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How the Courts Analyze the Validity of a Decision Made by a Public Body: The Impact of the Oft-Used Whereas Clause

Sometimes, a person disagrees with a resolution or by-law the municipal council has adopted and challenges the decision by appealing to the Superior Court for judicial review.

Last November, the Supreme Court of Canada clarified this review framework in the *Auer* decision.¹ The *Auer* decision modified a trend in case law stemming from the *Katz Group* decision² on analyzing the field of jurisdiction when a body adopts a legislative text.

From now on, for subordinate legislation (such as a municipal by-law) to be declared *ultra vires*³ on the grounds that it is incompatible with its enabling legislation, it is no longer necessary to demonstrate that it is “unimportant,” “irrelevant,” or “completely extraneous” to the purpose of the legislation. The threshold for analysis has been brought into alignment with the standard, which involves determining whether the by-law is reasonable and reasonably compatible with the purpose of the enabling legislation.

According to the *Vavilov* decision⁴ and reiterated in the *Auer* decision, it is presumed that a court reviewing a municipal council decision must apply the standard of reasonableness.⁵

As such, the court must consider whether the decision made by the municipal council has the characteristics of a reasonable decision, and whether the decision is justified in light of the relevant factual and legal constraints. Although municipalities have broad discretionary powers and adopting by-laws and resolutions involves “an array of social, economic, political and other non-legal considerations,”⁶ municipalities must exercise them in good faith, within the limits of the powers and jurisdictions expressly delegated to them, and following the applicable legal framework.

This way, the courts can analyze the decision itself, the reasons for it, the relevant documents available at the time,⁷ its application, and the context in which it was made. This is where a preamble and its attending whereas clauses can be important and have an impact on the courts’ analysis and review of the decision.⁸

Minor exemptions

Section 145.1 of the *Act respecting land use planning and development* (ALPD) allows a municipality to adopt a by-law concerning minor exemptions from the provisions of the zoning or subdivision by-laws.

The ALPD does not require the municipal council to provide reasoning for any resolution that grants or refuses a minor exemption. However, the duty to act fairly may require justification for the decision in some cases.⁹ According to the standard of reasonableness, courts may review the decision even without written reasoning.¹⁰

The legislative framework regarding minor exemptions is strict. The criteria for granting or refusing a request for a minor exemption are set out in sections 145.2 and 145.4 of the *Act respecting land use planning and development*, and are cumulative. If any one of them has not been analyzed by the municipal council itself, it may be grounds for the decision to be reviewed and invalidated by the courts.¹¹

In *Tobin v Municipalité de Dunham*,¹² the Court of Appeal quashed the resolution because it made no mention of one of the criteria and the evidence showed that the criterion was not included in the council’s analysis.

Thus, when a municipal council rules on a request for a minor exemption, it must analyze all the criteria set out in the ALPD and, ideally, leave a record of its reasoning.

As such, the preamble can be a useful tool for demonstrating that all the criteria have been taken into account, hence the importance of drafting the oft-used whereas clauses.

¹ *Auer v Auer*, 2024 SCC 36.

² *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64.

³ “*Ultra vires*” means “beyond the powers,” meaning beyond the scope of the enabling legislation.

⁴ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, para. 99.

⁵ *Ville de Gatineau v Stinson*, 2023 QCCA 306, para. 106; *Nita v Municipalité de Wentworth-Nord*, 2024 QCSC 2237, para. 63.

⁶ *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, para. 19.

⁷ *WM Québec inc. v Ville de Drummondville*, 2024 QCCA 4.

⁸ *Beaudoin v Municipalité de Beaulac-Garhby*, 2024 QCSC 4493, para. 58.

⁹ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48; *Toke v Municipalité de Rawdon*, 2020 QCSC 2795, paras. 15, 42, and 45; *Lizotte v Municipality of Lantier*, 2023 QCSC 2627; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699;

¹⁰ *Catalyst Paper Corp.*, *supra*; *Ville de Brossard v Ville de Longueuil*, 2022 QCCA 1139.

¹¹ *Municipalité de Saint-Elzéar v Bolduc*, 2021 QCCA 19, para. 39.

¹² *Tobin v Municipalité de Dunham*, 2024 QCCA 69.