

Federal Court



Cour fédérale

Date: 20191211

Docket: T-396-19

Citation: 2019 FC 1589

Ottawa, Ontario, December 11, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**FRASER LEISHMAN AND
GRAY GREENWAY**

Applicants

and

**HER MAJESTY THE QUEEN IN RIGHT OF
CANADA, AS REPRESENTED BY THE
MINISTER OF ENVIRONMENT AND
CLIMATE CHANGE AND
PARKS CANADA AGENCY**

Respondents

JUDGMENT AND REASONS

[1] The Applicants, Dr. Fraser Leishman and Mr. Gary Greenway, bring this application challenging a decision by Parks Canada Agency [Parks Canada] to issue development and building permits [the permits] authorizing the construction of a Visitor Reception Centre [VRC] in the townsite of Waterton, Alberta [Waterton].

[2] Because Waterton lies within the Waterton Lakes National Park [Park], land use management authority rests with Parks Canada.

[3] The Applicants seek an order quashing the permits, a declaration that certain parts of the proposed VRC are unlawful because they incorporate prohibited uses under the 2000 Waterton Community Plan [Community Plan], and an order prohibiting the on-going construction of the VRC.

I. Background and Positions of the Parties

[4] The Applicants are part-time residents of Waterton. Dr. Leishman holds a leasehold interest in a recreational property in Waterton, which he and his family occupy seasonally. That property is approximately three blocks from the VRC now under construction. Mr. Greenway and his extended family are also long-standing seasonal cottage residents of Waterton, although the leasehold interest in question is owned by his mother.

[5] Neither of the Applicants has provided any personal evidence in support of their opposition to the VRC beyond its proximity to their properties, and their contention that the development is unlawful and should be stopped.

[6] The Applicants' attempts to prevent construction of the VRC date back at least as far as November 2016. At that point, they brought an application in this Court challenging a decision by the Park Superintendent to locate the VRC on what is known as Block 39 in Waterton.

Notwithstanding the Applicants' knowledge of the Superintendent's decision made in March 2016, they waited 8 months to bring their first application for judicial review.

[7] This Court refused the Applicants' motion to extend time, and their application was dismissed on that basis. That decision was appealed unsuccessfully to the Federal Court of Appeal (see *Leishman v Canada*, 2017 FCA 206). However, that Court left open the possibility that later decisions necessary to advance the VRC project could be made the subject of judicial review. It was on the strength of that possibility that this application was commenced on February 28, 2019, challenging the legality of the permits insofar as they authorized the following:

To undertake development on Block 39, Lots 1, 2, 3, 4, 5, 6, 7, 13, 14, 15, 16, (404 Cameron Falls Drive) in accordance with the construction drawings listed on the attached Appendix 1 for the :

Construction of a Visitor Centre including a multi-use building, public washrooms, outdoor recreational and interpretive spaces, administration offices, landscaping and parking.

[8] It is also of some potential significance to this application that, according to the affidavit of Parks Canada Waterton Townsite Manager, Robert Elliott, sworn April 8, 2019, a tender contract was to be awarded on April 15, 2019, for the construction of the VRC, and construction was to commence on or about May 11, 2019. According to Mr. Elliott's affidavit, as of March 31, 2019, expenditures and contractual commitments preliminary to construction of \$4,543,400 had already been made. It is unfortunate that more up-to-date evidence was not filed concerning the present status of the project, although it is not disputed that construction has been underway for several months. This is potentially relevant to the granting of prerogative relief,

particularly in a situation like this, where the Applicants failed to seek interim injunctive relief but are now asking the Court to effectively halt a project that is now well-advanced.

[9] The Applicants challenge the Superintendent's permitting decision on the grounds of procedural fairness and its lawfulness. Their fairness arguments are based on complaints about the adequacy of Parks Canada's consultations. Their substantive concerns are based on an assertion that the Superintendent could not lawfully authorize the construction of the VRC for purposes that are inconsistent with the permitted uses for Block 39 as recognized in the Community Plan.

[10] The Respondents challenge the Applicants' standing to bring this application, arguing that they lack any interest sufficient to bring this proceeding under s 18.1 of the *Federal Courts Act*, RSC, 1985, c. F-7, and that they do not meet the requirements for public interest standing. On the substantive merits of this case, the Respondents contend that the Superintendent's decision to issue the permits fell well within his broad discretion to make land use decisions within the Park, and that it was, in all respects, reasonable.

[11] It is common ground that land development within the Park is under the general control and management of Parks Canada. In the case of a decision to issue a building permit, the necessary authority lies with the Park Superintendent acting under s 5 of the *National Parks Building Regulations*, CRC, c. 1114. No explicit authority exists with respect to the authority to issue a development permit, although the need for one is recognized in the Community Plan. However, nothing turns on this distinction.

[12] The Applicants say that the permits issued by the Superintendent authorizing the construction of the VRC do not conform to the land use limitations that apply to Block 39. According to this argument, the Superintendent could not lawfully approve any development on that parcel that did not strictly conform to the uses permitted by the Community Plan.

[13] It is not disputed that Block 39 is designated under the Community Plan as a recreational reserve. The stated purpose of a recreational reserve is to provide open space for recreational and cultural activities.

[14] The Community Plan stipulates that a recreational reserve can be developed for the following uses:

- a) Interpretive theatres;
- b) Outdoor recreational services;
- c) Playgrounds;
- d) Public parks;
- e) Public washrooms; and
- f) Any other use that is necessary to support recreational and cultural uses.

[15] The evidence before me indicates that before the approval of the VRC, Block 39 had been used mainly as parkland, incorporating a playground with washrooms and some parking.

[16] The Applicants argue that the permits allow for uses that are not authorized for a recreational reserve, including a visitor reception area, administrative offices and retail space.

Initially, the Applicants took issue with the presence of on-site parking. In oral argument, the Applicants retreated from this position by conceding that parking is and had historically been a permitted ancillary use for Block 39. The Applicants continued to express a concern about the interpretive theatre, arguing it could be put to non-recreational and non-cultural purposes. The example given was a political meeting. This argument has absolutely no legal merit. The construction of an interpretive theatre on Block 39 is permitted under the Community Plan. The Community Plan does not exclusively limit the use of a theatre for recreational and cultural purposes, but even if other uses were expressly prohibited, the potential for “misuse” provides no basis for preventing the construction of what is an authorized structure.

[17] What remains for consideration is whether the authorization of the construction of a visitor reception facility, administrative offices and retail space falls within the Superintendent’s discretion, and whether that discretion was lawfully exercised.

[18] The Applicants say that the Community Plan is binding on the Superintendent in the same way that zoning by-laws impose mandatory controls over municipal land use. The Respondents argue that the Community Plan is not a regulatory instrument. Rather it is a land-use guidance document and, as such, it cannot legally bind the Superintendent in the exercise of land-use decisions. Indeed, according to this argument, operational guidelines or policies cannot be applied by a decision-maker to the exclusion of other relevant considerations.

II. The Decision Under Review

[19] The underlying reasons for issuing the permits for the VRC are contained in a Briefing Note signed by the Superintendent (see Respondents' Record, Vol. 1, pp 227-231). That document contains the following rationale for the decision:

Context

There has long been a need for a new VRC in Waterton Lakes National Park. This was recognized in the 2010 Waterton Lakes National Park Management Plan. The former facility was opened in 1958. By present standards it was a small structure and by the 2000s was wholly inadequate to serve the needs of the increasing numbers of visitors. It was also located adjacent to the trailhead of the busiest trail in the Park, leading to major congestion, and in a key wildlife corridor, impacting wildlife movement. The destruction of this facility in the 2017 Kenow Wildfire has only increased the need for a new VRC.

On March 7, 2016, Parks Canada announced that the new VRC would be located in the townsite on Block 39. Attempts to challenge the VRC location decision by judicial review in the Federal Courts were unsuccessful.

On August 31, 2017, the Parliamentary Secretary for Parks Canada met in Waterton with community organizations regarding Parks Canada's location decision. The Minister subsequently issued a statement on November 15, 2017 confirming the decision to locate the new VRC at the Block 39 townsite location.

Following a competitive process in August 2016, Parks Canada awarded a contract to FWBA Architects to design the new VRC. FWBA Architects prepared three design options for the new VRC. Over a six-week consultation period, Parks Canada sought public input on these options through an online engagement website and an open house in the community on April 27, 2017. On January 12, 2018, Parks Canada announced that the Town Plaza design option had been selected for the new VRC following a review of feedback and consideration of the three design options. FWBA Architects has now completed the 99% architectural and engineering drawings of the chosen concept required for the issuance of both the development and building permits.

The new VRC will cover an area of 12,147 square meters on 11 lots on Block 39. The combined footprint of the three buildings will be 988 square meters (8.1% of the total area). Parking will account for 1,960 square meters (16.1% of the total area). The remainder will consist of open space. This will be landscaped and will have a number of interpretative features some of which will double as children's play structures.

Considerations

The Superintendent of Waterton Lakes National Park has the authority to issue building and development permits. By policy (the Waterton Community Plan), a proponent of a development is to have a development permit from the Superintendent. By regulation (the National Parks Building Regulations), the proponent requires a building permit prior to the commencement of work. Here, Parks Canada is the proponent of the development and the Agency is following the same development review process and requirements that would be required of a third party developer.

In determining whether to grant these permits, the Superintendent considered the following documents and resources:

- The Canada National Parks Act;
- Parks Canada Guiding Principles and Operational Policies;
- The National Parks Building Regulations;
- The Waterton Lakes National Park of Canada Management Plan 2010;
- The 2000 Waterton Community Plan;
- The Architectural Motif Guidelines for Waterton Lakes National Park; and
- The Waterton Townsite Landscape Management Plan

In my view, it is in the best interests of the Park to issue the building and development permits for the VRC. The new VRC will ensure that Parks Canada can provide an enhanced visitor experience, including a full range of information services and interpretive programming throughout the year. The new VRC will celebrate the national and cultural heritage of the Park, ensuring that Canadians and visitors from around the world have the best possible experience in the Park. I have also considered that visitors will be unable to benefit from a visitor centre in the Park until a

new complex is built, given the destruction of the previous visitor centre in the September 2017 Kenow wildfire.

In determining whether to issue the building and development permits, Parks Canada is not reconsidering or revisiting the location of the new VRC. The location decision was made by Parks Canada in March 2016 and confirmed by the Minister in November 2017.

Parks Canada's Guiding Principles and Operating Policies

Parks Canada's Guiding Principles and Operating Policies direct that services and facilities for the public must directly complement the opportunities provided, be considered essential, take account of limits to growth, and not compromise ecological and commemorative integrity nor the quality of experiences. They must be consistent with approved management plans. Also, they must reflect national standards for environmental and heritage protection and design, as well as high-quality services, the diversity of markets and equity of access considerations for disabled persons and visitors of various income levels. The new VRC fulfills this direction.

Ecological Integrity

Under ss 8(2) of the *Canada National Parks Act*, SC 2000, c. 32, ecological integrity is the first consideration for the Minister in all aspects of managing parks. Parks Canada applies a suite of regulatory, policy, and operational tools to achieve the spirit and intent of the legislation. At a strategic level, the Waterton Lakes National Park Management Plan (2010) sets out land use zoning and key strategies for managing the Park and for maintaining ecological integrity. At a project scale, to ensure that the potential impacts of the proposed VRC on ecological (and cultural) resources are understood and mitigated, Parks Canada completed a basic environmental impact assessment consistent with the Parks Canada Directive on Impact Assessment (2015). No issues that affect ecological integrity were identified. The new VRC site is located in the developed area of the townsite of Waterton and the construction site is previously disturbed.

On the completion of the VRC, the existing interpretative theatre will be removed and the site restored to open space which will increase the size of the Cameron Falls Day Use Area. In addition the current townsite office will also be removed. This will be replaced with additional parking and an egress road for the congested marina area of the townsite. Including the loss by fire of

the old visitor centre, the elimination of these three structures will be consistent with principles of no net negative environmental impact and environmental stewardship. Further the loss of the old VRC and the subsequent remediation of the site resulted in an ecological gain.

Management Plan

Article 4.6 of the current Waterton Lakes National Park of Canada Management Plan (2010) gives specific direction to improve visitor orientation and information infrastructure. The completion of the VRC will fulfill, in part, that direction.

The Management Plan also states at 5.2.4 that the Waterton Community Plan 2000 will continue to guide the community within the context of this management plan and the Canada National Parks Act and Regulations.

Community Plan

The Waterton Community Plan 2000 indicates that the Park is in need of a new Visitor Reception Centre and specifies that a location for the VRC will be located within the community. Further the community plan suggests that the new VRC will provide for educational, social and cultural facilities appropriate to a national park (page 28).

The eleven lots containing the total development are currently zoned as recreational reserve in the Waterton Community Plan. The purpose of this district is to provide open space for recreational and cultural uses. It formerly contained a children's playground, spray park, tennis courts, a basketball net and a public washroom. These have been relocated elsewhere in the townsite. The rest of the area was an undeveloped grassy field and some informal parking. The permitted uses in this district include interpretative theatres, outdoor recreational services, playgrounds, public parks and public washrooms. The new VRC development has all of these elements. The Waterton Community Plan discourages all development except that necessary to support recreational and cultural uses in this district. I am satisfied that the new VRC conforms to the Community Plan.

[20] It is apparent from these reasons and from other documents in the record that the Superintendent did not limit his discretion to the consideration of the Community Plan land-use

designations. He also took into account the expected benefits of removing and remediating several existing facilities from environmentally sensitive areas of the Park, and from utilizing the already disturbed land on Block 39. He also noted the 2010 Management Plan direction “to improve visitor orientation and information infrastructure”, which the VRC was intended to fulfill in part.

III. Analysis

A. *Standard of Review*

[21] I do not accept the Applicants’ submission that the Superintendent’s interpretation and application of land-use directives pertaining to Waterton National Park should be assessed under the correctness standard. As discussed below, the Superintendent has a broad discretion to consider relevant factors before issuing development and building permits for projects within the Park. The exercise of that discretion does not require him to answer an extricable issue of law, but instead involves consideration of a range of factual matters relevant to the proper management of a national park. The authorities have repeatedly held that this type of decision should be assessed on the standard of reasonableness: see *Grandjambe v Canada (Parks)*, 2019 FC 1023 at para 32, 308 ACWS (3d) 871; *Canadian Parks and Wilderness Society v Maligne Tours Ltd.*, 2016 FC 148 at para 26, 263 ACWS (3d) 1058 [*Maligne*]; *Sunshine Village Corporation v Park Canada Agency*, 2014 FC 604 at para 30, 242 ACWS (3d) 3, and *Burley v Canada (Attorney General)*, 2008 FC 588 at paras 33-40, 167 ACWS (3d) 1006.

B. *Standing*

[22] The Respondents argue that the Applicants lack standing to bring this application because they do not have sufficient interest in the Superintendent's decision to challenge it. I agree that, on the evidence before the Court, the Applicants have not shown that they are "directly affected" by the issuance of the permits. The bare occupation of property within Waterton under an unaffected leasehold is insufficient to bring the Applicants within s 18.1 of the *Federal Courts Act*. That said, I am prepared to decide this application on its merits based on the Applicants' hypothetical right to public interest standing. I am giving them the benefit of the doubt on this issue without deciding it because it is important that this matter not be resolved on purely technical grounds.

C. *Are the Development and Community Plans Binding on the Superintendent?*

[23] The Applicants have provided very little authority for their argument that the land-use provisions found in the Community Plan are legally binding on the Superintendent. Although the Community Plan does use some mandatory language about the application of its land-use designations, it does not purport to be a regulatory instrument. Rather, it uses the term "Directive" and is included within a list of applicable "regulations", "guidelines", "plans" and "policies": see Applicants' Record, Vol 1, p. 109.

[24] Support for the idea that the Community Plan land use designations have regulatory and binding effect is said to be found in the definition of "regulation" in ss 2(1) of the *Interpretation Act*, RSC, 1985, c. I-21. The Applicants contend that the reference there to "other instrument" is

broad enough to include a community plan. The defect in this argument can be seen in the decision of the Federal Court of Appeal in *Lukács v Canada (Transportation Agency)*, 2014 FCA 76 at paras 32-33, 239 ACWS (3d) 2:

[32] First, the definition of “regulation” in subsection 2(1) of the *Interpretation Act* is preceded by the phrase “In this Act”. This is to be contrasted with subsection 35(1) of the *Interpretation Act* which contains definitions that are to be applied “[i]n every enactment”. As the word “regulation” is not found in subsection 35(1), the logical inference is that the definition found in subsection 2(1) is not to be applied to other enactments.

[33] Similarly, the word “regulation” is defined in the *Statutory Instruments Act* only for the purpose of that Act.

[25] There is, however, strong authority supporting the Respondents’ position that these types of documents are non-binding guidelines. In *Brewster Mountain Pack Trains Ltd. v Canada (Minister of Environment)*, [1993] FCJ No 700 at para 27, 41 ACWS (3d) 761, Justice Andrew MacKay had this to say about the nature of a national park management plan:

27 What then is the status and nature of the management plan? I accept the submission on behalf of the respondent that upon its approval by the Minister in November 1988 the management plan for the Park became effective. Tabling in the House of Commons, here done in December 1989 is a statutory requirement under the Act, but the Minister has full responsibility for the management and administration of the Park and for development of a management plan within that responsibility. It is also his or her responsibility to review the plan periodically and to table amendments in the House. It was suggested by counsel for the respondent that once approved, the management plan was binding in the same way regulations under the Act would be, but I am not persuaded that this is so. The requirements for a plan are included with other provisions in section 5 for administration of parks which is within the authority of the Minister, not within section 7 which provides a wide range of matters upon which the Governor in Council, not the Minister, may make regulations. Moreover, the nature of a management plan generally is to provide a framework of principles, standards or objectives which are to be used as guidelines for particular decisions in future. The more detailed the

provisions of a plan, for example in the naming of those who shall be recognized as providing services, the more likely it is that the plan will have to be modified as conditions, including major players, change. Thus, in my view, the fact that the plan as approved stipulates that resident outfitters shall be limited to two, cannot legally be more than guidance for the Minister and those who act for him under the plan. The Minister remains responsible for administration and management of the Park on an ongoing basis in light of conditions as they may evolve, regardless of what a management plan previously approved by him or her may provide.

Also see *Maligne*, above, at paras 91-92.

[26] I fully endorse Justice MacKay’s analysis of the authority of a management plan, which applies with equal force to a national park community plan.

[27] The Applicants’ suggestion that the Community Plan land-use designations are equivalent to a zoning by-law is belied by the fact that, unlike Waterton, the Town of Jasper does have zoning regulations: see *Town of Jasper Zoning Regulations*, CRC, c 1111 created under the *Canada National Parks Act*. Of additional significance is the fact that s 5 of the *National Parks Building Regulations* sets out a number of grounds on which the Superintendent “may” refuse to issue a building permit. This is clearly permissive and not mandatory language. There is also nothing in s 5 that refers to compliance with management or community plans, only to zoning.

[28] On its face, the Community Plan is an aspirational document that speaks to creating “a vision and a strategic action plan for developing a model national park community”. It also states that it “supports and builds on policies and initiatives presented in Parks Canada’s Guiding Principles and Operational Policies”. This is the language of policy guidance and not regulation.

[29] The 2010 Management Plan similarly describes the Community Plan as a guidance document and it recognizes Parks Canada as the “authority for community planning, land use, development and environmental issues”: see Applicants’ Record at p 208 and p 243. The Management Plan itself offers a strategic vision for the Park and sets out a list of priorities and targets to be pursued and measured over 5 to 15 years. Clearly, it is a high level strategic document describing desired and not mandated outcomes: see s 11 of the *Canada National Parks Act*.

[30] The non-binding effect of policy guidance documents was described in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 60, 305 ACWS (3d) 888 in the following way:

[60] However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: *Thamotharem, supra* at paragraph 59; *Maple Lodge Farms, supra* at page 6; *Dunsmuir, supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator’s law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

[31] In my view, neither the Management Plan nor the Community Plan is a legislative instrument that imposes mandatory land-use obligations on the Superintendent. Rather, they are policy guidance documents that do not, and must not, bind the Superintendent.

[32] It is, accordingly, open to the Superintendent to deviate from the Community Plan where he reasonably considers it appropriate. The Superintendent was permitted - indeed required - to

take account of all relevant factors in issuing the VRC permits, including consideration of the efficiencies, ecological advantages and other benefits that could accrue from consolidating several Parks Canada operations in one central location within the townsite. Some additional factors that appear to have gone into the decision to authorize the construction of the VRC on Block 39 can be seen in a 2016 information statement (FAQ) issued by Parks Canada:

Q. Why was Block 39 chosen?

A. The townsite location was chosen to provide the best experience for park visitors and to meet key Parks Canada objectives:

1. This location offers a central, easily accessible site to present the park's ecological, cultural and historical significance.
2. The new visitor centre will significantly increase services to the hundreds of thousands of visitors annually. This location will maximise the opportunity for Parks Canada to connect directly, and multiple times during a stay, with the greatest number of visitors through welcome, orientation and a full range of interpretive programming.
3. Since all park visitors go to the townsite, the location of the new visitor centre is expected to reduce traffic congestion during the busy summer months and provide easier walking access from anywhere in the village.
4. The townsite location provides the best value for taxpayer money as it permits consolidation and the subsequent removal of up to three aging Parks Canada facilities (existing visitor centre, townsite administration building and possibly the interpretive theatre).
5. A new visitor centre located within the townsite implements the Waterton Community Plan, and is fully consistent with the Waterton Lakes National Park Management Plan and the Canada National Parks Act and Regulations.

[33] Even if I am wrong about the non-binding legal effect of the Management Plan and the Community Plan, I am also satisfied that the Superintendent's incorporation of a visitor reception area, retail space and administration offices within Block 39 reasonably conforms with the permitted uses of a recreation reserve. The proposed buildings occupy a relatively small footprint (8.1%) within a much larger area of substantially improved recreational green space.

The uses that the Applicants contest are not expressly identified as permitted, but it was not unreasonable for the Superintendent to have found that the project conformed to the Community Plan under the category of discretionary uses “necessary to support recreational and cultural uses”. It was presumably on that basis that the Superintendent found that the VRC conformed to the allowable uses for a recreational reserve.

D. *Fairness*

[34] The Applicants argue that Parks Canada breached its duty of fairness by failing to notify or consult with community representatives after receiving the application for the permits. This “duty” is said to arise under s 3.3 of the Community Plan. They also complain that the development review that did take place failed to conform with Parks Canada 1997 Development Review Process booklet, which called for the creation of an Advisory Development Board [ADB]. The supposed role of the ADB was to conduct a public review of the VRC and to advise the Superintendent about whether it should go forward. This was not done.

[35] I agree with the Respondents that the Applicants were not owed any procedural duties beyond those that may have applied to any concerned resident of Waterton, and that the consultations that did take place were more than sufficient to satisfy the obligation described in ss 12(1) of the *Canada National Parks Act*.

[36] The record before me shows that Parks Canada did engage in widespread community consultations in advance of issuing the permits, dating back at least to 2015 (see Respondents’ Record Vol 1, pp 98-99). In November 2015, the Superintendent met with the Waterton Lakes

Leaseholder Association from which a working committee, including six leaseholder representatives, was struck (see Respondents' Record Vol 1, pp 101-102). Following a two-day facilitated public meeting held on June 18 and 19, 2016, the proposal for siting a visitor centre on Block 39 was raised. Among the topics discussed were safety, traffic, parking, preserving green space and consolidation of Parks Canada operations on Block 39.

[37] Between April 3 and May 12, 2017, Parks Canada conducted an online consultation seeking input on project design preferences. Several respondents questioned the proposed use of Block 39, but those were deemed to be non-responsive to the consultation question about project design.

[38] On August 31, 2017, the Parliamentary Secretary for Parks Canada met in Waterton with community representatives and discussed, among other things, the proposed use of Block 39. A letter from the Parliamentary Secretary dated November 15, 2017 described the extent of the Parks Canada community engagement and provided the following rationale for its decision to use Block 39:

Issue raised by the STWF: "There was insufficient consultation with the community regarding the location of the visitor centre."

Response: Any decision relating to a visitor centre at Waterton must be based on the role of the townsite of Waterton as the center for visitor services in the national park as set out in the *Canada National Parks Act*, the Waterton Lakes National Park Management Plan and the Waterton Community Plan. The Act, the management plan and the community plan were all subject to extensive national consultations.

In particular, the Waterton Lakes National Park Management Plan reflects the expectations that Canadians have clearly identified for the current and future management of the park.

Before Parks Canada made any decision on the location of the visitor centre and also following the location decision, Parks Canada directly engaged discussions with a range of stakeholders and leaseholders.

Public consultations prior to the March 7, 2016, announcement included:

- Waterton Park Community Association (August 2015);
- Waterton Lakes Leaseholders Association (September 2015, November 2015, December 2015);
- Waterton Park Chamber of Commerce (September 2015);
- Rotary International Peace Park (September 2015);
- Rotary Club Lethbridge East (November 2015);
- Kainai (Blood) First Nation Chief and Council (November 2015),

Public consultations after the March 7, 2016, announcement were also extensive and included:

- Kainai (Blood) First Nation Chief (March 2016);
- Stakeholders engagement (May 2016), including: Alberta Southwest Regional Alliance, Improvement District #4, Save the Waterton Field, Travel Alberta, Waterton Biosphere Reserve Association, Waterton Chamber of Commerce, Waterton Park Community Association, Waterton Lakes Leaseholders Association, and Waterton Natural History Association;
- Piikani Chief and Council (June 2016);
- Public information session in Waterton on June 18 and 19, 2016. At that session, the public was invited to submit any new information that Parks Canada had not yet considered. A report from the public information session is available on Parks Canada's website.

One of the possible locations you noted that was researched and assessed was the Parks Canada operations compound. However, as a location for visitor services and information, the operations compound involves a number of concerns for the quality of visitor experience and for visitor safety and has been determined

to be unsuitable as a location for visitor services and information. Specifically:

- The compound is the centre for all of Parks Canada's operational activities in the park, including sewage and garbage management and so experiences a high volume of heavy vehicle traffic. This poses safety risks for visitors and noise and distraction concerns.
- Access to the operations compound is directly from the only route into the national park, so vehicles turning into and leaving from the location can cause traffic delays and congestion which would be compounded if the site incorporated a visitor centre.
- Combining visitor and operations traffic would likely compromise the speed of operations services that are critical to the community
- The operations compound is beyond normal walking distance from the townsite. This would mean visitors wishing to participate in interpretive activities or obtain information while in the community would have to drive to the compound, increasing traffic congestion on Waterton's main road as well as in the townsite.

I would like to note that Parks Canada's selection of the site for a new visitor centre was based on four primary criteria: a) how best to service parks visitors, b) how best to achieve Parks Canada's objectives, c) how best to achieve maximum value of the investments, and d) the role of the Waterton townsite as the center for visitor services in the national park as set out in the *Canada National Parks Act*, the *Waterton Lakes National Park Management Plan* and the *Waterton Community Plan*.

The townsite location was selected as the best possible site by Parks given that it will offer visitors and residents the best possible experience while ensuring a number of other important objective can be achieved. Specifically:

- A new visitor centre will significantly increase services to the hundreds of thousands of visitors who come to Waterton Lakes National Park annually. This location will maximize the opportunity for Parks Canada to connect directly, and multiple times during a stay, with the greater number of visitors through welcome, orientation and a full range of interpretive programming. One improvement will be the ability

to increase the sharing of information about avoiding human-wildfire conflicts, and the consequences that frequently follow such instances.

- A visitor centre in the townsite will also encourage walking among visitors and limit the vehicle use within the townsite (i.e., people can walk from their accommodation to the visitor centre multiple times during the stay).
- Since 98% of all park visitors go to the townsite, the townsite location of a new visitor centre is expected to connect with the most visitors, reduce traffic congestion during the busy summer months along the main road into the townsite and provided easier walking access from anywhere in the village.
- The townsite location provides the best value for money as it permits consolidation and the subsequent removal of up to three aging Parks Canada facilities (the existing visitor centre, the townsite administration building and possibly the interpretive theatre).
- The townsite location offers greater potential to minimize environmental and ecosystem impacts because it is within the footprint of the community of Waterton, so would not require removal of land from conservation. The townsite location also is one of few locations that can accommodate the size of the visitor centre facility.

Having now seen the potential alternative sites personally and having reviewed the pros and cons associated with the main potential locations, I concur that Block 39 is the most appropriate location – a location that will enable the National Park to fulfill its mandate in a manner that can also work well for the local community.

Overall, with respect to the location of a new visitor centre in the townsite, after having heard and seriously considered your views and concerns as well as those expressed by other stakeholders, and after reviewing and assessing once again how Parks Canada came to its decision, I want to let you know that I am of the view that a new Waterton Lakes National Park visitor center should be constructed at Block 39 in the townsite of Waterton. In coming to this determination, I have carefully considered the concerns that have been expressed and am of the view that such concerns have either already been addressed or

that they will be addressed through ongoing management planning.

[39] On November 15, 2017, the Minister for Parks Canada, Catherine McKenna, issued a public statement confirming the decision to locate the Waterton Lakes visitor centre on Block 39. This was followed by the Superintendent's issuance of the permits on February 7, 2019.

[40] It is clear from the record before me that any interested and engaged resident of Waterton would have known about Parks Canada's decision to locate a visitor centre and administrative offices on Block 39 well in advance of the Superintendent's decision to issue the permits. The Applicants do not contend otherwise and, in fact, they attempted to stop the project in 2016 for the same reasons they have raised in this proceeding. Their affidavits do not indicate the extent of their informal efforts to persuade Parks Canada to protect Block 39, but it cannot be disputed that they and other like-minded residents had several available opportunities to have their views considered. The record does disclose some public opposition to the use of Block 39, but it also shows that Parks Canada took those views into consideration.

[41] To the extent the Applicants had participation rights, the consultative process followed by Parks Canada was more than sufficient to meet its duty of procedural fairness.

[42] The Applicants' further argument that Parks Canada was required to strictly comply with any consultative steps identified in the Management and Community Plans, and in the ADB, has no merit. Those documents do not create binding process obligations, and Parks Canada was

free to adopt other adequate consultative measures. Its only obligation was to consider the views of the public in good faith and, in this case, it met that responsibility.

[43] Although the Applicants asked the Superintendent to inform them in advance that the permits were to be issued, they were only told after-the-fact. This is not a breach of procedural fairness because the Superintendent owed the Applicants no special duty of notice. It was only a courtesy that the Superintendent advised them of the existence of the permits a few days after their issuance. Nothing turns on this issue in any event. It was always open to the Applicants to contest the Superintendent's authority to authorize the construction of the VRC on Block 39. Indeed, at the point the permits were issued, it was well-known by all the interested parties, including the Applicants, that Parks Canada intended to include a visitor reception area and administrative offices within the development and that it did not accept that those were prohibited uses of Block 39. The significance of the issuance of the permits was only that a reviewable decision had been made – a decision the Applicants quickly challenged by initiating this application.

IV. Relief

[44] Even if the Superintendent's permitting decision had been unlawful, unreasonable or tainted by a breach of procedural unfairness, I would not have granted the remedies requested by the Applicants. I accept their point that, as a matter of principle, the vindication of the rule of law will usually prevail when a government agency acts unlawfully. However, there are situations, like this one, where the balance of convenience has tipped so far that broader public interest considerations must apply.

[45] Here the Applicants had no personal legal interests that were harmed or affected by the issuance of the permits. On the other hand, Parks Canada has spent millions of taxpayer dollars on the VRC project, and is committed to the expenditure of millions more. Presumably, there are members of the Waterton community and beyond who do not share the Applicants' concerns, particularly when the project has proceeded as far as it has.

[46] It was also open to the Applicants to seek interim injunctive relief. Having failed to take that step and, in the absence of any identified harm to their legal interests, fiscal responsibility profoundly overwhelms any general concern about the presence of a visitor centre (including a modest retail outlet) and some administrative offices on Block 39: see *MiningWatch Canada v Canada (Minister of Fisheries and Oceans)*, 2010 SCC 2 at para 52, [2010] 1 SCR 6.

[47] For the foregoing reasons, this application is dismissed. The Respondents' are seeking costs under Tariff Column III. I will allow the Applicants five days to set out in writing their position on costs. The Respondents will have five days to respond in writing. Neither submission is to exceed 10 pages.

JUDGMENT IN T-396-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and
2. The issue of costs is reserved pending the receipt of additional written submissions from the parties.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-396-19

STYLE OF CAUSE: FRASER LEISHMAN AND GRAY GREENWAY v HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND PARKS CANADA AGENCY

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: NOVEMBER 21, 2019

JUDGMENT AND REASONS: BARNES J.

DATED: DECEMBER 11, 2019

APPEARANCES:

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