**BOARD ORDER:** **MGB 032/17**

**FILE:** **16/IMD-03**
**16/IMD-04**

**IN THE MATTER OF THE** *Municipal Government Act* being Chapter M-26 of the Revised Statutes of Alberta 2000 (*Act*).

**AND IN THE MATTER OF INTERMUNICIPAL DISPUTES** lodged by the Town of Drayton Valley v Brazeau County Bylaws, Bylaw 892-15 and Bylaw 905-16

**CITATION:** Town of Drayton Valley v Brazeau County, 2017 ABMGB 32

**BEFORE:**

Members:

H. Kim, Presiding Officer
M. Axworthy
D. Thomas

Case Managers:

C. Miller Reade
R. Lee (Assistant)

This is a preliminary hearing arising from disputes filed with the Municipal Government Board (MGB) under section 690 of the *Act* claiming that Bylaw 892-15 and Bylaw 905-16 have a detrimental impact on the Town of Drayton Valley. Upon notice being given to the interested parties, a hearing was held in the City of Edmonton, in the Province of Alberta, on May 2, 2017.

## OVERVIEW

In this preliminary hearing, the parties addressed the MGB's questions about the ability to amend, repeal or replace a bylaw under appeal, and whether an amendment to a land use bylaw would survive the repeal and replacement of the parent bylaw. After receiving submissions and conducting a hearing, the MGB restated the issues into the following three questions:

1. Can a bylaw under appeal be repealed, amended or replaced?
2. By adopting Bylaw 923-16, did Brazeau repeal Bylaw 905-16 and Bylaw 892-15?
3. Since Bylaw 923-16 was adopted, are the appeals under MGB files 16/IMD-03 and 16/IMD-04 moot? If so, should the MGB still exercise discretion to hear the appeal?

Counsel for Drayton Valley, Brazeau,County and the Landowners all agreed that the *Act* does not prevent a municipality from repealing, amending or replacing a bylaw under appeal. The MGB accepts this argument. In response to Question 2, Brazeau County argued the appeal of Bylaw 892-15 suspended its operation and effectively "placed it in a bubble". As such, subsequent repeal of its parent Bylaw 782-12 could not repeal Bylaw 892-15. Brazeau County also argued that in any event, Bylaw 923-16 – which repealed the earlier parent bylaw – was not intended to repeal Bylaw 892-15. While the Landowner essentially agreed with Brazeau, County Drayton Valley argued that Bylaw 892-15 could not survive the repeal of its parent bylaw. Further, it said the text of the repealing Bylaw 923-16 demonstrated intent to replace Bylaw 892-15.

The MGB found that Bylaw 923-16 repealed all of the proceeding bylaws including Bylaw 892-15. The appeal is therefore moot and there is insufficient reason to proceed with reference to the stated criteria set out by the Courts, including judicial economy, resolution of a live issue or proper exercise of a decision maker's function.

## BACKGROUND: WHAT IS THE INTERMUNICIPAL DISPUTE?

Overview of Brazeau County's Land Use Bylaw Amendments

[1] In 2016, land use in Brazeau County (Brazeau) was governed by Land Use Bylaw (LUB), Bylaw 782-12 (Bylaw 782-12). On March 1, 2016, Brazeau passed Bylaw 892-15 (Bylaw 892-15), a Direct Control Bylaw (DC Bylaw) which regulated land use specifically on lands owned by A. Peck and D. McGinn (Peck Lands). These lands were historically districted "Agricultural" under Bylaw 782-12. Outdoor Storage Facility qualified as a Discretionary Use under the Agricultural District. The adoption of Bylaw 892-15 elevated Outdoor Storage Facility to a Permitted Use, while authorizing Brazeau Council to impose conditions on any permit obtained.

[2] On March 31, 2016, the Town of Drayton Valley (Drayton Valley) filed a section 690 appeal in relation to Bylaw 892-15 alleging detrimental impacts. On April 8, 2016, the MGB acknowledged receipt of Drayton Valley's appeal under File 16/IMD-03, advising that in accordance with section 690(4), Bylaw 892-15 was "deemed to be of no force and effect".

[3] On May 3, 2016, Brazeau held first reading for a new LUB, Bylaw 905-16, intended to replace Bylaw 782-12. Third reading of Bylaw 905-16 occurred on August 16, 2016. On September 15, 2016, Drayton Valley filed a second appeal against Bylaw 905-16, alleging detriment due to the provisions of the Agricultural district. The MGB acknowledged receipt of this appeal under File 16/IMD-04, attaching a copy of the application and the statutory declaration, and advised Brazeau that Bylaw 905-16 was deemed to be of no effect. A preliminary hearing date of November 9, 2016 was chosen, and the preliminary hearing advertised in the local newspaper as all owners of land in Brazeau were affected by the land use bylaw.

[4] Concurrently, Brazeau asked Drayton Valley to comment on the proposed Bylaw 923-16, a LUB that was to have the effect of repealing all previous LUBs, including Bylaw 905-16. Drayton Valley replied that Bylaw 923-16 appeared to address the concerns it had arising from Bylaw 905-16. On October 18, 2016, Brazeau gave all three readings to Bylaw 923-16. Drayton Valley did not appeal Bylaw 923-16.

[5] Bylaw 923-16 states "Bylaw 782-12, as amended, and Bylaw 905-16 are hereby repealed". On October 27, 2016, Brazeau notified the MGB of its adoption of Bylaw 923-16 and its position that the adoption of Bylaw 923-16 (which repealed Bylaw 905-16), rendered Appeal 16/IMD-04 moot.

The Question of Mootness

[6] In *Borowski v Canada (Attorney General)* (*Borowski*), the Supreme Court of Canada recognized that a decision maker should decline to hear a case which raises merely a hypothetical or abstract question. This doctrine applies in circumstances where, at the time of the proceedings, there is no longer a live controversy between the parties, and the court's decision would have no practical effect on the parties' rights. The general rule is that a moot application should not be heard, although the Supreme Court has recognized that in limited circumstances a Court may still exercise its discretion to hear the matter.

[7] On November 9, 2016, the MGB held a preliminary hearing regarding Bylaw 905-16. In its November 29, 2016 decision (MGB 072-16), the MGB directed that a preliminary hearing be held to determine the whether File 16/IMD-04 was moot.

[8] Finally, on January 6, 2017, Drayton Valley requested that the scope of the preliminary hearing be expanded to consider whether File 16/IMD-03 regarding Bylaw 892-15 was also moot. On January 23, 2017, a case management session was held to clarify the issues for this preliminary hearing.

## ISSUES

[1] Following a case management session on January 23, 2017, the MGB issued DL 004/17 setting the preliminary hearing to the following issues:

1. Does section 690(4) of the MGA prevent a municipality from amending or repealing the provision of the statutory plan or amendment or land use bylaw or amendment that is the subject of the appeal from the date the Board receives the notice of appeal and statutory declaration under subsection 1(a) until the date it makes its decision?

2. If section 690(4) of the MGA did not prevent Brazeau from repealing the bylaws in dispute, did Brazeau in fact repeal Bylaws 892-15 and 905-16?

Having heard the parties' full submissions, these issues can be reframed usefully as follows:

1. Does section 690(4) prohibit municipalities from amending or repealing land use bylaws that are the subject of an appeal before the MGB?

2. If section 690(4) of the MGA did not prevent Brazeau from repealing the bylaws in dispute, did Brazeau in fact repeal Bylaws 892-15 and 905-16?

3. If Bylaws 892-15 and 905-16 were repealed by Bylaw 923-16, are these disputes now moot? If so, should the MGB still exercise its discretion to hear the appeals?

**ISSUE 1: Does section 690(4) prohibit municipalities from amending or repealing land use bylaws that are the subject of an appeal before the MGB?**

[2] Counsel for both municipalities and the landowner were in agreement that section 690 does not preclude a municipality from amending or repealing a bylaw. While there is no case law directly on point, the parties urged the MGB, in its role as an adjudicator, to apply statutory interpretation principles, interpreting the words of the *Act* in their grammatical and ordinary sense. Brazeau provided the MGB with a thorough comparison of case law, statutory interpretation and argument summarised below.

Brazeau's Position:

[3] Brazeau urged the MGB to apply a "broad and purposive interpretation" of section 690(4) as mandated in *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)* and *Rizzo & Rizzo Shoes Ltd. (Re)*. A "broad and purposive interpretation" requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

***Words of the Act in their grammatical and ordinary sense***

[4] In *Churgin v Calgary (City)*, the Alberta Court of Appeal recognized that a municipal council has the power to amend or repeal its bylaws, and that a Court will not lightly find that a municipal council's power to do so has been fettered. Section 639 requires that a municipality adopt a LUB. Beyond this requirement, municipal councils have an unfettered discretion to pass bylaws of whatever nature they wish, subject only to the limits of the *Constitution Act* and the limited powers given to the MGB under section 690(4) if it finds detriment. There is no connection

between the MGB's powers under sections 690 and 691 and that of the power of a municipal council to adopt statutory plans and land use bylaws under sections 639 and 640.

[5] The purpose of sections 690 and 691 are to provide a municipality with the opportunity to challenge an adjacent municipality's statutory plans and land use bylaws on the basis that they will cause detriment. After an appeal is filed, it is anticipated that mediation will be attempted, and if resolution does not occur, then the MGB will hold a hearing and make a decision. Section 690(4) does not contain any language suggesting that, in the event of an appeal, a municipal council is prevented from passing bylaws. Section 690(4) states that: "…the provision of the statutory plan or amendment or land use bylaw or amendment that is the subject of the appeal is deemed to be of no effect and not to form part of the statutory plan or land use bylaw from the date the Board receives the notice of appeal and statutory declaration under subsection (1)(a) until the date it makes a decision under subsection (5)." Under section 690(5), the MGB can "order the adjacent municipality to amend or repeal the provision." Section 690 does not grant the MGB the authority to issue stays, grant injunctions, or interfere with a municipal council's discretion to amend or repeal bylaws.

***Words of the Act in their context, and the Scheme of the Act***

[6] An application of statutory interpretation principles and a broad and purposive interpretation of section 690(4) leads to the conclusion that Brazeau was not prevented from amending or repealing bylaws that were the subject of an appeal before the MGB. An interpretation of section 690(4) that allows municipalities to repeal or amend impugned bylaws, or adopt a new bylaw is consistent in the context of the legislation. A municipality should not be prohibited from repealing a bylaw under appeal if it resolves the source of detriment without expending further resources and eliminating the need for a merit hearing. When a municipality is prepared to repeal an impugned bylaw, conducting a merit hearing would not make practical sense. Further, repealing a bylaw under appeal provides the appealing municipality with the "maximum relief" that the MGB can order under section 690(5). A distinction should not be drawn between the ability to amend or repeal a bylaw and ability to adopt a new general LUB.

[7] Further, section 690(4) cannot be interpreted in such a way that results in a legislative gap which interferes with a municipality's power to regulate land use, and its ability to approve development or enforce land use standards. When Bylaw 905-16 was appealed by Drayton Valley, Brazeau was concerned that it did not have a land use bylaw. This would suspend all development in the municipality and put the municipality in breach of section 639 of the *Act*, and may result in section 690 appeals being filed for improper purposes. Brazeau adopted Bylaw 923-16, explaining to Drayton Valley, that Bylaw 923-16 included all the amendments requested by Drayton Valley and its appeal would be moot.

Drayton Valley's Position:

[8] Drayton Valley acknowledged that there is support in law for the position that a bylaw that is not in force can be repealed. Section 35 and 37 of the *Interpretation Act* suggest that an enactment that is not in force is subject to repeal. Section 690(4) does not prevent municipalities from repealing or amending bylaws that are the subject of appeal before the MGB.

Landowner's Position:

[9] Counsel for the Landowners, D. McGinn and A. Peck, agreed that section 690(4) did not restrict Brazeau's ability to amend or repeal bylaws that were appealed to the MGB. Section 690 suspends an impugned bylaw from the time the MGB receives an appeal until it renders a decision. Counsel also cited previous MGB decisions where the MGB found an intermunicipal dispute can be resolved through an amendment to the bylaw. And while the MGB is not bound by its previous decisions, it should strive for consistency in its interpretation of the *Act*.

**Findings – Issue 1**

1. Section 690(4) of the *Act* does not prevent a municipality from amending or repealing the provision of the statutory plan, land use bylaw or an amendment under appeal to the MGB.

**Reasons – Issue 1**

[10] The MGB thanks the parties for their thorough submissions on this matter. Both municipalities and the Landowner agreed that section 690 does not prevent a municipality from amending, repealing, or replacing an appealed bylaw or amendment. The MGB accepts that there is nothing in the *Act* that explicitly prevents or restricts a municipality's power to pass bylaws while an appeal is underway. There is no language linking the intermunicipal dispute provisions in Division 11 and municipal councils' bylaw making powers under Division 5. While section 488 assigns certain responsibilities to the MGB, injunctions or stays is not amongst the list of responsibilities, nor is there any specific reference to stays or injunctions in Part 12 of the *Act.*

[11] Because section 690(4) includes an attempt at mediation, the legislature clearly intended that the municipalities discuss and attempt to resolve the dispute before proceeding to an MGB merit hearing. As counsel for the Landowner noted, there have been many intermunicipal disputes that, with the assistance of a mediator, were successfully mediated by the municipalities, resulting in an agreement, then amendments or a new plan or bylaw were adopted, and finally withdrawal of the MGB appeal. For example, this approach was used in two recent appeals (10/IMD-08 and 15/IMD-01) between Lacombe County and the Town of Sylvan Lake. In each case, mediation took

place, an agreement was reached, and the appellant municipality subsequently withdrew the appeal prior to a merit hearing.

**ISSUE 2: If section 690(4) of the MGA did not prevent Brazeau from repealing the bylaws in dispute, did Brazeau in fact repeal Bylaws 892-15 and 905-16?**

[12] Brazeau, Drayton Valley, and the Landowner agreed that Bylaw 923-16 repealed both Bylaw 782-12 and Bylaw 905-16. However, there was disagreement about the effect of Bylaw 923-16 on Bylaw 892-15 which had been appealed by Drayton Valley. Brazeau maintained that Bylaw 923-16 did not repeal Bylaw 892-15. Drayton Valley argued that the repeal of Bylaw 782-12 also repealed Bylaw 892-15, which amended Bylaw 782-12.

Brazeau's Position:

[13] Brazeau submitted Bylaw 923-16 expressly repealed Bylaw 905-16 and, as amended, Bylaw 782-12. However, Bylaw 892-15 was not repealed, as it was under appeal to the MGB and suspended, and did not form part of Bylaw 782-12. Because it was suspended, Bylaw 892-15 was placed "in a bubble", which insulated it when Bylaw 782-12 was repealed. If the MGB agrees Bylaw 892-15 was not repealed, then a merit hearing should be set for Bylaw 892-15.

***Why Bylaw 892-15 has not been repealed.***

[14] Upon receipt of Appeal 16/IMD-03, the MGB advised Brazeau that under section 690(4), Bylaw 892-15 was "deemed to be of no effect and not to form part of the statutory plan or land use bylaw". Brazeau submitted that the interpretation and consequence of this phrase are novel issues requiring guidance from the MGB. More specifically, Brazeau asked whether a provision, having been found "not to form part of" a LUB, is protected from any amendments or repeals affecting the remainder of the LUB.

[15] In light of this novel issue, Brazeau submitted it would be a reasonable interpretation to suggest that the impugned provisions that no longer form part of a LUB enter a protective "bubble" in which they are immune to amendments and repeals that affect the remainder of the LUB.

[16] Because its provisions were deemed not to form part of Bylaw 782-12, Brazeau did not incorporate the wording of Bylaw 892-15 into Bylaw 905-16. By virtue of not forming part of the land use bylaw, Brazeau submitted that Bylaw 892-15 was not repealed when Bylaw 905-16 was repealed. Rather, its operation was merely suspended. If the MGB were to hold a merit hearing and if it were unable to find that Bylaw 892-15 was detrimental, Bylaw 892-15 would form part of Brazeau's land use bylaw, which is Bylaw 923-16.

[17] In support of this interpretation, Brazeau submitted that the *Act's* incorporation of both "deemed to be of no effect" and "not to form part of the statutory plan or land use bylaw" was a deliberate choice in language suggesting that the legislature must have intended the latter to mean something more than a mere suspension of the provisions' effect. The MGB should strive to give meaning to all of the words used by the legislature in its interpretation of section 690(4).

[18] Secondly, the subject lands of Bylaw 892-15, the Peck Lands, are shown as direct control on maps in Section 16 of both Bylaw 905-16 and 923-16. Since Bylaw 892-15 was under appeal, the text of the bylaw which establishes the purpose, land uses and regulations attached to the direct control district was not listed or included in Section 17, the Appendix to both Bylaw 905-16 and 923-16. Bylaw 892-15 was in force as an amendment to Bylaw 782-12 and was not repealed. Since Bylaw 892-15 has not been repealed, a merit hearing should be scheduled.

Drayton Valley's Position:

[19] All of the previous bylaws were repealed by Bylaw 923-16. Since Bylaw 782-12 was listed as repealed, the intent was to repeal Bylaw 892-15 as well, whether or not this was specifically listed. Bylaw 892-15, as an amendment, forms part of Bylaw 782-12. Brazeau also advised Drayton Valley in correspondence prior to the adoption of Bylaw 923-16, that Bylaw 923-16 addressed all of its concerns. Further, Bylaw 923-16 appeared to resolve the issues that Drayton Valley had with both Bylaw 892-15 and 905-16.

***Bylaw 892-15 is repealed***

[20] Drayton Valley believed that with the repeal of Bylaw 782-12 that Bylaw 892-15 was also repealed. There is a clear relationship between the two bylaws as the Agricultural district provisions of Bylaw 782-12 were modified by Bylaw 892-15 to allow outdoor storage as a permitted use and set regulation for the direct control district. There is nothing in Bylaws 905-16 or 923-16 that would prompt the public to believe that Bylaw 892-15 was in place, or suspended.

[21] If Brazeau's intent was not to repeal Bylaw 892-15, Drayton Valley expected that it would have been included in the list of direct control bylaws contained in Appendix 17 of Bylaw 923-16. The legislative process to adopt bylaws must be transparent. The principle of transparency would require changes to Bylaw 923-16 to include the following: to list the direct control bylaw, Bylaw 892-15, in Appendix 17; incorporate the text of the direct control district into the bylaw; or list the bylaw as under appeal to the MGB. Since none of these had occurred, Drayton Valley believed that Bylaw 892-15 was repealed.

[22] Section 13.6 in both Bylaw 905-16 and 923-16 also state that a direct control district is comprised of a purpose statement and regulations that will be detailed in the Appendix 17.

Appendix 17 includes a list of the relevant direct control districts, followed by the specific amendments. However, Bylaw 892-15 is not listed, and the text of Bylaw 892-15 is not included in either Bylaw 905-16 or 923-16 in Section 17, Appendix. Without a reference to Bylaw 892-15, it is unclear which uses or standards would apply to the Peck Lands. While the map in Bylaw 782-12, Bylaw 905-16 and Bylaw 923-16 show a direct control district on the Peck Lands (using a different map colour and hatching), there is no corresponding district with a purpose statement, uses and district regulations.

***Brazeau advised that Bylaw 923-16 addressed all of Drayton Valley's concerns***

[23] Prior to the adoption of Bylaw 923-16, Drayton Valley requested written clarification from Brazeau about the status of Bylaw 892-15 and storage on the Peck Lands; however, none was provided. In his October 5, 2016 letter, Brazeau's Director of Planning stated that amendments to Bylaw 923-16, such as the creation of an overlay for storage management (Overlay) and the inclusion of a map showing the storage management area, would address Drayton Valley's concerns with outdoor storage. After receiving this letter, Drayton Valley understood that all outdoor storage would be discretionary, thereby addressing their concerns with Bylaws 892-15 and Bylaw 905-16. If Drayton Valley was aware that Brazeau viewed Bylaw 892-15 as suspended and not repealed by Bylaw 923-16, an appeal would also have been filed for Bylaw 923-16.

[24] Counsel for Drayton Valley opined that attaching Bylaw 892-15 to Bylaw 923-16 might not be possible as the MGB can only order a change to a bylaw before it. Since Drayton Valley did not appeal Bylaw 923-16, that bylaw cannot be changed by the MGB.

<u>Landowner's Position:</u>

[25] After reviewing Brazeau's submissions, counsel for the Landowner understood that that Brazeau did not intend to repeal Bylaw 892-15. Given submissions by Drayton Valley and Brazeau, counsel for the Landowner suggested that, once Bylaw 782-12 was repealed by Bylaw 905-16, Brazeau could not revive it and use it while the appeal of Bylaw 905-16 was underway. Once Bylaw 905-16 was appealed to the MGB and deemed to be of no force, Brazeau was left without a land use bylaw until the adoption of Bylaw 923-16. In response to a question by the panel, counsel indicated that despite Drayton Valleys' appeal of the Agricultural district of Bylaw 905-16, Bylaw 782-12 was repealed at the time of the adoption of Bylaw 905-16 and Bylaw 923-16.

***Bylaw 892-15 is not repealed.***

[26] Counsel for the Landowner agreed that Bylaw 782-12 and its amendments were repealed by Bylaw 905-16 and, then again, by Bylaw 923-16. What is important is what Brazeau said when

it repealed both bylaws, as Bylaw 892-15 was not mentioned specifically as being repealed. After reviewing Brazeau's submissions, the Landowner agrees that Bylaw 892-15 was not listed in Appendix 17 of either Bylaw 905-16 or Bylaw 923-16, and one conclusion could be that Bylaw 892-15 was of no effect and did not form part of either Bylaw 905-16 or Bylaw 923-16. The other conclusion is that Bylaw 892-15 was repealed at the same time that Bylaw 782-12 or Bylaw 905-16, and continuing these appeals would be moot.

[27] However, due to the existence of the Town of Drayton Valley Outdoor Storage Overlay (Overlay) in section 14.2 in Bylaw 923-16, all outdoor storage in the Overlay is discretionary, over riding Bylaw 892-15. Therefore, outdoor storage on the Peck Lands is discretionary.

[28] In response to a question by the panel about how the MGB should proceed if it found that the only way to attach Bylaw 892-15 to Bylaw 923-16 was to reintroduce the direct control bylaw and hold a public hearing, counsel for the Landowner stated that, in the interests of economy, the MGB should schedule a merit hearing, since if the MGB found that Bylaw 892-15 was repealed with Bylaw 782-12, it is likely that Brazeau would adopt a new direct control bylaw, which would again be appealed by Drayton Valley.

**Findings – Issue 2:**

2. Despite being under appeal, Bylaw 892-15 was repealed by Bylaw 905-16 and Bylaw 923-16.

**Reasons – Issue 2:**

[29] It is agreed that Brazeau repealed Bylaw 782-12 when it adopted Bylaw 905-16 and Bylaw 923-16. The question is whether by repealing Bylaw 782-12, Brazeau also repealed Bylaw 892-15. As an amending bylaw, Bylaw 892-15 would ordinarily be considered part of Bylaw 782-12 and hence repealed along with it. The complicating factor is that since Bylaw 892-15 was itself under appeal, it was deemed "not to form a part of … the bylaw" by operation of section 690(4).

[30] Brazeau argued that the intent of section 690(4) is to create an insulating "bubble" around Bylaw 892-15 that would protect it from being repealed along with its parent bylaw. The MGB disagrees. The intent of section 690(4) is to suspend operation of appealed portion of a bylaw and to prevent that portion from having any effect on the continued operation of the otherwise properly constituted bylaw. In other words, the intent of section 690(4) is to minimize the intrusive effect of a section 690 appeal by allowing continued operation of the parent bylaw – not to prevent repeal of the suspended bylaw through repeal of the parent.

[31] The interpretation urged by Brazeau is not only inconsistent with the intent of section 690(4), but also violates the principle of transparency. As noted by Drayton Valley, the legislated process is intended to be transparent – a principle underscored by Goal 2 of the Provincial Land Use Policies which states "Planning activities are to be carried on in a fair, open, considerate and equitable manner." Thus, it is reasonable to expect actions taken by municipalities for planning matters to be transparent. Yet there was little in the correspondence or the discussions related to Bylaw 923-16, or more importantly its text, which would give Drayton Valley or the public an indication that Brazeau's intention was anything other than a replacement for Bylaw 782-12 and Bylaw 905-16. Since Bylaw 892-15 was an amendment to Bylaw 782-12, the most reasonable expectation is for the amendment to a bylaw to be repealed along with the parent, unless specifically stated otherwise.

[32] While it is true that the map in both Bylaws 905-16 and 923-16 show the Peck Lands with Direct Control districting, a map is not a bylaw. The Board also observes that Drayton Valley appealed only the Agricultural district within Bylaw 905-16. Therefore, if Brazeau's argument holds true for Bylaw 892-15, a parallel argument should also apply to the Agricultural District under Bylaw 905-16. That is to say, the Agricultural district for Bylaw 905-16 would also have been "placed in a bubble" and therefore insulated from repeal. In that case, there would be 2 competing Agricultural districts – which is an absurd consequence. Moreover, several inconsistencies in Bylaw 923-16 suggest that Bylaw 892-15 was no longer in effect. The inconsistencies in Bylaw 923-16 which demonstrate an intention to repeal the DC Bylaw are as follows: Appendix 17, which lists all of the direct control districts does not include Bylaw 892-15; there is no purpose statement or other regulations for Bylaw 892-15; and finally, the lands which are the subject of Bylaw 892-15 appear to be included in the Overlay.

[33] From all appearances, Bylaw 892-15 was repealed by Bylaw 923-16. This understanding appears to have been shared by Brazeau's Director of Planning. In correspondence prior to the adoption of Bylaw 923-16, Brazeau's Director of Planning advised Drayton Valley that Bylaw 923-16 "made the three amendments requested by the Town including….creating 14.2 (storage management area) and adding an additional map (related to 14.2). In the statutory declaration for File 16/IMD-04 filed by Brazeau's Chief Administrative Officer (CAO), Brazeau advised that "Since Bylaw 905-16 has been repealed, the subject matter of the Town's complaint is no longer in existence. It is our view that the appeal has become moot." In addition, Bylaw 923-16 introduced an Overlay surrounding Drayton Valley, making outdoor storage a discretionary use.

[34] In view of the foregoing considerations, the MGB concludes Bylaw 892-15 was in fact repealed along with its parent, Bylaw 782-12.

**ISSUE 3: If Bylaws 892-15 and 905-16 were repealed by Bylaw 923-16, are these disputes now moot? If so, should the MGB still exercise its discretion to hear the appeals?**

***Mootness***

[35] In *Borowski* the Supreme Court held that decision makers should decline to hear a matter when the decision would have no practical effect on the rights of parties in a controversy, and raises merely a hypothetical or abstract question. The Supreme Court confirmed that this general policy is enforced "unless the court exercises its discretion to depart from its policy or practice." In determining whether a matter should be heard, the Court set out a two-part test which asks:

(a) Does a "live controversy" still exist? If not, the matter is moot.
(b) If the matter is moot, should the decision maker exercise its discretion to hear the matter?

Guiding considerations:

i) Adversarial context or relationship
ii) Judicial economy
iii) Awareness of decision maker's proper law making function

Party positions:

[36] All parties agreed that with the repeal of Bylaw 905-16 the appeal under File 16/IMD-04 became moot, and none of the parties urged the MGB to continue with that appeal. In support, it was stressed that section 690(5) stipulates that upon finding detriment, the "maximum relief" the MGB can award is to direct the amendment or repeal of the impugned bylaw. Repealing Bylaw 905-16 has achieved the same result, so there is no further relief the MGB could give. Further, the alleged detriment expressed in File 16/IMD-04 was addressed in Bylaw 923-16 to Drayton Valley's satisfaction, as evidenced in the email correspondence between the parties.

[37] Turning to the *Borowski* criteria as to whether the Board should hear the Bylaw 905-16 matter even though it is moot, it was stressed there is no "adversarial context" in the present case such that continuing the litigation could save resources by preventing future re-litigation. Nor would there be any economy of procedure if the MGB were to hear an appeal of File 16/IMD-04 - certainly, the matter is not one of national importance justifying the use of scarce resources. Finally, given that the "maximum relief" that the MGB has the power to grant in after a finding of detriment (repeal) has been achieved, there is no further relief that the MGB could grant Drayton Valley by proceeding with File 16/IMD-04. The MGB has no power to issue declaratory relief with regard to impugned bylaws. All these factors work against the MGB exercising discretion to hear the matter even though it is moot.

[38] Drayton Valley took a similar position with respect to Bylaw 892-15, which it says is repealed and no longer presents a live issue. The language in Bylaw 923-16, and the inclusion of the Overlay made outdoor storage a discretionary use in the area surrounding Drayton Valley. As discussed under the previous section, Brazeau and the Landowner's position was that Bylaw 892-15 was not repealed, and that the merit hearing should continue. However, even if it was repealed, the Landowner suggested it would still be appropriate to schedule a merit hearing to address the concerns about detriment. Brazeau could then adopt a new bylaw and the appeal process could begin anew. Finally, the Landowner requested costs on a solicitor and client indemnity basis.

**Finding – Issue 3:**

3. By adopting Bylaw 923-16, Brazeau repealed Bylaw 905-16 and Bylaw 892-15. Both appeals are moot, and there is insufficient reason to continue with the appeal.

**Reasons – Issue 3:**

[39] The MGB has already found both Bylaws 892-15 and 905-16 were repealed. Accordingly, no live issue remains and both appeals are moot.

[40] None of the parties argued the MGB should exercise discretion to continue with the appeal of Bylaw 905-16. The MGB agrees that – even if it has authority to continue – the *Borowski* criteria do not argue in favour of continuing with that appeal.

[41] With respect to Bylaw 892-15, the MGB also finds the *Borowski* criteria provide no encouragement to continue with the appeal, even if there is discretion to do so. First, there is no adversarial relationship, since Drayton Valley is of the opinion that Bylaw 923-16 creates no detriment. The MGB observes that Bylaw 923-16 makes outdoor storage a discretionary use in the Overlay area, so outdoor storage may still occur provided it meets the stipulations in the land use bylaw; alternatively, it could be approved under section 687(3)(d). It is of course possible for the Landowner to apply for - or Brazeau to develop anew – another direct control district for the lands that previously covered under Bylaw 892-15. If Drayton Valley believes any such new bylaw to be detrimental, it can file a new appeal, but that outcome is not inevitable. Persevering with the appeal of Bylaw 892-15 will do nothing to save judicial or Board resources, nor is the MGB anxious to interfere with an elected Council's legislative role in the absence of a live section 690 dispute.

**Decision**

[42] The MGB dismisses both appeals.

[43] The MGB is not inclined to consider nor award costs based on presentations made to this point. In this appeal, the submissions provided by Brazeau, Drayton Valley and the Landowner were necessary and helpful for the Panel to understand the complexity of each issue and the implications for both municipalities and the Landowner.

DATED at the City of Edmonton, in the Province of Alberta, this 12th day of July, 2017.

MUNICIPAL GOVERNMENT BOARD

(SGD) H. Kim, Presiding Officer

**APPENDIX "A"**

PERSONS WHO WERE IN ATTENDANCE OR MADE SUBMISSIONS OR GAVE EVIDENCE AT THE HEARING:

| NAME | CAPACITY |
|---|---|
| Stewart-Palmer, G. | Counsel, Brazeau County |
| Athwal, A. | Counsel, Brazeau County |
| Hutchison, J | Counsel, Town of Drayton Valley |
| Haldane, K. | Counsel for Landowners, A Peck and D McGinn |
| Dibben, D. | Observer, Chief Administrative Officer, Town of Drayton Valley |

**APPENDIX "B"**

DOCUMENTS RECEIVED PRIOR TO THE HEARING:

| NO. | ITEM |
|---|---|
| 16/IMD-03 | |
| 1A | Town of Drayton Valley Notice of Appeal and Statutory Declaration of D. Dibben, CAO |
| 2R | Contact Information for Landowner for 16/IMD/03 |
| 3R | Map of Area, Title for Lands and Copy of Bylaw 892-15 Direct Control Bylaw |
| 4R | Brazeau County Response and Statutory Declaration of M. Schoeninger, CAO |
| 5A | Drayton Valley Correspondence re: Timing of Mediation and Preliminary Hearing |
| 6R | Brazeau County Response |
| 7L | Email from Landowner regarding Participation in Hearing. |
| 8A | Proposed Schedule for Evidence Exchanges and Hearings |
| 9L | Landowner Request |
| 10A | Mediation Progress Report and Extension Request |
| 11A | Mediation Progress Report and Extension Request |
| 12A | Request to Address Preliminary Matters: Order or Argument/Evidence Submission and Mootness |
| 13R | Response/Request for Preliminary Hearing on Mootness |
| 14R | Agreement re: Case Management |
| 15R | Brazeau Submission: Argument re: Mootness and Status of Bylaws |

| | |
|---|---|
| 16A | Drayton Valley Response |
| 17L | Response of Landowner |
| 18R | Brazeau Rebuttal |

16/IMD-04

| | |
|---|---|
| 1A | Drayton Valley Notice of Appeal and Statutory Declaration of D. Dibben, CAO |
| 2R | Brazeau County Response and Statutory Declaration of M. Schoeninger, CAO. |
| 3R | Copies of Brazeau County Land Use Bylaws 782-12, 895-15, 905-16, 923-16 as well as Intermunicipal Development Plan Bylaw 779-11. |
| 4 | Transcript of November 9, 2016 |

**APPENDIX "C"**

DOCUMENTS RECEIVED AT OR AFTER THE HEARING.

| **NO.** | **ITEM** |
|---|---|
| 19R | Schedule A: List of Brazeau Bylaws and Statuses |
| 20 | Transcript of May 2, 2017 |

**APPENDIX "D"**

**LEGISLATION**

The *Act* contains criteria that intermunicipal disputes filed under section 690. While the following list may not be exhaustive, some key provisions are reproduced below.

***Municipal Government Act***

Section 488 is the section of the *Act* that sets out the jurisdiction of the MGB.

*488(1) The Board has jurisdiction*

> *(a) to hear complaints about assessments for linear property,*
> *(b) to hear any complaint relating to the amount set by the Minister under Part 9 as the equalized assessment for a municipality,*
> *(c) repealed 2009 c29 s 34,*
> *(d) to decide disputes between a management body and a municipality or between 2 or more management bodies, referred to it by the Minister under the Alberta Housing Act,*
> *(e) to inquire into and make recommendations about any matter referred to it by the Lieutenant Governor in Council to the Minister,*
> *(f) to deal with annexations in accordance with Part 4,*
> *(g) to decide disputes involving regional services commissions under section 602.15,*
> *(h) to hear appeals pursuant to section 619,*
> *(i) to hear appeals from subdivision decisions pursuant to section 678(2)(a), and*
> *(j) to decide intermunicipal disputes pursuant to section 690.*

*(2) The Board must hold a hearing under Division 2 of this Part in respect of the matters set out in subsection (1)(a) and (b).*

*(3) Sections 495 to 498, 501 to 504 and 507 apply when the Board holds a hearing to decide a dispute or hear an appeal referred to in subsection (1)(g) to (j).*

Section 617 is the main guideline from which all other provincial and municipal planning documents are derived. Therefore, in determining an intermunicipal dispute, each decision must comply with the philosophy expressed in 617.

*617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted*

> *(a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and*
> *(b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta*

*without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.*

Section 690 and 691 govern the process and procedure for intermunicipal disputes. In addition to these sections, the MGB utilizes the Intermunicipal Dispute Procedure Rules.

*Intermunicipal disputes*

*690(1) If a municipality is of the opinion that a statutory plan or amendment or a land use bylaw or amendment adopted by an adjacent municipality has or may have a detrimental effect on it and if it has given written notice of its concerns to the adjacent municipality prior to second reading of the bylaw, it may, if it is attempting or has attempted to use mediation to resolve the matter, appeal the matter to the Municipal Government Board by*

> *(a) filing a notice of appeal and statutory declaration described in subsection (2) with the Board, and*
> *(b) giving a copy of the notice of appeal and statutory declaration described in subsection (2) to the adjacent municipality*

*within 30 days after the passing of the bylaw to adopt or amend a statutory plan or land use bylaw.*

*(2) When appealing a matter to the Municipal Government Board, the municipality must state the reasons in the notice of appeal why a provision of the statutory plan or amendment or land use bylaw or amendment has a detrimental effect and provide a statutory declaration stating*

> *(a) the reasons why mediation was not possible,*
> *(b) that mediation was undertaken and the reasons why it was not successful, or*
> *(c) that mediation is ongoing and that the appeal is being filed to preserve the right of appeal.*

*(3) A municipality, on receipt of a notice of appeal and statutory declaration under subsection (1)(b), must, within 30 days, submit to the Municipal Government Board and the municipality that filed the notice of appeal a statutory declaration stating*

*(a) the reasons why mediation was not possible, or*
*(b) that mediation was undertaken and the reasons why it was not successful.*

*(4) When the Municipal Government Board receives a notice of appeal and statutory declaration under subsection (1)(a), the provision of the statutory plan or amendment or land use bylaw or amendment that is the subject of the appeal is deemed to be of no effect and not to form part of the statutory plan or land use bylaw from the date the Board receives the notice of appeal and statutory declaration under subsection (1)(a) until the date it makes a decision under subsection (5).*

*(5) If the Municipal Government Board receives a notice of appeal and statutory declaration under subsection (1)(a), it must, subject to any applicable ALSA regional plan, decide whether the provision of the statutory plan or amendment or land use bylaw or amendment is detrimental to the municipality that made the appeal and may*

*(a) dismiss the appeal if it decides that the provision is not detrimental, or*
*(b) order the adjacent municipality to amend or repeal the provision if it is of the opinion that the provision is detrimental.*

*(6) A provision with respect to which the Municipal Government Board has made a decision under subsection (5) is,*

*(a) if the Board has decided that the provision is to be amended, deemed to be of no effect and not to form part of the statutory plan or land use bylaw from the date of the decision until the date on which the plan or bylaw is amended in accordance with the decision, and*
*(b) if the Board has decided that the provision is to be repealed, deemed to be of no effect and not to form part of the statutory plan or land use bylaw from and after the date of the decision.*

*(6.1) Any decision made by the Municipal Government Board under this section in respect of a statutory plan or amendment or a land use bylaw or amendment adopted by a municipality must be consistent with any growth plan approved under Part 17.1 pertaining to that municipality.*

*(7) Section 692 does not apply when a statutory plan or a land use bylaw is amended or repealed according to a decision of the Board under this section.*

*(8) The Municipal Government Board's decision under this section is binding, subject to the rights of either municipality to appeal under section 688.*

*Board hearing*

*691(1) The Municipal Government Board, on receiving a notice of appeal and statutory declaration under section 690(1)(a), must*

*(a) commence a hearing within 60 days after receiving the notice of appeal or a later time to which all parties agree, and*

*(b) give a written decision within 30 days after concluding the hearing.*

*(2) The Municipal Government Board is not required to give notice to or hear from any person other than the municipality making the appeal, the municipality against whom the appeal is launched and the owner of the land that is the subject of the appeal.*

**PROVINCIAL LAND USE POLICIES (OC 522/96)**

**2.0 THE PLANNING PROCESS**

**Goal**

Planning activities are to be carried out in a fair, open, considerate and equitable manner.

**Policies**

1. Municipalities are expected to take steps to inform both interested and potentially affected parties of municipal planning activities and to provide appropriate opportunities and sufficient information to allow meaningful participation in the planning process by residents, landowners, community groups, interest groups, municipal service providers, and others stakeholders.