



THE COMMUNICATOR

Alberta Development Officers Association (AdoA)

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Summer Issue

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Photo by S. Barkley

Words from the Editor

This heat right! I really prefer to be at a swim up bar when its this hot, yikes!

Things are going well in the County of Newell, maybe a bit quieter than previous years but still a good Spring and Summer for Development.

The news regarding the halt on the wind and solar developments was a bit of a surprise and will be interesting to see what comes out of that. We don't have wind energy in our area but we have had a lot of solar applications, the concerns are often aesthetics, reclamation and how much energy can be produced at the cost. It appears that Smith is asking these same questions so will be interesting.

The committee met in Leduc in the Spring for a meeting. The hotel is lovely and its right across the street from an outlet shopping mall and Costco. Well planned out Leduc! We met a few of the ladies that are hosting the conference and it sounds like a real good time is coming our way.

The Alberta Development Officers Association 40th year anniversary is 2024 and without spoiling the exciting things we are getting planned, please save the date September 25-27, 2024. The association is hosting the 40 year anniversary conference and it will be held in Calgary.



Photo Susie Martens

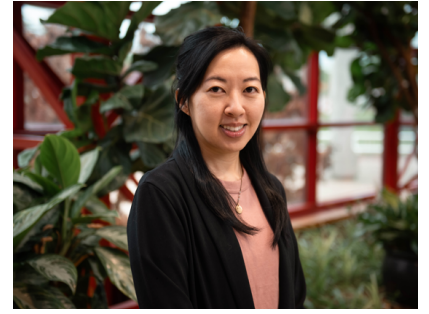
ADOA 2023 City of Leduc Conference Hosts



Carley Graham, Economic Development Officer



Kelly Stadnyk, Development Officer



Jessica Lui, Planner I



Dennis Peck, Manager Planning & Development



Teaka Broughm, Director Planning & Econ. Development



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Ali Rhine, Permit Clerk



Elevating Impact. Empowering Change.

TOWN OF BARRHEAD ALBERTA



The Town of Barrhead was originally situated two kilometers north and one kilometer west of its current location. In this location Barrhead served as a trading post for Klondikers making their way to the Yukon along the Klondike trail.



Many decided to settle in the Barrhead area during the Klondike gold rush, by 1912 a group of farmers in the area came up with a plan to create an urban center and “drew up “a memorandum of association” of the Paddle River and district Co-operative society Limited”.

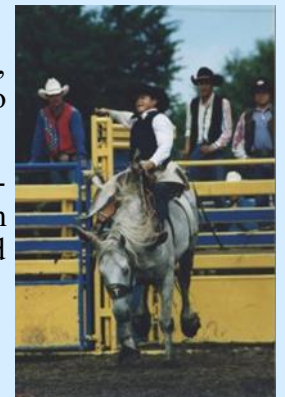
On December 4 of that year the association began the construction of a two-story building housing business on the main floor and a community hall upstairs. In 1913, the association applied to locate a post office in the building, the federal postal department asked the association to supply them with a name. The Maguire brothers, as members of the association, came from Barrhead Scotland, with some nostalgia chose to name the post-office after their hometown and the name was approved.



In the 1920's it was announced that the rail line would be coming to a location near Barrhead. While it was hoped that the rail would come through the original town site, the location chosen was two miles south, and one mile west of the Hamlet. This was the deciding factor that forced the town to relocate to the location that it is now in.

Presently the Town of Barrhead is a vibrant urban center offering the educational, health, emergency response, seniors, recreational, and cultural services of a metropolitan hub to the surrounding community.

Additionally, Barrhead is home to a number of events throughout the year. Some highlight events are, The Blue Heron Fair and rodeo, the annual demolition derby which always draws a crowd, a street festival, show and shine events a Santa Claus Parade and many more events throughout the year.



One of the most important elements of life in Barrhead is its location. Barrhead is situated near numerous lakes that provide the core of recreational life in the community. In the summer the lakes are filled with boaters, water-skiers, fishers and swimmers. In the winter month's snowmobiling, ice fishing skiing, curling take over as recreational activities. Barrhead is also situated near three rivers (the Pembina, the Paddle and the Athabasca) and within a diverse natural setting, which caters to the outdoor enthusiast.



The Town has grown a lot since its early days, and became a vibrant, friendly welcoming community with many things to offer its residents now and in the future

Submitted by
Cheryl Callihoo
Town of Barrhead

ADOA LEGAL CORNER with:



BROWNLEE LLP
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Proper Planning Considerations

Article 8 of Brownlee LLP's Processing Development Permit Applications Series

Subject to certain express limitations, Alberta municipalities have broad authority through bylaw, planning policies, and statutory plans, to regulate and control the development of land within their corporate boundaries. In particular, Part 17 of the *Municipal Government Act* ("MGA") provides the legislative framework within which municipalities must make planning and development decisions. With respect to the purpose of Part 17 of the MGA and the regulations and bylaws thereunder, the MGA states the following at section 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 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 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.

While section 617 of the MGA provides the general purpose for all matters that fall under Part 17 of the MGA, the Courts have provided further specifics as to what constitutes a relevant or irrelevant consideration from a municipal planning perspective, and what is a valid planning purpose. If a decision of a municipality or its development authority extends beyond a proper planning purpose, there is the risk that this decision (whether it be a land use bylaw amendment or issuing a development permit) will be considered *ultra vires* (outside legal authority), and therefore be deemed invalid. Decisions must be rooted in planning considerations and purposes, and must be relevant to the planning matter at issue.

There are a number of irrelevant planning considerations that have been deliberated by the Courts, including:

- The user of development or the character of an applicant/landowner;
- Business competition;

- The lengths or expense to which an applicant has gone to achieve approval;
- Requiring a public benefit beyond legislative authority; and
- The generation of property taxes.

Below we offer further details on why these considerations are irrelevant in the planning context and provide examples of past court decisions that have ruled on these irrelevant planning considerations. A development authority must be careful when dealing with development permit applications to ensure that development decisions are always being made for valid planning purposes and that they are not taking into account irrelevant considerations.

✓ User vs. Use

The character of a landowner or an applicant (the user of land) is not a relevant planning consideration, in part, because a landowner can change.

Both the Supreme Court of Canada (“SCC”) and the Alberta courts have confirmed that a characteristic of the user of land is not related to the use of land; and the use of land as opposed to its user, is what should be considered in a valid planning decision.

In *Dallinga v. Calgary (City)*, the development appeal board refused to grant a development permit for an auto-wrecking yard. The appellant was granted leave to appeal on evidentiary issues, including:

- Whether “character evidence” used by a competitor at the appeal hearing was irrelevant and inadmissible. During the appeal hearing, a competitor claimed that the appellant “was committing fraud by means of the use of deceptive signs and in some other nebulous manner diverting orders to the appellant that were intended for the competitor”; and
- Reference by the development office to the fact that the appellant had commenced the development prior to applying for the permit.

The Court of Appeal (then called the Appellate Division of the Alberta Supreme Court) held that the Board “encouraged rather than discouraged” the irrelevant evidence of the past business practices or moral character of the appellant, that the Board treated the evidence as relevant, and took the irrelevant evidence into account when reaching its decision to refuse the development permit. In doing so, the Court held that the development appeal board exceeded its jurisdiction by considering the non-planning issue of the appellant’s past business practices or moral character. A new hearing was directed.

In *Bell v. R*, the applicable zoning bylaw restricted the use of a dwelling unit to one family. Under the zoning bylaw, a “family” included two or more people who were connected by some form of consanguinity, marriage or legal adoption. The appellant was living in a dwelling unit with 2 other unrelated persons and was convicted of using a dwelling unit in contravention of the zoning bylaw. The SCC held that “by restricting the use of a dwelling to “family” and then defining “family” by reference to ties created by blood, marriage and adoption, the by-law in question does

not regulate the use of a building but rather determines who can live in it”. In purporting to regulate the relationship of occupants rather than the use of the building, the subject municipality had stepped outside its planning authority and engaged in an irrelevant planning consideration.

When deciding on a development permit, a development authority must ensure it is not considering the past actions or the character of an applicant or the users of the land when coming to a decision on the application. These considerations are irrelevant. The use of land is a relevant consideration, not characteristics of the land user or the applicant for the permit.

This principle “cuts both ways”; in other words, a development authority should also not be more inclined to grant an approval, based on the character of the applicant. For example, it is not uncommon to hear at a SDAB hearing “my family is ‘third generation’ in this municipality,” or “our business has a solid track record” – such considerations are irrelevant from a planning perspective. Because development approval essentially runs with the land, consideration of the approval (coupled together with the appropriate conditions if approval is granted) must be within the ‘four corners’ of the development approval.

✓ **Business Competition**

Issues respecting business competition or business viability are not valid planning considerations. A municipality can determine what uses are appropriate at a given location, but it is an irrelevant consideration to take into account whether the economic success of a development will be impacted by the land use approvals around it.

In *Actus Management Ltd. v. Calgary (City)*, an applicant submitted a development permit application for a grocery store. The permit was approved subject to a number of conditions, but was subsequently appealed to the development appeal board by an individual representing 6 businesses owners located within the vicinity of the approval. The appellant noted that if a “chain” grocery retailer opened, it would “destroy family businesses built up over many years” in the vicinity of the approval. The development appeal board accepted the argument and overturned the development permit approval. However, on appeal, the Court of Appeal (then called Appellate Division of the Alberta Supreme Court) held that the legislation did not recognize the regulation of business competition as relevant to development planning; the Court referred the matter back to the appeal board to properly consider the matter. Of note, the Court also provided that the excessive provision of particular facilities or services would in some circumstances, be a planning factor that might properly be considered. Subsequent cases have confirmed the validity of land use bylaw provisions (such as spatial separations) that intend to either prohibit blight caused by particular type of development, or alternately impose a distance between certain types of developments and other developments deemed to be incompatible (such as liquors stores and schools).

Similarly, in *Calgary (City) v. Valdun Development Ltd.*, a developer applied to have land rezoned for development and use of a casino. Calgary City Council voted to reject the developer’s application, and the developer applied to have the matter reviewed before the Courts. The Court of King’s Bench set aside Council’s decision because it was not based on evidence of legitimate

planning concerns. The matter was appealed to the Alberta Court of Appeal, which held, in part, that the regulation of competition is not a planning concern. Similar to the decision in *Actus Management*, the Court also noted that whether or not there is an adequate supply of a particular service in an area is a legitimate planning consideration.

Further, in *Parks West Mall Ltd. v. Hinton (Town)*, an applicant submitted a development permit application for a bingo hall. The development permit application prompted Hinton Town Council to amend its land use bylaw to expressly exclude certain establishments in the subject land use district, including bingo halls. There were 2 existing bingo halls in the Town, including one that was owned by the Town itself (and the existing bingo halls provided funding for non-profit societies). The Court of King's Bench held Council's decision was *ultra vires*; the Court held that the purpose of the bylaw amendment was to protect funding of non-profit societies, and therefore to limit competition, which is not a permissible planning objective.

When deciding on a development permit application, a development authority cannot consider matters related to business competition. That said, considering whether there is an appropriate or adequate supply of a particular service within an area may be a legitimate planning consideration, depending on the circumstance.

✓ Resources Spent in the Furtherance of Development

A landowner or applicant expending money or going to excessive lengths to move a project forward before receiving proper approval is not a valid planning consideration.

In *Harvie v Calgary (City) Regional Planning Commission*, the application at issue was a subdivision approval, not a development permit; in our view the legal principles would apply in both circumstances. The applicant submitted an application for the subdivision of a quarter section. The same application was rejected several times before finally being approved by the planning commission. After a Chambers Judge refused an application on the matter, the Court of Appeal (then called the Appellate Division of the Alberta Supreme Court) held that the only inference that could be drawn from the change in decision on the subdivision application in otherwise unchanged circumstance was that the planning commission decided to approve the subdivision because the owner had expended money on road construction. The Court held that the fact that an applicant had spent a considerable amount of money to develop a road within the proposed subdivision was "not a matter relevant to good planning" and therefore set aside the approval.

When deciding on a development permit, a development authority must not consider any actions taken by an applicant or landowner in an attempt to further a development prior to approval, even if these actions may have caused financial hardship or strain. These are not a valid planning considerations. Again, the application should be considered within its 'four corners', i.e. its proper planning merits.

✓ **Requiring Public Benefit Beyond Legislative Authority**

A development authority cannot require a developer to confer a public benefit, as part of a development approval, unless that public benefit is found within the legislative framework, even if the developer is agreeable. For example, it is appropriate to impose requirements respecting construction of roads and utilities, as referenced in the MGA s. 650.

In *Prairie Communities Development Corp. v. Okotoks (Town)*, Okotoks Town Council passed a resolution enacting an off-site levy bylaw and a contribution and cost recovery agreement respecting expenses related to off-site levies. The form of agreement adopted by Town Council provided for payment of fees with respect to off-site facilities and services of a kind and nature that at that time were outside the scope of those designated in the MGA. A Chamber's Judge dismissed an application by a subject developer which challenged the validity of both the bylaw and the contribution agreement. On appeal to the Alberta Court of Appeal, the Court found that the form of contribution agreement adopted by Council was intended to facilitate the collection of the improper levies rates on off-site facilities and infrastructure beyond those authorized by section 648 of the MGA. Because the Town was requiring the payment of the levies and the entering into of the agreement, the Town could not rely on its "natural person powers" found at section 6 of the MGA. Specifically, the Court held that natural person powers cannot be used to impose levies on other facilities and infrastructure not expressly identified in the MGA, that natural person powers do not extend to imposing fees or charges, or coercing developers into agreements to "voluntarily" pay for infrastructure deficits. As natural persons have no powers to issue subdivision or development approvals, a municipality is exercising municipal powers not natural person powers when issuing approvals, and is restricted by the MGA.

A development authority must ensure that it is not forcing a developer or landowner to provide a public benefit that is not authorized under the legislative framework as a condition of approval. Even if a developer agrees to providing the benefit, a development authority cannot rely on natural person powers when issuing development approvals.

✓ **Property Tax Revenue**

Alberta Courts have made it clear that the generation of municipal tax revenue is not a relevant planning consideration.

In *Atkins v. Calgary (City)*, the bylaw in question concerned the redesignation of a parcel of land from an urban reserve designation to a direct control designation, with the purpose of accommodating a shopping centre, multi-dwelling residential development, a child-care facility, and a light rail transit park 'n ride site. The applicants applied to the Court of King's Bench to declare the bylaw void, in part, on the basis that City Council relied upon improper considerations when making its decision. In respect to the allegations of irrelevant considerations by City Council, such as potential jobs related to the development and the generation of tax revenue, the Court of King's Bench stated that it is trite law that when considering land use designation applications, a municipal council can only consider relevant planning matters. The Court held that

the evidence demonstrated that City Council were informed and aware of their duty in considering whether or not the proposed bylaw represented good planning and accordingly rejected this ground of attack. The application to declare the bylaw void was dismissed.

When deciding on a development permit application, a development authority must not consider the potential for municipal property tax revenue in its decision making; this is an irrelevant consideration.

Conclusion

Development decisions must serve a proper planning purpose – a municipality cannot require an action it deems necessary or consider circumstances without proper planning justification. As noted, irrelevant planning consideration include taking the following factors into account when making a development decision: (1) the characteristics of the user of the land, as opposed to the use itself; (2) business competition; (3) the length or expense to which an applicant has gone to achieve approval; (4) public benefit beyond legislative authority; and (5) the generation of property taxes. When making decisions on development permit applications, development officers must ensure to remain within the legislative framework of Part 17 of the MGA and make decisions for purposes, as outlined at section 617.



The Brownlee Municipal Law Team is pleased to offer our services in a number of planning and development areas, including processing development permit applications, subdivision applications, all related appeals, and adoption of planning bylaws. For more information, please contact a member of the Brownlee LLP Municipal Team on our Municipal Helpline at 1-800-661-9069 (Edmonton) or 1-877-232-8303 (Calgary).

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