

**In the Court of Appeal of Alberta**

**Citation: Beaverford v. Thorhild (County No. 7), 2012 ABCA 99**

**Date:** 20120328  
**Docket:** 1103-0270-AC  
**Registry:** Edmonton

**Between:**

**Robert Beaverford**

Applicant

- and -

**County of Thorhild No. 7 and County of Thorhild No. 7 Subdivision  
and Development Appeal Board**

Respondents

and -

**Long Lake Cottage Owner's Association**

Respondent By Order

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**Reasons for Decision of  
The Honourable Mr. Justice Ronald Berger**

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**Application for Leave to Appeal**

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[1] The Applicant sought a development permit for gravel extraction. The County's Municipal Planning Commission refused the application. The issue was appealed to the Subdivision and Development Appeal Board (the "SDAB") and heard on September 22, 2011.

[2] At the commencement of the hearing, the Applicant objected to the participation of Councillor Wayne Croswell as a member of the SDAB panel. That objection was rejected and the hearing proceeded with Councillor Croswell as a member of the panel.

[3] The basis for objecting to the participation of Councillor Croswell was that he had allegedly expressed a definitive opinion on the topic of gravel extraction. The Applicant contends that a reasonable person would conclude that Councillor Croswell would not decide the appeal fairly and that, accordingly, the Applicant maintains that a reasonable apprehension of bias is made out.

[4] The asserted factual underpinning for the allegation is that one year prior to the hearing Councillor Croswell openly and actively campaigned against another gravel extraction development operated by the Applicant's consultant 541466 Alberta Ltd., operating as JLG Ball Enterprises, in close proximity to the lands which are the subject of the present dispute and that Councillor Croswell questioned why the County was not "securing the gravel for its own use". The argument is that Councillor Croswell "opposed all gravel extraction development in general, repeatedly moving for Council 'to prohibit development for aggregate extraction purposes on any crown land within the [County] other than for the use of the [County] ...'" (Factum of the Applicant, para. 30)

[5] I find the affidavit of Lisa Ball to be admissible. New evidence may be permitted where a reasonable apprehension of bias is raised; the Applicant would not have had an opportunity to marshal that evidence in a timely fashion before the SDAB hearing was convened, mindful that the participation of Councillor Croswell could not have been ascertained with certainty in advance of the hearing. Ms. Ball's affidavit has attached to it the minutes of various Council meetings and the following entries:

a) **Council Meeting - County of Thorhild No. 7 - February 23, 2010**

Councillor Croswell questioned why the County of Thorhild would be allowing a gravel extraction development as the Land Use Bylaw deems this area as recreational zoning, and a pristine area would be affected. Mr. Croswell wanted to know why the County would be giving away a valuable resource which the County of Thorhild requires. He asked for clarification regarding two maps displaying different designations for the SW 36-63-19-W4 in the County's Municipal Development Plan and Land Use Bylaw.

b) **Council Meeting - County of Thorhild No. 7 - July 12, 2011**

Wayne Crosswell gave notice of his intention to propose a motion at the next regular Council meeting to amend the Land Use Bylaw 989-98 to prohibit development for aggregate extraction purposes on any crown land within the County of Thorhild No. 7 other than for the use of the County of Thorhild No. 7 or Provincial and Federal Government Transportation requirements. Any exception would require unanimous Council approval, thereby bringing awareness and acceptance to allowance of this kind of development within the County of Thorhild No. 7 to all of Council.

c) **Council Meeting - County of Thorhild No. 7 - July 26, 2011**

Wayne Crosswell presented the motion to amend the Land Use Bylaw 989-98 to prohibit development for aggregate extraction purposes on any crown land within the County of Thorhild No. 7 other than for the use of the County of Thorhild No. 7 or Provincial and Federal Government Transportation requirements. Any exception would require unanimous council approval, thereby bringing awareness and acceptance to allowance of this kind of development within the County of Thorhild No. 7 to all of council.

[6] In rejecting the objection to the participation of Councillor Crosswell, the SDAB held that the Councillor had only “raised a number of questions in relation to another proposed gravel pit in the area. There was no evidence before the Board that Councillor Crosswell had made any comments or taken a position with respect to this proposed gravel pit.” (Record, Reasons, p.000338)

[7] The test for reasonable apprehension of bias is whether an informed person viewing the matter realistically and practically would have a reasonable apprehension of bias. The grounds must be serious and substantial; a real likelihood or probability is necessary, not a mere suspicion. The burden of proof is on the party alleging a real or apprehended breach of impartiality by establishing actual bias or a reasonable apprehension of bias: *Beier v. Vermilion River (County) Subdivision & Development Appeal Board*, 2009 ABCA 338, 464 A.R. 242; *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394-395; *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 at 323-324.

[8] It is not uncommon for municipal Councillors to also exercise an adjudicative role as members of the SDAB. It is trite that one would reasonably expect an individual performing such a dual function to have some knowledge of the historical underpinnings in the municipality regarding the issue and with a measure of inclination as to what might be an appropriate disposition. The relevant inquiry will be whether the individual is able to discharge his duty impartially and whether the test set out above, which is an objective test, is arguably made out.

[9] In my opinion, this ground of appeal satisfies the test for leave. The proposed appeal involves a question of law of sufficient importance and has a reasonable chance of success. The SDAB is *quasi* judicial in nature, and given its role it is required to “exhibit a high degree of impartiality”: *Beier* at paras. 6 and 10:

“6 As Professor Frederick A. Laux has stated in his textbook, *Planning Law and Practice in Alberta*, looseleaf, 3d ed. (Edmonton: Juriliber Limited, 2005) at s. 10.1(4) *Impartiality of Board Members*:

‘Since a subdivision and development appeal board exercises quasi-judicial functions, one would expect its decision-making process to exhibit a high degree of impartiality.’

As an example of such impartiality, Professor Laux cites this Court’s decision in *Murray v. Rocky View (Municipal District No. 44)* (1980), 21 A.R. 512, 12 Alta. L.R. (2d) 342 (Alta. C.A.).

...

10 The role and function of a subdivision and development appeal board with respect to property rights is highly significant to the use of property. As Professor Laux has said, the function is ‘quasi-judicial’. The decisions of the subdivision and development appeal board are an adjudication of property rights. They set and shape development in a community and may affect many property owners. It is trite law that justice must be seen to be done as well as being done.”

[10] The decision of a tribunal will be quashed even if the impugned vote may not have been a factor in the outcome: *Mountain Creeks Ranch Inc. v. Yellowhead (County) Subdivision and Development Appeal Board*, 2006 ABCA 126 at paras. 8:

“8 The Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45 at para. 2, held that allegations that a decision may be tainted by a reasonable apprehension of bias are to be dealt with as serious matters. Parties appearing before administrative tribunals or boards such as the SDAB are entitled to decision-makers who approach the matters before them free of interest. However, there is a presumption that tribunal members will act impartially in the absence of evidence to the contrary: Sara Blake, *Administrative Law in Canada*, 3d ed. (Markham, Ont.: Butterworths, 2001) at 106. The principle of impartiality is so fundamental to a fair hearing that if a single member of an administrative body is disqualified on the basis of bias or reasonable apprehension of bias, the whole proceeding is affected.

As a result, the general rule is that the decision will be quashed, regardless of the fact that the biased member's vote may not have been a factor in the outcome: Frederick Laux, *Planning Law and Practice in Alberta*, 3d ed. (Edmonton: Juriliber, 2002) at s. 7.3(5)."

[11] The remaining grounds of appeal ask whether, in its reasons, the SDAB applied the wrong legal test in stating that "before deviating from the policy paper, it must have evidence before it that provides a basis for doing so"; whether it failed to consider the appropriate factors in rendering its decision; whether it failed to provide adequate reasons in concluding that the Applicant's conservation and reclamation business plan did not satisfactorily establish that certain environmental impacts "could be adequately and appropriately addressed"; and whether the SDAB's findings regarding environmental impacts flies in the face of that which the Applicant maintains is the "wealth of evidence to the contrary".

[12] The Policy Paper is not a part of the Land Use Bylaw, the Municipal Development Plan, or any other binding planning document. As such, the SDAB was correct in ruling that it was not bound by the Policy Paper. The amount of weight that the SDAB gave to the Policy Paper is not a question of law. As counsel for the Long Lake Cottage Owner's Association argued in its Memorandum at para. 27:

"The SDAB considered the relevant provisions of the LUB, the Municipal Development Plan, the Policy Paper and the Long Lake Background Report. The SDAB acknowledged that while it is not bound by the Policy Paper, the Policy Paper is a relevant consideration for the Board to take into account in exercising its discretion. It was entirely possible for the SDAB to comply with the binding statutory plans, given the discretionary nature of the proposed use in the Agricultural district, and Council's previously expressed intention with respect to natural resource extraction in close proximity to Long Lake, as set out in the Policy Paper."

[emphasis in original]

[13] I also agree with counsel for the Respondent, County of Thorhild No. 7, that it is not the role of the Court to re-weigh the evidence that was before the SDAB or to substitute its own findings on the evidence. In my opinion, the SDAB's decision is not based on a complete lack of evidence but on a weighing of evidence before it. The SDAB was entitled to consider the Applicant's Conservation and Reclamation Business Plan, which it did, and determine that it was insufficient to address the legitimate planning considerations in the Policy Paper which the SDAB appreciated was not binding upon it.

[14] The remaining contentions do not satisfy the test for leave to appeal.

[15] In the result, leave to appeal is granted on the first ground but not on the remaining grounds of appeal.

[16] Costs of the application shall be dealt with by the panel that hears the appeal.

Application heard on March 6, 2012

Reasons filed at Edmonton, Alberta  
this 28th day of March, 2012

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Berger J.A.

**Appearances:**

R.A. Farmer  
for the Applicant

J.A. Agrios, Q.C.  
for the Respondent Subdivision and Development Appeal Board of the County of  
Thorhild

B.A. Sjolie, Q.C.  
for the Respondent County of Thorhild No. 7

K.L. Becker Brookes  
for the Respondent Long Lake Cottage Owner's Association