be liable where it makes a policy-based decision. In ***Welbridge Holdings Ltd v Winnipeg (Greater)***, [1971] SCR 957, (1970), 22 DLR (3d) 470 [***Welbridge***, cited to SCR], Laskin J, as he then was, said the following:

> … A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach. ...

> ... [T]he risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care …
>
> ***Welbridge*** at 968-69, 970 [emphasis added].

See also ***Motkoski*** at para 53.

[151] In ***Calgary (City) v Valdun Developments Ltd***, 1997 ABCA 134 at paras 22-25, 200 AR 19, 51 Alta LR (3d) 31, the court explained the difference between the quasi-judicial and legislative functions. It said:

> The scheme of the planning legislation and the case law interpreting it indicate that the powers exercised by Council in circumstances such as this are both legislative and quasi-judicial. Council's legislative function, which pertains to the public interest in municipal planning, precludes it from restricting the submissions it hears to those which are relevant only to technical planning issues relating to the property in question. …
>
> [Kerans, J.A. in *Atkins v. Calgary (City)* (1994), 25 Alta. L.R. (3d) 365 (Alta. C.A.)] added that the "dividing line" between the legislative and quasi-judicial functions may lie in the nature of the issue before Council (p. 373):
>
> > When the proposed re-designation is about one parcel, and the dispute is between two citizens, and when no larger question of public policy is engaged, I would expect that, in the absence of some special reason, the hearing would be inclusive and decisive. In other cases, especially when larger political questions arise, the role of a council is much more legislative than judicial and the hearing should be seen by all as nothing more than one aspect of the decision process.
>
> Section 617 of the [*MGA*] requires Council to consider both the public interest and private interests in order to:
>
> > (a) ... achieve the orderly, economical and beneficial ... use of land ... and (b) ... to maintain and improve the quality of the physical environment within which patterns of human development are situated ... without infringing on the rights of individuals for any public interest except to the extent that it is necessary for the overall greater public interest.
>
> Here, Council was not merely adjudicating a dispute between citizens or between the City and a citizen. It was required to take into account the public interest, not at large but in the context of the criteria set out in s. 617, that is, in the light of sound planning principles. To that extent the hearing had a legislative character. Council was entitled to hear and consider submissions which addressed the public interest in orderly municipal planning in the broadest sense. It may have permitted some evidence and comments which were on the borderline of relevancy and some which undoubtedly were beyond the pale. That did not, however, impugn the validity of the hearing or, in itself, the decision which emanated from it.

> Council did, however, act in a quasi-judicial capacity in making its decision to reject the motion. Its decision had the effect of restricting the right of the Respondent to use its land as it saw fit. The Respondent was legally entitled to have that issue decided only in light of the objectives stated in s. 617, that is, on the basis of the application of planning principles.

[152] In ***Just v British Columbia***, [1989] 2 SCR 1228 at 1242, 43 CCLT (3d) 163, 82 OR (3d) 321, Cory J, for the majority, illustrated the difference between policy, legislative or quasi-judicial levels, on the one hand, and an operational level, on the other, when he quoted with approval from the Australian High Court decision in ***Sutherland Shire Council v Heyman*** (1985), 60 ALR 1 at 34-35, 59 ALJR 564, which said the following:

> The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that *a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints*. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. *But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness*.
>
> [Emphasis in original].

[153] In ***Brown v British Columbia (Minister of Transportation & Highways)***, [1994] 1 SCR 420, 112 DLR (4th) 1 [***Brown***, cited to SCR], Cory J, for the majority, expanded on this notion, when he said the following:

> True policy decisions involve social, political and economical factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
>
> The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.
>
> …
>
> … [T]he appellant contended that policy decisions must be limited to so called threshold decisions, that is to say, broad initial decisions as to whether something will or will not be done. … [T]his submission cannot be accepted. Policy decisions can be made by persons at all levels of authority. In determining whether an impugned decision is one of policy, it is the nature of the decision itself that must be scrutinized, rather than the position of the person who makes it
>
> …
>
> ***Brown*** at 441, 442 [emphasis added].

[154] In ***Bowen v Edmonton (City)*** (1977), 8 AR 336 at paras 44, 48, [1977] 6 WWR 344 (SC, TD), Clement J held that the principles outlined in ***Welbridge*** apply to the subdivision approval process, when he said the following:

> … [T]he [Planning] Act contemplates balancing of the interests of a developer against those of the public, a purpose in which there is inherent in varying degrees a judicial or quasi-judicial function which may lead to a type of legislative action. Nowhere is this more apparent than in the areas of zoning and subdivision which are closely, almost inextricably, related in the process of planned development. Zoning must be taken into account in planning a subdivision, and a subdivision must conform to zoning as the present case illustrates. A number of factors required by the Act and the regulations to be taken into account in these activities must, I think, be classed as of an administrative nature, but there are a number upon which judgment must be exercised in giving effect to s. 3. In the area of subdivision and zoning public interest is strongly present.
>
> …
>
> *Welbridge Holdings* proceeded on a footing that zoning and rezoning and proceedings ancillary to these Acts are quasi-judicial or legislative in nature: see pp. 963-64. I am of opinion that this ratio applies equally to subdivisions. In both, judgment on a number of factors has to be made, in addition to the purely administrative requirements that are prescribed, in either refusing or formulating a by-law or resolution; and in both the objective is orderly development in the existing circumstances, a matter which, in itself and speaking broadly, involves judgment. As I have said, the two are intertwined … In both cases the judicial considerations will, in appropriate circumstances, lead to what may reasonably be called legislative action of a subordinate nature drawing its jurisdiction from provisions in The Planning Act.

[155] Thus, the immunity that the court in ***Welbridge*** described applies to the ancillary decisions that lead to the municipality's "legislative action."

[156] In ***Neufeld*** a developer sued the county and 2 of its councillors to recover its economic losses as a result of the county's refusal to re-designate certain lands in the developer's favour. The county applied for summary dismissal of the developer's action, which Master Prowse granted. In so doing Master Prowse said the following:

> The developers categorize their claim as being against a municipality in its 'operational' capacity, but that is not accurate. <u>The allegations against the planning department employees of the County (for whom the municipality is said to be vicariously liable), and against the two individual councillor defendants, arise from steps taken leading up to a legislative policy decision. They are steps which are part of the legislative function of a municipality.</u>
>
> As stated in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), "Loss caused as a result of policy decisions made by the public authority in the bona fide exercise of discretion will not be compensable". Further, as stated in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.):

> The need for distinguishing between a government policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors.

Neufeld at paras 28-29 [emphasis added].

[157] Thus, a court should not attempt to separate the operational elements of the planning approval that might give rise to a duty of care: Basile Chiasson, QC "Municipal Liability for Negligent Subdivision Approval" (2009), 55 MPLR (4th) 22, 55 MPLR-ART 22. In ***1022049 Alberta Ltd v Medicine Hat (City)***, 2013 ABQB 111 at paras 13-14, 8 MPLR (5th) 103 (Master), Master Prowse explained this as follows:

> The problem with the Club's argument is that it attempts to divide the City's land use function into components, labelling some of them as 'administrative' and others as 'legislative or judicial', and then bring a suit for administrative errors, ignoring the fact that the errors were made in the context of a legislative function. Case law establishes that a composite function which involves both legislative, judicial and administrative duties is overall to be considered as quasi-judicial. Support for this proposition is found in *Harvie v. Calgary (City) Regional Planning Commission*, 1978 CarswellAlta 172, 8 Alta. L.R. (2d) 166, 12 A.R. 505, 94 D.L.R. (3d) 49 (Alta. C.A.) at paragraphs 28 to 30:
>
> > This is not to say that the two functions must necessarily be compartmentalized in the analysis of function by a court, or that an administrative function can in all cases be divorced from interplay with the judicial function. As pointed out in *Bowen*, a tribunal may in the course of its exercise of jurisdiction perform some combination of functions ... A composite function which involves both judicial and administrative duties is in my view properly designated as quasi-judicial ... In such a case, the administrative element does not submerge the judicial element; the function being composite, it is the effect of the decision of the tribunal on such rights or interests as are claimed by the complainant, as seem by the court, that is to be taken into account in determining whether, in the final result, there is an effective judicial component within the accepted criteria.
>
> In my view, the function being carried out by the City in this case was primarily legislative (land use planning) and that categorization, and the immunity from tort claims which comes with it, cannot be overcome by isolating and focussing on administrative steps which form part of the overall process.

See also ***Woestenburger v City of Kamloops***, 2001 BCSC 523 at paras 48-51, 18 MPLR (3d) 257.

[158] Keyland provides this Court with a quotation from ***Build-A-Vest Structures Inc v Red Deer (City of)***, 2006 ABQB 869, 29 MPLR (4th) 210 [***Build-A-Vest***] at para 103, in which Clackson J said "[i]t is patent that the City owed a duty to development permit applicants to take

care in the assessment of development applications." Although this purports to be a general statement of the law, it is important to note the context in which Clackson J made that comment. He described the nature of the case as arising "from the use of the term 'retort' on a development application which was not recognized or understood by those issuing the resulting development permit as meaning 'cremator.'" Specifically, he noted that the plan reviewer, "admitted that she missed the reference to 'retort room' and did not realize the application was for a funeral home and cremator. In any event, she indicated that she did not know what a retort meant in that context." Because of this lack of understanding on the part of the plan reviewer, the city made a decision that caused loss to the plaintiff. Thus, this breach was indeed of an operational nature, and not one of policy. The plan reviewer failed to exercise a proper standard of care when implementing a policy.

[159] Strekaf J, as she then was, used Clackson J's quotation in ***JEC Enterprises Inc v Calgary (City)***, 2015 ABQB 555, 40 MPLR (5th) 53 [***JEC***] at para 31, in holding that a public authority can be liable for negligence in carrying out its operational functions in a land development context. She does not particularize the context in which Clackson J made his decision, but she does refer to the Alberta Court of Appeal decision in ***Steele (Next Friend of) v Burgos***, 2008 ABCA 321 [***Steele***]. In that case a child was struck crossing the street next to a playground where no playground signs or no parking signs had been posted. The court was considering whether the city's immunity under *MGA* s 533 from being liable for damage by the presence or absence of a traffic control device applied to this case. O'Brien JA, for the court, said the following:

> ... It is not clear, or beyond question to us, that the immunity under s. 533 arises in all cases where there is an absence of signage, if that absence is determined to arise from a failure to implement a policy decision, or otherwise is an operational decision or if that decision was made for ulterior purposes. It can be anticipated that evidence at trial will clarify the role of the Warrant and, in particular, whether it required the erection of a playground sign in this situation, and whether the absence of a sign is attributable to a policy decision, an exercise of allowable discretion under the subject manual, or the misinterpretation of its requirements by the employees responsible for its implementation.
>
> ***Steele*** at para 19.

[160] In other words, the court infers that if the absence of signage arose from a policy decision, the city would be immune. Otherwise it could be liable. But it needed further evidence to make a determination of whether the failure to erect a sign was operational or flowed from a policy decision. Like ***Build-A-Vest***, the court was not making a blanket statement that all decisions that arise in the land development context are operational.

[161] Keyland argues that Master Prowse erred in his analysis in ***Neufeld*** and ***Medicine Hat*** by suggesting that he recognized no meaningful distinction between policy functions, and administrative or operational functions of a municipality in the planning process for the purposes of tort liability. This Court does not see that error in his rationale. When one examines the cases in which the court found negligence on the part of the municipal body, or its actors, the tasks that the court found to be negligent are purely operational matters, or negligence in the application of policy decisions. That differentiation is clear in ***Build-A-Vest***, where the plan reviewer had no idea what a "retort" was and did not care to find out. She simply issued the development permit.

In ***Steele***, the Alberta Court of Appeal differentiated between policy decisions and operational decisions and provided courts with examples of each.

[162] As a general statement, this Court agrees with Master Prowse's comment in ***Neufeld*** that the steps the municipality (or county) takes to reach its legislative decision would be immune. There are, however, situations in which those steps could be considered to be operational in nature. For example, in ***Build-A-Vest***, the plan reviewer's negligence was an operational step taken in a process that resulted in the issuance of the development permit. She failed to follow the legislated "policy."

[163] As well, in ***Steele*** the Alberta Court of Appeal specifically referenced "failure to implement a policy decision" as an example of an operational decision. In other words, contrary to the vagueness in the 2 concepts, this Court does not see such vagueness. The decision is either operational or it is a policy decision. The steps leading to a policy decision are not operational decisions. They are simply steps leading to the policy decision. This is what Master Prowse was referring to.

[164] In ***Entreprises Sibeca Inc v Frelighsburg (Municipality)***, 2004 SCC 61, [2004] 3 SCR 304 [***Sibeca***] at paras 21, 23-24, Deschamps J for the majority, said the following:

> The adoption, amendment or repeal of a zoning by-law does not in itself trigger a municipality's liability even if the effect of that action is to reduce the value of the lands affected. In exercising its regulatory power, a municipality enjoys broad discretion in public law. ...
>
> …
>
> In public law, a municipality may not therefore be held liable for the exercise of its regulatory power if it acts in good faith or if the exercise of this power cannot be characterized as irrational. ... A municipality has a margin of legitimate error. In public law, it is protected by what may be called relative immunity. ...
>
> ... Municipalities perform functions that require them to take multiple and sometimes conflicting interests into consideration. To ensure that political disputes are resolved democratically to the extent possible, elected public bodies must have considerable latitude. Where no constitutional issues are in play, it would be inconceivable for the courts to interfere in this process and set themselves up as arbitrators to dictate that any particular interest be taken into consideration. They may intervene only if there is evidence of bad faith. The onerous and complex nature of the functions that are inherent in the exercise of a regulatory power justify incorporating a form of protection both in civil law and at common law.
>
> [Emphasis added].

[165] In addition to the foregoing, *MGA* Part 13 sets out certain express limitations on municipal liability. The following sections, which are relevant to the issues in the case at bar, are in *MGA* Part 13:

> 527.2 Subject to this and any other enactment, a municipality is not liable for damage caused by anything done or not done by the municipality in accordance

> with the authority of this or any other enactment unless the cause of action is negligence or any other tort.
>
> 529 A municipality that has the discretion to do something is not liable for deciding not to do that thing in good faith or for not doing that thing.
>
> 535(2) Councillors, council committee members, municipal officers and volunteer workers are not liable for loss or damage caused by anything said or done or omitted to be done in good faith in the performance or intended performance of their functions, duties or powers under this Act or any other enactment.
>
> 535(4) This section does not affect the legal liability of a municipality.

[166] *MGA* Part 17 deals with planning and development. *MGA* s 621, which is in *MGA* Part 17, provides as follows:

> 621(1) Except as provided in this Part ..., nothing in this Part or the regulations or bylaws under this Part gives a person a right to compensation.
>
> (2) Subsection (1) applies only to this Part and does not create, extinguish or affect rights created, extinguished or affected by the rest of this Act.

[167] In ***RVB Managements Ltd v Rocky Mountain House (Town)***, 2014 ABQB 51, 582 AR 1, 90 Alta LR (5th) 215 [***RBV***], aff'd 2015 ABCA 188, 600 AR 380, 19 Alta LR (6th) 195 [***RVB-CA***], Browne J said that these sections, and, in particular, *MGA* ss 529 and 621, "merely codify the common law principle … that government bodies, like municipalities, are protected from liability for discretionary decisions made in good faith": ***RBV*** at para 194.

[168] In ***Neufeld***, Master Prowse discussed these provisions and said the following:

> We are dealing with a council exercising its legislative land use planning jurisdiction. The steps taken by the employees in the County's planning department were taken as part of that process.
>
> A municipality can only operate through its councillors and employees. When a statute releases a municipality from claims arising from planning decisions taken in good faith, that release cannot be avoided by saying that it was employees who took the steps on behalf of the municipality, and the municipality is vicariously liable. This interpretation would make meaningless section 529 of the *Municipal Government Act*.
>
> ***Neufeld*** at paras 126-27 [emphasis added].

[169] Browne J said the following in ***RBV***:

> Discretionary powers exercised by a public authority often involve balancing public and private interests. These discretionary powers regulate the broad public interest. A public authority's concern is generally a public one when it is using its legislative and quasi-judicial authority. The duty of care is owed to the public as a whole and encompasses policy considerations that may conflict with an individual's interests. As a result, a public authority has broad discretion and is not liable for the exercise of its discretionary powers while performing a regulatory function unless the public authority acts irrationally or in bad faith: *Entreprises Sibeca inc.* at para 23.

RVB at para 193 [emphasis added].

[170] It is certainly possible that a decision that a municipality makes could be found to be negligent through one of its policy decisions. An extreme example might be a situation where the municipality approves the construction of a road on a hillside that would not support the road's construction. The municipality relies on a technical study that shows the hillside could support a road. If the road collapses and a vehicle is caught in the slide, the municipality might be found to be negligent by relying on a faulty technical study. This liability would result, not because this was an operational decision. It was a policy decision. However, the liability would stem from *MGA* s 527.2.

[171] When a governmental authority, including a municipality, makes a policy decision, a court will question that decision only when "the policy decision is shown to have been made in bad faith or in circumstances where it is so patently unreasonable that it exceeds governmental discretion": ***Brown*** at 435. Thus, the Supreme Court of Canada has established that the municipalities are immune from liability when their decisions or functions are policy-based, legislative or quasi-judicial, provided they make those decisions and exercise those functions in good faith, or they are not patently unreasonable.

4. Bad Faith

[172] As discussed earlier, Deschamps J said in ***Sibeca*** at paras 23-24, that a municipality has immunity for its policy-based decisions provided it did not act in bad faith, and will not be held liable for its discretionary decisions, provided that it acted in good faith. What is bad faith? In ***Lloyd MacLellan Construction Services Limited v Halifax Regional Municipality***, 2014 NSSC 118 (CanLII), 1092 APR 117, 345 NSR (2d) 117 ["***MacLellan***"], a developer required an easement from Halifax Regional Municipality ("HRM") for access to facilitate the development of an industrial park. The developer and HRM staff reached an agreement on the terms for the granting of the easement. When the agreement was submitted to Council for approval, Council imposed a condition that the Minister of Environment conduct a full environmental assessment. The developer wanted simply a public consultation. The Minister noted that a full environmental assessment was not needed. As a result, HRM was of the view that the condition could not be fulfilled, so it declined to grant easement. Wright J found that the condition was invalid but refused to grant order of mandamus, as HRM owed no public duty to the developer. HRM rescinded the motion and re-zoned site as residential. The developer brought action for damages for breach of contract or bad faith. Wright J held that HRM was acting "with the legitimate objective of taking environmental concerns into account and not for any improper purpose": ***MacLellan*** at para 71. He went on to say the following:

> … The fact that the environmental protection condition imposed in the motion was subsequently declared by this court to be invalid does not necessarily attract liability.
>
> In the absence of any deliberate or intentional exercise of bad faith, and where Council's mistake was simply choosing the wrong means in trying to promote a legitimate objective, I conclude that the plaintiff is not entitled to a remedy in damages for bad faith. The case law to which I have been referred does not support such a finding of liability.
>
> ***MacLellan*** at paras 77-78 [emphasis added].

[173] In ***Neufeld***, Master Prowse said that "[b]ad faith is more than mere carelessness or neglect": ***Neufeld*** at para 55. He then goes on to summarize the authorities that have considered bad faith where there is no direct motive to cause harm, and sums up by say that the following may constitute bad faith:

> … acting while knowing that one has no power to do so; acting in excess of powers conferred; acts markedly inconsistent with the relevant legislative context; acting unlawfully with reckless indifference to the illegality of the act; engaging in deliberate unlawful conduct; engaging in conduct he/she knows is inconsistent with the obligations of the office; acting in other than the public interest; and engaging in unlawful, dishonest behaviour.
>
> ***Neufeld*** at para 58.

[174] In ***Sibeca***, Deschamps J for the majority said the following:

> ... [T]he concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it.
>
> ***Sibeca*** at para 26.

[175] In ***RBV***, Browne J said the following:

> The Courts have said that bad faith constitutes a higher standard of proof than that of reasonableness … and that bad faith is not actionable as a stand-alone cause of action (*Elder Advocates* at para 78). Therefore, if the alleged wrongs do not give rise to a cause of action for a non-public entity on a reasonableness standard, I conclude it does not matter if there was bad faith. There is no cause of action.
>
> …
>
> There is no cause of action for any of these alleged delays by a private actor, as no private actor would have a duty to approve an ASP or local improvements, to enter into an agreement, to finalize a sub-division, or to refrain from pursuing arbitration. These are all duties of a public body. The only remedy for bad faith in these circumstances would have been judicial review to seek mandamus or certiorari. The Plaintiffs cannot bootstrap an allegation of bad faith where there is no cause of action for negligence (*Elder Advocates* at para 77). If there is no negligence claim, there is no room for bad faith.
>
> ***RBV*** at para 195, 198.

[176] The Alberta Court of Appeal specifically upheld these findings: ***RBV-CA*** at paras 11-12.

[177] As one can see, Browne J cited the case of ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24, [2011] 2 SCR 261 [***Elder Advocates***]. In that case, McLachlin CJC said the following for the court:

> I agree with the Province's submissions that the allegation of bad faith, as pleaded, is bootstrapped to the duty of care claim, and cannot survive on its own when the plea of negligence is struck. …
>
> …
>
> The law does not recognize a stand-alone action for bad faith. … [T]he bad faith exercise of discretion by a government authority is properly a ground for judicial review of administrative action. In tort, it is an element of misfeasance in public office … The simple fact of bad faith is not independently actionable.
>
> ***Elder Advocates*** at paras 77-78.

[178] Thus, if a plaintiff's bad faith claim is a part of a tort that the defendants have committed, the court must consider whether the defendants are guilty of bad faith. If the plaintiff is not able to ground its bad faith claim on to a tort, the court need not consider it. In the case at bar, Keyland alleges that the Respondents, or one or more of them, have committed the torts of conspiracy and misfeasance in public office, so it is within those contexts that this Court will consider Keyland's allegations of bad faith.

5. Civil Conspiracy

[179] Keyland alleges that the Town, the MDR, and HMQ conspired when they entered into the MOU and the Annexation Agreement, which, it argues, effectively prevented Keyland from accessing the Lands using RH Drive.

[180] In ***Herchak v Enbridge Pipelines Inc***, 2016 ABQB 217 at para 28, Tilleman J cited ***Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd***, [1983] 1 SCR 452 at para 33, and ***Balm v Aikins, MacAulay & Thorvaldson LLP***, 2012 ABCA 96 at para 11, 522 AR 402, when he provided the following elements of the tort of civil conspiracy:

> ... In Canada, there are two routes to establish the tort of conspiracy where two or more defendants act with common design, and: (1) where the predominant purpose of the defendants' conduct is to cause injury to the plaintiff, whether the means used are lawful or unlawful; or (2) where the conduct of the defendants is unlawful, that conduct is directed toward the plaintiff, and the defendants should know in the circumstances that injury to the plaintiff is likely to and does in fact result …
>
> [Emphasis added].

[181] In ***Harris v Glaxosmithkline Inc***, 2010 ONCA 872 at para 39, 106 OR (3d) 661, 78 CCLT (3d) 52, Moldaver JA, as he then was, for the court said the following:

> To make out a conspiracy to injure, the defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if harm is the collateral result of acts pursued predominantly out of self-interest. The focus is on the actual intent of the defendants and not on the consequences that the defendants either realized or should have realized would follow.
>
> [Emphasis added].

[182] In ***Murphy Oil Co v Predator Corp***, 2004 ABQB 688, 365 AR 326, 36 Alta LR (4th) 301 [***Murphy Oil***, cited to AR], McMahon J granted a summary judgment order dismissing counterclaim based, among other things, on the following:

> … The actions of the Applicants, even when viewed in their totality, offer no factual basis upon which to reasonably infer an agreement between Apache and Murphy the predominant purpose of which was to injure Predator or the livelihood of its principals. The evidence permits of one objective inference only: that Murphy and Apache's predominant purpose was to protect their own interests in the field and that such actions were lawful. Accordingly, the applicants have established that there is no genuine issue for trial in relation to the conspiracy claims.
>
> ***Murphy Oil*** at para 93 [emphasis added].

[183] Earlier, McMahon J said the following:

> On an application for summary judgment the plaintiff must show that it has a factual basis for its assertion that the conduct was in furtherance of a conspiracy. It is insufficient that the conduct could have been the result of the conspiracy where the conduct is easily explained by lawful motives … Nor does the pursuit of legitimate business goals for the predominant purpose of economic advancement constitute a conspiracy, even if it may have caused the complaining party to suffer injury … Additionally, an inference that defendants entered into an agreement to injure the plaintiff or commit an unlawful act may only be drawn where the facts do not fairly admit of any other inference …
>
> ***Murphy Oil*** at para 90 [emphasis added].

[184] The Alberta Court of Appeal upheld McMahon J's conclusions: ***Murphy Oil Co v Predator Corp***, 2006 ABCA 69 at para 43, 384 AR 251, 55 Alta LR (4th) 1.

[185] The Town argues that the case at bar bears certain similarities to the situation in ***Mraiche***, in which the Alberta Court of Appeal upheld the chambers judge's decision granting summary judgment dismissing a conspiracy claim. The Alberta Court of Appeal described the plaintiff's evidence in that case as an "elaborate affidavit … [that] consists essentially of a concatenation of available records, correspondence, portions of examination of some witnesses, and the principal's interpretive argument": ***Mraiche*** at para 28. The defendant denied all allegations against it. The Town argues that the facts in ***Mraiche*** are similar to those in this case as, "the appellant's case rests entirely on suspicions of the appellant contrived from the basic facts indicated by the documents, transactional history, and evidence. The respondent says there is no actual evidence of any entry into a conspiracy … and that is that": ***Mraiche*** at para 35. In ***Mraiche***, the Alberta Court of Appeal adopted the British Columbia Court of Appeal's summary of the elements that a party must prove to show a civil conspiracy from ***Can-Dive Services Ltd v Pacific Coast Energy Corp*** (1993), 96 BCLR (2d) 156 at para 5, 26 CPC (3d) 395 (CA), in which McEachern CJBC wrote the following:

> Accordingly, the following elements must be proved:
>
> 1. an agreement between two or more persons;
>
> 2. concerted action taken pursuant to the agreement;

3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;

(ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);

4. actual damage suffered by the plaintiff.

Mraiche at para 40.

[186] Keyland argues that the actions of the Town, the MDR and the HMQ resulted in the effective closure of RH Drive and, in so doing, those parties breached the provisions of the *MGA* and the *Public Highways Development Act*, RSA 2000, c P-38 [*PHDA*]. Such is the "unlawfulness" of their actions. As well, it argues that the parties "unlawfully" entered into the MOU and, by following the terms of the MOU, they unlawfully entered into the Annexation Agreement. We must remember, however, that the Town, MDR and HMQ are all governmental bodies, whose role is to act in the public interest. Accordingly, the following statement is important when this Court considers this issue:

> There is no known tort of deprivation of statutory benefits and a claim for breach of statutory duty has not been recognized, following the decision of the Supreme Court of Canada in *Saskatchewan Wheat Pool v. Canada* [22 (1983), 143 D.L.R. (3d) 9 (S.C.C.)]. Even if one could consider this claim as an aspect of a claim in negligence, or the sort of harm that might be included under the tort of a conspiracy, no harm could be assumed where the loss alleged results simply from coordinated action, pursuant to statute, to fulfil lawful responsibilities, by public servants.
>
> ***Olympia Interiors Ltd v R***, [1999] 3 CTC 305 at para 82, 167 FTR 165 (FC-TD) [emphasis added].

[187] Keyland also argues that the provisions contained in MOU and the Annexation Agreement were directed at Keyland, inasmuch as it had made its intentions known to the Town, the MDR and HMQ to use RH Drive to develop Cochrane Crossing. However, there were other considerations at play, in the minds of the applicants. These included, for example, the safety of access to BVHS (HMQ's primary concern), the concerns of RH Drive residents (the MDR's concern), and the negotiation and completion of the Annexation Agreement, which included areas far beyond RH Drive (the Town's concern).

[188] The mediation that resulted in the MOU dealt with some of these issues. Keyland's complaint is that it was required to use the River Avenue Bridge, or build a new bridge. The applicants argue that the requirement that Keyland not use RH Drive did not "prevent" it from accessing the Lands. It only forced it to do what the previous plans required it to do. As well, Keyland could have sought a permit to access the Lands using RH Drive, but it chose not to seek that permission, once the Town and the MDR entered into the Annexation Agreement. This Court finds that the applicants did not cause or intend to cause injury to Keyland by enforcing already-existing policies. Furthermore, they did not cause or intend to cause injury to Keyland by preventing Keyland from taking steps on its own to allow it access to the Lands.

[189] This Court cannot see that the applicants had made a concerted effort to cause Keyland injury. Further, the applicants committed no unlawful action which they knew or ought to have

known would cause injury to Keyland. They were simply making policy or quasi-judicial decisions. This Court finds, based on the evidence before it, that there was no such intent and, hence, no conspiracy.

6. Misfeasance in Public Office

[190] The other way in which bad faith might enter into this Court's consideration is pursuant to Keyland's claim that certain individuals in each of the Town, the MDR, and HMQ were guilty of the intentional tort of misfeasance in public office.

[191] Because misfeasance in public office is an intentional tort, the public officer commits the tort if they act with a particular state of mind, *viz*, with the actual intent to inflict injury (malice) or with knowledge of or reckless indifference to the fact the conduct is unlawful, and with knowledge that it was likely to injure or harm: ***RVB*** at para 97.

[192] In ***Odhavji Estate v Woodhouse***, 2003 SCC 69, [2003] 3 SCR 263 [***Odhavji***], Iacobucci J, for the unanimous court, provided the following, that sets forth the elements of the tort:

> … [T]he tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries and that the injuries suffered are compensable in tort law.
>
> ***Odhavji*** at para 32.

[193] The first element ties in with this Court's earlier discussion concerning bad faith. Iacobucci J said the following:

> As a matter of policy, I do not believe that it is necessary to place any further restrictions on the ambit of the tort. The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty." In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.
>
> ***Odhavji*** at para 28.

[194] As to the second element, Iacobucci J earlier said the following:

> The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard

> for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but, absent some awareness of harm, there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.
>
> ***Odhavji*** at para 29.

[195] It is important for the purposes of this Court's decision to set forth what this tort does not include. Iacobucci J said that following are not included in the tort of misfeasance in public office:

- a public officer who inadvertently or negligently fails adequately to discharge the obligations of their office
- a public officer who fails adequately to discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond their control, as they have not deliberately disregarded their duties
- a conflict between the public officer's statutory obligations and their constitutionally-protected rights

Odhavji at para 26.

[196] We must remember that we are dealing with misfeasance in *public* office. In other words, the public official should properly be dealing with the interests of the public, and not with a personal or private agenda. In ***First National Properties Ltd v Highlands (District)***, 2001 BCCA 305 at para 40, 17 MPLR (3d) 80, 88 BCLR (3d) 125, Newbury JA for the court said the following:

> … Decisions made by elected officials in pursuit of what they see as the public good often adversely affect private interests. Knowledge that this will result can surely not, if the power is otherwise properly exercised, convert such decisions into targeted malice.

[197] Thus, the Alberta Court of Appeal said that finding liability based on misfeasance in public office must be approached cautiously. In ***Alberta (Minister of Public Works, Supply & Services) v Nilsson***, 2002 ABCA 283 at para 87, 320 AR 88, 8 Alta LR (4th) 83, the court said the following:

> Accordingly, there must be a tortious character to the acts or omissions of the government agents that are the operative cause of the damage. To approach the matter otherwise than cautiously is unwise. This was pointed out by Newbury J.A. in *Powder Mountain Resorts Ltd. v. British Columbia*, [[2001] 11 WWR 488, 159 BCAC 14 (BCCA), at para 2] where she said:
>
> > But for reasons that are perhaps obvious, the tort must be used cautiously. Otherwise, the courts risk straying into the arena of political decision-making, bypassing the normal restraints associated with judicial review, and becoming the arbiters of the

> personal thought processes of public officials. One recent commentator (Phillip Allott, *EC Directives and Misfeasance in Public Office* (2000), 59 Camb. L.J. 4) has written that the court should not, by means of the tort, take on the role of "ombudsman, a parliamentary committee, or an organ of public opinion in reviewing even egregious acts of maladministration, official incompetence, or bad judgment". (at p. 6) To avoid dangers of this kind, a balance must be sought between curbing unlawful behaviour on the part of governmental officials on the one hand, and on the other, protecting officials who are charged with making decisions for the public good, from unmeritorious claims by persons adversely affected by such decisions. This appeal provides us with another opportunity to consider the tort and the striking of that balance.

[198] Keyland argues that various representatives of the Town, the MDR and HMQ committed a misfeasance and were acting in bad faith while negotiating the MOU, which resulted in restricting Keyland's access to and use of RH Drive. While acknowledging that these individuals were attempting to deal with disparate interests, they "over-stepped their authority without appropriate regard for Keyland's rights." Based on the evidence the parties presented to this Court, the latter over-emphasizes Keyland's "rights." This is the reason why there is immunity for public bodies when they make decisions, while considering various disparate interests. Most political or quasi-judicial decisions involve a balancing of disparate interests. There will often be a disgruntled constituent. Surely such a result could not spark an action for misfeasance on the part of the public officials involved in the decision-making process.

[199] This Court finds that there was no misfeasance on the part of any of the officials involved in the negotiation of the MOU, and the resulting Annexation Agreement.

7. Unjust Enrichment

[200] Keyland's claim for unjust enrichment is based on its argument that it was not compensated for the new intersection and Stub Road that the School Division constructed, which, Keyland argues, was based on the engineering drawings and analysis for which Keyland paid.

[201] The elements that Keyland must establish to succeed in its unjust enrichment claim are as follows:

> … [T]he test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), at p. 455; *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), at p. 848; *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 987; *Peel (Regional Municipality) v. Canada*, , [[1992] 3 S.C.R. 762 (S.C.C.)], at 784; *Garland v. Consumers' Gas Co.*, [[2004] 1 S.C.R. 629, 2004 SCC 25 (S.C.C.)] at para. 30).
>
> ***Pacific National Investments Ltd. v Victoria (City)***, 2004 SCC 75, [2004] 3 S.C.R. 575 [***Pacific National***] at para 14.

See also ***Kerr v Baranow***, 2011 SCC 10 at para 32, [2011] 1 SCR 269

[202] In ***Pacific National***, Binnie J for the court said the following with respect to the first element:

> The existence of an enrichment to the defendant is governed by "a straightforward economic approach" (*Peter*, *supra*, at p. 990). An enrichment may "connot[e] a tangible benefit" (*Peel*, *supra*, at p. 790), or it can be relief from a "negative", such as saving the defendant from an expense he or she would otherwise have been required to make.
>
> ***Pacific National*** at para 15.

[203] Using the same "straightforward economic approach," Binnie J said, concerning the second element, "I would have thought that if there is enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment": ***Pacific National*** at para 20, quoting ***Peter v Beblow***, [1993] 1 SCR 980 at 1012, 101 DLR (4th) 621, 44 RFL (3d) 329.

[204] Keyland argues that it spent time and money working with HMQ and the MDR to develop plans to build the new intersection and Stub Road. The MDR declined Keyland's application to make those upgrades. As a result, Keyland provided the plans to the School Division in the hopes that Keyland would be able to use the new intersection and Stub Road to access to the Lands. When the School Division sought approval to build the new intersection and Stub Road, the MDR withdrew its objection so that school buses could use the new intersection and Stub Road. Keyland could not, without permit, use these newly-constructed facilities. As with many of the decisions involved in this process, HMQ and the MDR balanced the respective interests for which they were responsible to arrive at a compromise that would meet these interests. Keyland chose to make a "gift" to the School Division, in the hopes that it would benefit from this gift. It did not. Keyland was deprived of the benefit of constructing the new intersection and Stub Road, but it did so of its own volition.

[205] The third element is somewhat more complex. In ***Garland v Consumers' Gas Co***, 2004 SCC 25 at paras 44-46, [2004] 1 SCR 629, Cromwell J, for the court said the following:

> ... First, the plaintiff must show that no juristic reason from an established category exists to deny recovery ... The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra)*, a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations ...

[206] There are, thus, 2 stages involved in this portion of the inquiry. Keyland has the burden of proving that there is no juristic reason within the established categories to deny recovery. As discussed a moment ago, Keyland had a donative intent which is evidenced by its voluntarily providing the engineering work to the School Division for nothing more than a hope that, once built, the new intersection and Stub Road would be available for Keyland's use. Thus, Keyland has failed to show a *prima facie* case under the juristic reason aspect.

[207] Even if this Court were to find no juristic reason to deny recovery, this Court would deny recovery on the basis that Keyland provided the plans to the School Division with no expectation of recovery, other than the hope that an indirect approach might result in its succeeding in allowing its use of RH Drive. Although this Court questions Keyland's motive for taking this approach, a "hope" does not elevate its right to possessing a juristic reason that would allow its recovery.

8. Common Law Right of Access

[208] Keyland argues that the applicants breached its access to RH Drive in 2 ways. First, they restricted construction traffic on RH Drive for no legitimate reason. Second, the applicants were intending to restrict future Cochrane Crossing residents from using the intersection at Highway 22 and RH Drive. The applicants argue that there is no merit to Keyland's claim that they have breached Keyland's common law right of access.

[209] Keyland provides this Court with ***Fritz v Hobson*** (1880), 14 Ch D 542 (HL) [***Fritz***]. In that case the defendant partially blocked with construction materials the plaintiff's access, and that of his customers and potential customers, to the plaintiff's shop. The court said:

> Then arises the question, does this state of circumstances gives rise to any legal right in the Plaintiff? The cases of *Rose v. Groves* and *Lyon v. Fishmongers' Company* appear to me to establish this, that where the private right of the owner of land of access to a highway is unlawfully interfered with, he may recover damages from the wrongdoer to the extent of his loss of profits in his business carried on at that place.
>
> ***Fritz*** at 553-54 [emphasis added].

[210] *MGA* ss 22-23, and the *PHDA* ss 28-29, 47.1 allow the municipalities and HMQ to control and limit access to roads and highways within their respective jurisdictions, and provide procedures for so doing, including compensating those who suffer loss or damage as a result. Keyland argues that these provisions do not supplant a person's common law right of access. In ***Hydro-Electric Power Commission of Ontario v Grey (County)*** (1924), 55 OLR 339 at 344 [1924] OJ 31 (SC-App Div), the court said the following:

> It has long been recognized in the Courts of Ontario and England that the right of the public to free passage along the King's highway is paramount and cannot be interfered with even by the Crown itself, but only by Parliament or the Legislature. … [T]he right of the public in the King's highway has always been jealously guarded by the Courts and is not lightly to be interfered with. There is no question that the Legislature of Ontario can by statute modify or abolish that right; but, if it is to be modified and the rights of the public curtailed or affected, the will of the Legislature must be unequivocally expressed.

See also ***Toronto Transportation Commission v Swansea (Village)***, [1935] SCR 455 at 457-58, [1935] 3 DLR 619.

[211] As well, there is a distinction between the common law and statutory remedies. In ***TDL Group Ltd v Niagara (Regional Municipality)*** (2001), 55 OR (3d) 1 at para 9, 21 MPLR (3d) 1 (CA), the Ontario Court of Appeal held as follows:

> … In my view, there is a clear distinction to be drawn between an interference with a common law right of access, which will lead to a remedy for compensation for injurious affection, and a denial of access, which will trigger the remedy conferred by s. 298(1). The statutory remedy under s. 298(1) consists not only of compensation but also of a right to an alternative means of access and can be invoked only where the owner is deprived of access, not where access is merely limited.

[212] *MGA* s 16 provides that the title to all roads in the municipality (other than a city) is vested in the Crown in the right of Alberta. *MGA* s 18 says that a municipality has the direction, control and management of all roads within the municipality.

[213] Pursuant to *Traffic Safety Act*, RSA 2000 c T-6, ss 13 and 152, a municipality can restrict both the weight and class of vehicles on the road. The Alberta Supreme Court – Trial Division upheld the imposition of road bans as a valid exercise of municipal authority in ***R v Torrance*** (1975), 29 CCC (2d) 376 (Alta SC-TD).

[214] The difficulty with Keyland's argument is that it does not appear that the applicants restricted Keyland's right of access to the Lands. For whatever reason, Keyland chose not to obtain permits to use RH Drive, so this Court will never know if the Town would have restricted Keyland's right of access. As well, we must remember that Keyland could have accessed the Lands had it upgraded the River Avenue Bridge or built a new bridge. It took no steps to do either.

[215] Furthermore, the applicants did not unlawfully interfere with Keyland's use of RH Drive. It was within their rights to deny use of RH Drive, which arguably they did not. Even if one could conclude that they so restricted Keyland's use of RH Drive, they are immune because of these would be policy-based decisions.

IV. Summary and Conclusion

[216] This Court started its discussion with its analysis of immunity for policy-based decisions. The reason is that this Court has found that each of the applicants based their decisions on the policies for which they are responsible. The evidence shows that Keyland was not the target of their decisions. The results of their decisions might have had an adverse effect on Keyland, but in the end, their decisions had to be based on a more general principle than targeting one particular constituent. They have shown this Court that they made principled decisions on that basis.

[217] As mentioned very early in these reasons, the issues that the parties have placed before this Court contain volumes of materials, which might lead one to believe that the issues are so complex that they cannot be the subject of a summary dismissal. However, when one reviews each of the issues that the parties have placed before this Court, they are not so complex as might first appear.

[218] Each of the applicants has shown to this Court that Keyland's various claims against them have no merit, based on the evidence that they have placed before this Court. As a result, this Court allows each of their applications a grants summary judgment dismissing Keyland's actions against them.

[219] Because of this finding, this Court need not discuss the issue concerning *Limitations Act* s 6, in which Keyland sought to add HMQ to its action against the Town and the MDR.

[220] If the parties are not able to agree on costs within 45 days following the entry of the order resulting from this decision, they may speak to costs.

Heard on September 26, 2016, through September 28, 2016.

Dated at Calgary, Alberta on December 22, 2016.

K.D. Yamauchi
J.C.Q.B.A.

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