In the Court of Appeal of Alberta

Citation: Condo Corporation No. 0410106 v Medicine Hat (City), 2019 ABCA 294

Date: 20190801
Docket: 1701-0355-AC
Registry: Calgary

Between:

Condo Corporation No. 0410106 [“River Ridge CC”], Condo Corporation No. 0113543 [“Garden Homes”], Condo Corporation No. 0810338 [“Riverstone”]

Appellants
(Applicants)

- and –

Club Sierra Lifestyles at River Ridge Inc. [“Masterpiece”], and 1554670 Alberta Ltd [“Riverstone Remainder”]

Not a Party to the Appeal
(Applicants)

- and –

The City of Medicine Hat

Respondent
(Respondent)

The Court:

The Honourable Mr. Justice Brian O’Ferrall
The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Jo'Anne Strekaf

Reasons for Judgment Reserved of the Honourable Madam Justice Strekaf
Concurred in by the Honourable Mr. Justice O'Ferrall
Concurred in by the Honourable Madam Justice Schutz

Appeal from the Judgment by
The Honourable Madam Justice G.D. Marriott
Dated the 24th day of November, 2017
Filed on the 8th day of December, 2017
(Docket: 1508 00374)

Reasons for Judgment Reserved
of the Honourable Madam Justice Strekaf

Introduction

[1] Three condominium corporations – representing a bare land condominium and two condominium buildings, respectively (the Condo Corps) – want the City of Medicine Hat (the City) to take responsibility for operating and maintaining certain water and sewer services located on the Condo Corps' lands. A chambers judge refused to declare that the City has a duty to operate and maintain those utility services, and dismissed the Condo Corps' application for an order of *mandamus* against the City.

[2] The Condo Corps have appealed. The central issue is the nature and extent of the City's responsibility to provide, operate and maintain public utility services to a parcel of land pursuant to the *Municipal Government Act* (*MGA*), RSA 2000, c M-26 when utility infrastructure located on or under private land provides service for more than one parcel.

Background

The River Ridge Development

[3] In 2001, Medican Developments Inc (the Developer) made a proposal to the City to develop a 27-acre parcel of bare land on the north bank of the South Saskatchewan River known as River Ridge. The River Ridge development was subdivided into five separate parcels: a bare land condominium with single-family houses, two traditional condominium buildings, an assisted-living apartment complex, and commercial office space. The Condo Corps represent the owners of the bare land condominium (Garden Homes), and the two traditional condominium buildings (River Ridge and Riverstone). The entire 27 acre development, which is now comprised of those five subdivided parcels of land, will be referred to as the River Ridge Lands.

[4] Between 2001 and 2006, the Developer and the City entered into a series of development agreements. The Developer and the City agreed that the City would build and retain ownership of the gas and electrical utilities within the development. The Developer would build and retain ownership of the other utilities and municipal improvements within the development, including roads, sidewalks, street lights, water, sanitary sewers, and storm sewers. The development agreements stipulated that the Developer, and subsequent owners, would be "responsible for the ongoing operation, maintenance, repair and replacement" of these utilities and municipal improvements, which were designated "on site work". The sole exception was the two pressure reducing vaults (PRVs), where the development's water system branched off from the City's main lines, which the Developer dedicated to the City. Since the rest of the water, sewer, and storm

sewer systems were not going to be transferred to the City, the Developer was not required to build them to City standards, and the City did not inspect them.

[5] The Condo Corps are not party to any of the agreements between the City and the Developer.

The Dispute Emerges

[6] In early 2005, issues arose between the Condo Corps, the Developer and the City regarding the ongoing operation and maintenance of the "on site work". Of particular, and continuing concern, was the sewage lift station, which is located on the lands of one of the Condo Corps, the River Ridge Condo Corp, and provides lift service for sewage for all five parcels that have been subdivided from the original River Ridge Lands.

[7] In January 2005, the solicitor for the Developer wrote to the River Ridge Condo Corp and told them that, under the *Condominium Property Act*, RSA 2000, c C-22, they were responsible for the common property of the condominium, which includes the lift station. There is evidence that the Condo Corps, and the individual purchasers of the condominium units, were not made aware of the maintenance arrangements between the City and the Developer before that time.

[8] In July 2006, the River Ridge and Garden Homes Condo Corps wrote to the City, expressing their concerns about the lift station: that the responsibility for the lift station was never disclosed to the buyers of the condominium units; that it is unfair for this expense to fall upon the owners of the River Ridge Condo Corp in particular; and that it is illogical that the responsibility for a lift station be left in the hands of a layman board. The River Ridge Condo Corp informed the City that it would no longer take responsibility for the lift station, concluding that "since this problem was created by [the Developer] and supported by the City, it is the responsibility of [the Developer] and the City of Medicine Hat to correct it." The City, for its part, took the position that the Developer knowingly chose to own the water and sewer infrastructure, and that the legal ownership of that infrastructure, and thus responsibility for its operation and maintenance, rests either with the Developer or the River Ridge Condo Corp.

[9] In October 2007, the River Ridge Condo Corp and the owners of the River Ridge condominium units sued the Developer, seeking an order directing the Developer to upgrade the lift station to City standards and to transfer it to the City. A chambers judge ordered the applicants and the Developer to use best efforts to proceed with subdivision and registration of a separate title for the lift station lands, following which the Developer would be required to operate and maintain the lift station until resolution of the matter by trial or further order of the Court.

[10] In June 2010, the Developer gave notice that it was seeking protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. Any remedies the Condo Corps or the owners of the condominium units might have had against the Developer were lost.

[11] The Condo Corps continued to demand that the City take over operation of the lift station. The City commissioned an independent report to determine whether the lift station met standards for a City-owned lift station. The report concluded that it did not, and that, at that time, it would take approximately $880,000 to bring the lift station up to standard. The cost of improving or replacing the lift station has since increased.

[12] The parties have not been able to agree on a solution. The Condo Corps, and particularly the unit owners of the River Ridge Condo Corp, on whose land the lift station is located, have been tasked with operating and maintaining that part of the sewage system to service all five parcels of land and the various residences and buildings on those parcels.

The Application for Judicial Review

[13] In November 2015, the Condo Corps applied by way of Originating Application for a declaration that the City has a statutory duty to operate and maintain public utility services. They also sought an order of *mandamus* directing the City to take responsibility for "all main and distribution lines for water, sanitary sewer and storm drains," to proceed to construct a replacement lift station and to maintain the existing lift station until it is decommissioned, and to reimburse the Condo Corps for all costs and expenses.

[14] The utility infrastructure at issue before the chambers judge and on this appeal is the following, as identified in the various plans in evidence (Disputed Infrastructure):

- the privately owned potable water lines that run from the PRVs to transmit water from one parcel to another parcel on the River Ridge Lands;
- the privately owned storm water lines on the River Ridge Lands that transmit storm water from one parcel to another parcel and ultimately connect to the City's storm sewer main line;
- the privately owned sanitary sewer lines on the River Ridge Lands that transmit sewage from one parcel to another parcel, to the lift station, and from the lift station to the City's sewer main line; and
- the lift station itself.

[15] It is not disputed, and not an issue on appeal, that:

- the City is responsible for the operation, maintenance, and repair of the sewer, potable water, and storm water main lines located beyond the boundary of the parcels that make up the River Ridge Lands;

- the City is responsible for the operation, maintenance, and repair of the potable water, sewer, and storm water main lines that pre-existed the development and lie within the City's utility rights of way on the River Ridge Lands; and

- the Condo Corps (or unit holders) of a parcel are responsible for the operation, maintenance, and repair of the portion of the sewer, potable water, and storm water utility system located within each parcel that are used solely for the purpose of supplying utility services to that parcel (or to the units in the parcel).

[16] The issue before the chambers judge was where responsibility lies for the operation of the Disputed Infrastructure – with the City or with the Condo Corps as landowners. In dismissing the application, the chambers judge referred to section 37 of the *MGA*:

> Section 37 of the Municipal Government Act states that the owner of a parcel of land is responsible for the service connection. Medican [the Developer] was the original owner of the land. Subsequently it was divided but each owner of the land is then responsible for the service connection. We're talking about the parcel, so it clearly applies to the development.

[17] The chambers judge concluded that the Developer and the City had agreed that the Disputed Infrastructure would be owned and operated by the Developer and not transferred to the City. The point of transfer of responsibility to the City was the PRV. The City took no steps to be involved in the "on site work", all of which was to be owned and operated by the Developer.

[18] The chambers judge dismissed the application, stating:

> In conclusion, I find that the City of Medicine Hat does not have a duty to own, maintain, nor repair the water services, sanitary sewer services, including a lift station, and storm sewer services on the lands owned by the applicants. It was agreed by Medican, the original owner, that these services collectively referred to as the on-site work would remain the responsibility of the owner of the lands, and is specifically identified in the agreement addressing the roles and responsibility of the city of Medicine Hat and Medican as a developer and owner. It is also clear that as early as 2005 the applicants had specific knowledge that this was their responsibility as the new owner of the lands. The City at no time assumed that responsibility, nor did it give any indication to the applicants that it was prepared to do so.
>
> .....

> The City is not responsible for their lack of due diligence when they assumed ownership of the land, nor for their failure to work together to resolves this. The City has resolved its duty with respect to its responsibilities as set out by statute and agreement, and owes no duty to the applicants as they have alleged.

The chambers judge went on to say:

> ... I have held that the City administration have the power and authority to enter into the agreements as they have done as part of the administration and operation of the City, and that the agreement was valid with Medican, and therefore the responsibilities in those agreements carry on through the subsequent owners.

Grounds of Appeal

[19] The Condo Corps submit that the chambers judge erred in law:

a. in failing to conclude that the City had a duty to provide the requested utility services to them, and that it was contrary to the purpose and intent of the *MGA* and *ultra vires* the City's statutory authority to contract out of its obligations under the *MGA*; and

b. in finding that the Condo Corps were bound by the agreement between the Developer and the City such that they were obligated to maintain, repair and operate the Disputed Infrastructure on the River Ridge Lands.

[20] The City argues that it does not have a duty to own, maintain or repair the Disputed Infrastructure on privately owned lands. Rather, the Condo Corps (and any subsequent owners of those lands) are obligated to maintain, repair and operate the Disputed Infrastructure.

[21] The City disputes the characterization of the chambers judge's decision in the second ground of appeal. It says that the chambers judge did not conclude that the agreements between the City and the Developer oblige the Condo Corps to maintain and operate the Disputed Infrastructure, but rather that such obligations are created by section 37 of the *MGA* as an incident of property ownership.

Standard of Review

[22] This appeal involves the interpretation of those parts of the *MGA* that govern the provision of utility services. The standard of review for errors of law, including the interpretation of legislation, is correctness: *Kozak v Lacombe (County)*, 2017 ABCA 351 at paras 16-19.

Analysis

What is the nature and extent of the City's duty to provide utility services under the MGA?

[23] The parties agree that under the *MGA*, the City has a duty to provide water, sewer, and storm water services to the River Ridge Lands. The disagreement is over the nature and extent of that duty and, ultimately, which party bears the responsibility for the Disputed Infrastructure in the circumstances present here.

[24] The City argues that providing utility service means that the City provides the development with clean drinking water, accepts and treats their raw sewage, and carries away their storm water. The duty to provide service, according to the City, does not imply a duty to operate and maintain parts of the utility system located on private land. Rather, the City is responsible for the main lines, and private landowners are responsible for the "service connection" that lies on or under their own land. If tree roots damage the sewer pipe running under your front yard, you do not ask the city fix it, any more than you ask the city to unplug your toilet. The water, sewer, and storm water systems within the River Ridge Lands are no different. The Developer specifically chose to retain private ownership of the pipes, lift station, and other infrastructure within the development. It would be unfair, the City maintains, to now allow the Condo Corps to foist the cost of operating and maintaining that infrastructure on the City's taxpayers.

[25] The City acknowledges that its agreements with the Developer are not binding on the Condo Corps, nor on the subsequent condo owners. Rather, the City says that the Condo Corps are responsible for maintaining the Disputed Infrastructure by virtue of the fact that, pursuant to the scheme set out in the *MGA*, they own it. Simply put, the City states that, in accordance with the *MGA*, it (the City) is responsible for the construction, maintenance and repair of a public utility from the main lines of the system to the boundary of a road or easement (s 35). The owner of a parcel of land is responsible for the construction, maintenance and repair of a "service connection" of a municipal public utility located above, on, or underneath their parcel (s 37). The City says that the Disputed Infrastructure is part of the service connection for the parcel of land owned by each applicant and is therefore their responsibility.

[26] The Condo Corps submit that the City is obligated to operate and maintain all of the utility infrastructure necessary to serve each individual parcel, and that it is not enough for the City to simply provide service up to the border of the five-parcel development as a whole. As it stands, individual parcels within the River Ridge Lands are reliant on privately owned infrastructure located on other parcels for access to municipal utilities. The Condo Corps say that is unfair and inconsistent with the City's duty to provide service. The owners of one parcel should not have to depend on the owners of another parcel for access to municipal utilities; nor should the owner of one parcel have to pay for the operation of infrastructure, such as the lift station, that serves the whole development.

[27] Ultimately, this dispute comes down to a question of statutory interpretation and therefore, the statutory scheme will be reviewed in some detail.

The Statutory Scheme

[28] The *MGA* governs public utility services within a municipality, including the division of responsibility between the municipality and landowners for different parts of the system. The relevant portions of the legislation are set out below.

[29] "Public utility" is defined in the *MGA* as "a system or works used to provide" services including water, sewage disposal or drainage, "for public consumption, benefit, convenience or use": section 1(1)(y).

[30] Section 28(b) defines "municipal public utility":

> (b) "municipal public utility" means the system or works of a public utility operated by or on behalf of a municipality or a subsidiary of a municipality within the meaning of section 1(3) of the *Electric Utilities Act* other than under an agreement referred to in section 45;

[31] Section 34(1) creates a duty on a municipality to supply utility service:

> Duty to supply utility service
>
> 34(1) If the system or works of a municipal public utility that provide a municipal utility service are adjacent to a parcel of land, the municipality must, when it is able to do so and subject to any terms, costs or charges established by council, provide the municipal utility service to the parcel on the request of the owner of the parcel.

[32] Sections 35 to 39 apportion responsibility between the municipality and landowners for the construction, maintenance, and repair of various parts of the utility system. The utility system is divided into "main lines" and "service connections". "Main lines" is not defined, but "service connection" is defined in relation to "main lines". Section 28(e) defines "service connection" thus:

> (e) "service connection" means the part of the system or works of a public utility that runs from the main lines of the public utility to a building or other place on a parcel of land for the purpose of providing the utility service to the parcel... ;

[33] Broadly speaking, the municipality is responsible for the main lines and the part of a service connection that lies under a road or easement, and the landowner is responsible for the part of a service connection that is on private land. Section 35 sets out the municipality's responsibility for the part of the service connection that is on or under a road or easement:

> Parcels adjacent to roads and easements
>
> 35(1) This section applies when the main lines of the system or works of a municipal public utility are located above, on or underneath a road or easement and the municipality provides the municipal utility service to a parcel of land adjacent to the road or easement.
>
> (2) The municipality is responsible for the construction, maintenance and repair of the portion of the service connection from the main lines of the system or works to the boundary of the road or easement.
>
> (3) Despite subsection (2), the council may as a term of supplying the municipal utility service to the parcel of land make the owner responsible for the costs of the construction, maintenance and repair of the portion of the service connection from the main lines of the system or works to the boundary of the road or easement.
>
> (4) If the owner is responsible for the costs of the construction, maintenance or repair referred to in subsection (3), those costs are an amount owing to the municipality by the owner.

[34] The municipality's responsibility for this portion of the service connection is a default rule. Under section 35(3), council can require a landowner to pay for those costs.

[35] Section 36 gives the municipality the right to enter any land to build and maintain the main lines and the part of the service connection for which it is responsible under section 35:

> Right of entry - main lines
>
> 36(1) This section applies to
>
> > (a) the main lines of the system or works of a municipal public utility located above, on or underneath a road or easement, and
> >
> > (b) the portion of a service connection referred to in section 35(2).
>
> (2) A municipality may enter on any land for the purpose of constructing, repairing or maintaining the system or works described in subsection (1).

[36] Sections 37 to 39 pertain to the part of the service connection that is on private land. By default, the landowner is responsible for construction, maintenance, and repair. The municipality reserves the right, however, to enter the land, do the work itself, and charge the cost back to the landowner:

> Service connections - owner
>
> 37(1) The owner of a parcel of land is responsible for the construction, maintenance and repair of a service connection of a municipal public utility located above, on or underneath the parcel.
>
> (2) If the municipality is not satisfied with the construction, maintenance or repair of the service connection, the municipality may require the owner of the parcel of land to do something in accordance with its instructions with respect to the construction, maintenance or repair of the system or works by a specified time.
>
> (3) If the thing has not been done to the satisfaction of the municipality within the specified time or in an emergency, the municipality may enter on any land or building to construct, maintain or repair the service connection.
>
> Service connections - municipality
>
> 38(1) Despite section 37, the council may as a term of providing a municipal utility service to a parcel of land give the municipality the authority to construct, maintain and repair a service connection located above, on or underneath the parcel.
>
> (2) A municipality that has the authority to construct, maintain or repair a service connection under subsection (1) may enter on any land or building for that purpose.
>
> Restoration and costs
>
> 39(1) After the municipality has constructed, maintained or repaired the service connection located above, on or underneath a parcel of land under section 37 or 38, the municipality must restore any land entered on as soon as practicable.
>
> (2) The municipality's costs relating to the construction, maintenance or repair under section 37 or 38 and restoration costs under this section are an amount owing to the municipality by the owner of the parcel.

[37] In summary, the *MGA* contemplates that a municipality will pay for the cost of the main lines and the service connection up to the boundary of the road or easement, and the landowner will pay for the part of the service connection on private land, subject to the municipality's right to make the landowner pay for the entire service connection.

[38] Finally, the *MGA* provides that a municipality may grant to another person a right to provide a utility service within the municipality. The municipality may grant such a right, by agreement, for no more than 20 years, and the agreement must generally be advertised and approved by the Alberta Utilities Commission: s 45.

[39] The City argues that, pursuant to s 37, landowners are responsible for the part of a service connection that lies on their land. According to the City, the Disputed Infrastructure, which runs from the City's main lines to the various parcels for the purpose of providing utility service to those parcels, is a service connection on privately owned land and is therefore the responsibility of the owners of that land.

[40] The City also notes that the Developer of the five parcels that make up the River Ridge Lands chose to retain private ownership of the roads, parks, street lighting, and other municipal improvements including the water, sewer, and storm water systems within the development. Responsibility for the maintenance and repair of such infrastructure follows from its private ownership. In contrast, the City has responsibility to maintain and repair the electrical and gas lines within the development, which the City installed and continues to own.

[41] The difficulty with the City's position is that the River Ridge Lands, while originally one parcel, were subdivided into five, separately-owned parcels. As a result, parts of what the City calls a "service connection" are located on one parcel but provide utility service to others. The lift station, for example, is located on the parcel owned by River Ridge Condo Corp but provides lift service to sewage from the entire development, including the lands owned by the owners of Garden Homes and Riverstone. Similarly, pipes that run from the PRVs located on the parcel owned by Club Sierra Lifestyles at River Ridge Inc (which operates an assisted-living facility) are responsible for supplying drinking water to all the other parcels in the development. Under the City's interpretation, the owner of the parcel on which such infrastructure sits is wholly responsible for its maintenance and operation, even though it provides service to other parcels.

[42] The provisions of the *MGA* should be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the act and the intention of the legislature: *MacKenas Estates Development Corp v Calgary (City)*, 2012 ABCA 376 at para 31. Further, the public policy goals of the *MGA*, which include providing good government, providing services, and developing and maintaining safe and viable communities, support a broad and purposive interpretation of the *MGA*: *Kozak v Lacombe (County)* at para 71.

[43] It is not consistent with the language or the purpose of the *MGA* to require the owner of one parcel to be responsible for the utility service provided to another parcel, nor, conversely, to expect the owner of one parcel to rely on the owner of another for its utility service. That interpretation is not consistent with the plain meaning of "service connection" in the *MGA*, the City's duty to provide utility service, or the broader scheme of the Act.

Is the Disputed Infrastructure a "service connection"?

[44] Section 28(e) of the *MGA* defines "service connection" as:

> ... the part of the system or works of a public utility that runs from the main lines of the public utility to a building or other place on a parcel of land *for the purpose of providing the utility service to the parcel* ...
>
> (emphasis added)

[45] The City interprets "service connection" to mean all parts of a utility system that are located on private land and have not been explicitly dedicated to the City. But the *MGA* defines "service connection" more narrowly, by referring not only to its location but also to function. "Service connection" is restricted to the part of a utility system that runs from the main line "on a parcel of land for the purpose of providing the utility service to the parcel" (emphasis added). Parts of a utility system that are designed to serve more than one parcel do not fit the definition.

[46] This distinction applies to the Disputed Infrastructure. The water, sewer, and storm water lines that run between the various parcels, as well as the sewage lift station, were specifically designed to serve the five-parcel development as a whole, and not only the individual parcels on which they sit. These are, both functionally and legally, "main lines" in that their purpose is to transmit drinking water, storm water and sewage across the development, from one parcel to another. The service connections, by contrast, are those parts of the utility systems that branch off from these main lines to supply service within an individual parcel.

[47] This reading of "service connection" is in keeping with the scheme of the *MGA* as it pertains to apportioning responsibility between the municipality and the landowner. As noted above, sections 35 to 39 establish, in short, that the municipality pays for the cost of the main lines and the service connection up to the boundary of the road or easement, and the landowner pays for the part of the service connection on private land. The object and purpose of these provisions is to allocate the costs of providing service between the municipality and the owner of a parcel. It is not surprising that a landowner should bear some or, under section 35(3), all of the cost of extending service to his or her own parcel, rather than to impose that cost on municipal taxpayers generally. It is also not surprising that the costs of providing a municipal utility service to one landowner would not be imposed on the owner of another parcel.

[48] Moreover, the purpose of sections 35 to 39 is to apportion responsibility between two parties: the municipality and the owner (or in some cases, the occupant) of a parcel. There is no place in this scheme for a third party, a separate landowner who is responsible for maintaining part of a utility system through which the owner of the parcel receives service.

[49] If the singular "parcel" in the definition of service connection were read to include the plural "parcels", as the City suggests, the provision would not make grammatical sense. Moreover, that suggestion also does not address the identified difficulties. The City's approach would continue to make one landowner responsible for maintaining part of a utility system relied upon by other landowners.

The duty to provide service and the broader purposes of the MGA

[50] Section 34(1) of the *MGA* imposes a duty on a municipality to provide utility service to a parcel where the municipal public utility system is adjacent to the parcel. The City says that it does provide service to each parcel in the River Ridge Lands development. Each parcel receives drinking water supplied by the City and the City accepts sewage and storm water from each parcel. The fact that some parcels receive those services through pipes that are maintained by the owners of other parcels does not, the City says, change the fact that the City is ultimately providing those services. The City's duty to provide service does not imply a duty to operate and maintain all infrastructure through which the service is provided.

[51] Section 34, however, specifies that it is the municipality, not a nearby landowner, who is to provide the municipal utility service to the parcel. For utility service to be provided in part through infrastructure maintained by another private landowner is incompatible with the ordinary meaning of the words used. It is also incompatible with the purpose of section 34, which is to ensure that landowners who are adjacent to a municipally owned utility have access to those utility services. If, for example, the River Ridge Condo Corp were unwilling or unable to properly maintain the lift station, the owners of Garden Homes and Riverstone would find themselves without access to the City's sewer system, despite the fact that their parcels are adjacent to the City's sewer system and within the City's exclusive franchise to operate a sewer system.

[52] The City wants to say, in effect, "you can put your sewage into our main line, but you will have to negotiate with a third party to get it there." Such a stance is incompatible with the meaning and purpose of section 34.

[53] The City's position is also inconsistent with restrictions on non-municipal public utilities contemplated by the *MGA*. Section 45 allows a municipality to grant a right to another person to provide a "utility service," subject to the approval of the Alberta Utilities Commission. The City's position would force one landowner to provide utility services for others without any of the oversight contemplated by the *MGA*.

[54] The City argues that section 45 was intended to apply to a very different situation, in which a private company builds, maintains, or operates a large-scale utility system across all or most of a city. That may be so, but the concerns addressed by section 45 arise in the present case. The *MGA* ensures that where a municipality contracts out the operation of a public utility, the contract is subject to public scrutiny and regulatory oversight. In the present case, the residents of Garden Homes and Riverstone, for example, are wholly dependent for sewage disposal on proper maintenance of the lift station by the River Ridge Condo Corp.

The City's Concerns

[55] The City has raised a number of concerns with an interpretation of the *MGA* that would make the City responsible to operate and maintain parts of a utility system that serve more than one parcel.

[56] First, the City argues that it is unclear where the physical line between municipal and private responsibility will fall. This objection misses the point. The City's duty to maintain the Disputed Infrastructure is defined not by its location in relation to the boundary of a parcel, condo unit, or easement, but by its function. Any part of a utility system that serves more than one parcel must be maintained by the City. In a typical subdivision, infrastructure that meets that test is generally located on, above, or under a public road or easement. In the River Ridge Lands, due to the choices made by the Developer and the City, the majority, but not all, of the infrastructure for which the City is responsible is located under a public road or easement. The functional test defined here provides a clear way of identifying what parts of the utility system are the City's responsibility. To be sure, uncertainty can arise in the application of any legal test, but there is no reason to think this test creates more uncertainty than any other.

[57] Second, the City argues that if utility infrastructure located on private land were deemed to be "main lines" for which the City is responsible, the City would have no right of entry to access that infrastructure. Section 36 of the *MGA* gives the City the right to enter any land to access a main line under a road or easement. Sections 37(3) and 38 give the City the right to enter private land, but only to construct or maintain a service connection. The City says the power to enter private land to construct or maintain a main line not under a road or easement is missing from this approach. Moreover, the City says, the fact that this power is missing from the legislation indicates that infrastructure on private property cannot be a "main line" under the *MGA*.

[58] The *MGA* seems generally to contemplate that main lines are located under public roads or easements. What was perhaps not contemplated by the legislature is the situation the City has created by failing to secure the appropriate easements. In any event, the City does hold utility rights of way over lands where most of the Disputed Infrastructure is located. A notable exception is the lift station. The appellants may have no difficulty in granting the City whatever rights of entry it needs to maintain and operate it. The City may also have the power to acquire any needed easements under the provisions of the *MGA* and the *Expropriation Act*, RSA 2000, c E-13, however it is not necessary to comment on these options as they were not before us.

[59] Third, the City argues that it is confusing or impractical to make the City responsible for the operation and maintenance of parts of the utility systems that it does not own. What if a landowner builds shoddy infrastructure that increases the maintenance costs? What if the landowner damages the infrastructure and thus imposes increased maintenance costs on the City? The City argues that there are no answers to these questions in the *MGA* because the legislature did not intend the City to be responsible for the operation and maintenance of utility infrastructure that it does not own.

[60] It may be true that the *MGA*'s silence on such questions reflects an assumption that the City would own the infrastructure for which it is responsible. Any difficulties in this respect were created by the City's decision to allow the Developer to retain private ownership of utility infrastructure that the City knew would serve more than one parcel, and for which the City ought to have known it would be responsible. It may also be true that the City's responsibilities for operation and maintenance would be most easily fulfilled if it owned the Disputed Infrastructure. The parties might now want to enter an agreement by which some or all of the Disputed Infrastructure is dedicated to the City, as is generally the practice when new subdivisions are built: see Frederick A. Laux, *Planning Law and Practice in Alberta* (Edmonton: Juriliber, 2013), chapter 14. The City might also choose to replace some infrastructure, such as the lift station. It is left to the parties to make what arrangements they see fit.

[61] Fourth, the City submits that this formulation of the City's duty to provide service will unfairly foist costs upon the City and thus upon municipal taxpayers. But if the City must now bear the cost of operating and maintaining utility infrastructure that serves more than one parcel, that is as it should be. The unfairness, as pointed out above, lies in making landowners responsible for the maintenance and operation of infrastructure that serves parcels other than their own. Moreover, section 34(1) of the *MGA* gives the municipality broad power to recover costs: the City's duty to provide service is "subject to any terms, costs or charges established by council". Some of the costs the City complains of may be recoverable under this provision or otherwise, but this matter was not before us.

Conclusion

[62] For the foregoing reasons, the appeal is allowed.

[63] The Condo Corps ask for an order declaring that the City has a statutory duty to operate and maintain the Disputed Infrastructure and for an order of *mandamus* directing the City perform that duty. The City does not dispute that, if it has a duty to operate and maintain the Disputed Infrastructure, it has not satisfied that duty.

[64] The declaration is granted in the terms set out below, but we see no need to go further and issue an order of *mandamus* at this time. There is no reason to expect that the City will fail to act in accordance with this Court's declaration.

[65] The City has a statutory duty to operate and maintain the Disputed Infrastructure, being those parts of the water, sewer, and storm water systems on the River Ridge Lands that provide utility service to more than one parcel.

[66] The City's duty does not extend to any part of the sewer, potable water, and storm water systems located within a parcel used solely for the purpose of supplying utility services to that parcel. In the *MGA*, "parcel of land" refers to a "lot or block shown on a plan of subdivision" and not to a unit of a condominium: section 1(1)(v). Thus, parts of the utility systems that serve more

than one unit within a condominium (whether a traditional or bare land condominium) are not the responsibility of the City unless they also serve other parcels within the development.

Appeal heard on February 14, 2019

Reasons filed at Calgary, Alberta
this 1st day of August, 2019

Strekaf J.A.

I concur:

Authorized to sign for: O'Ferrall J.A.

I concur:

Authorized to sign for: Schutz J.A.

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Appearances:

P.T. Linder, Q.C.
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G.J. Stewart-Palmer, K. Elhatton-Lake
for the Respondent