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EMERGING TRENDS 2013 – Unanswered Bear Pit Questions

We would like to thank everyone who attended this year's *Emerging Trends in Municipal Law* seminars in Calgary and Edmonton. Your attendance and continued support has made our *Emerging Trends* seminars a huge success. We are already working on the event for next year and we look forward to seeing both new and returning faces.

During this year's Bear Pit Sessions we were given a number of interesting and challenging questions which we were able to answer but, because of time, some questions were left unanswered. With that in mind, we have responded to the following unanswered questions below:

1. Canada Post is requesting municipalities include a clause in their development agreements which require the developer pays for community mail boxes. Is there legislation that requires a municipality to comply with this request? If the payment of the fee is included in the development agreement, is there any liability on the municipality to collect or make sure the developer pays this fee?

2. How does a municipality clearly address the types of Major Home Businesses that are allowed in Residential Neighbourhoods within the Land Use Bylaw?

3. What steps can a municipality take to prove that a landowner is renting out an illegal suite and how does the municipality enforce compliance with the Land Use Bylaw regarding these suites.

4. If a violation tag has been issued, and the non-compliance of a municipal bylaw continues, can the municipality levy a fine for each day that the non-compliance continues?

Answers

1. **Canada Post is requesting municipalities include a clause in their development agreements which require the developer pays for community mail boxes. Is there legislation that requires a municipality to comply with this request? If the payment of**

the fee is included in the development agreement, is there any liability on the municipality to collect or make sure the developer pays this fee?

There is no legislation that requires a municipality to address Canada Post services for a subdivision. Section 655 of the *Municipal Government Act* (the "MGA") lists the infrastructure and services that a development agreement may deal with. Canada Post services are not identified on this list.

As the subdivision authority, a municipality may impose any conditions pursuant to Section 655 of the MGA. This includes any conditions to ensure compliance with the MGA, any statutory plans, land use bylaw, the Subdivision and Development Regulation, and any *Alberta Land Stewardship Act* regional plan. If a municipality wishes to impose on a developer the requirement to pay for community mail boxes, the one approach would be to include requirements for community mail boxes within the municipality's statutory plans, such as the area structure plan for the proposed subdivision/development. In order to ensure compliance with the statutory plan, the subdivision authority could impose a condition of the subdivision approval that the developer consult with and pay Canada Post for community mail boxes.

Where the payment for community boxes is inserted as a condition for subdivision approval, the municipality must then ensure that the developer has paid the amount required to Canada Post prior to its endorsement of the plan of subdivision. A municipality may only endorse a plan of subdivision if it is satisfied that the plan complies with the subdivision approval and that any conditions imposed have been met or will be met in the near future (MGA, Section 657). If a municipality endorses the plan of subdivision without ensuring compliance with the subdivision conditions, the municipality may be negligent for doing so and may be responsible for any harm that follows from failing to ensure compliance with the subdivision approval.

Another approach, albeit a weaker one, is to include a condition in the development agreement that the developer pay Canada Post for community mail boxes. The general intent of a development agreement pursuant to Section 655(1)(b) of the MGA is to provide for the construction and installation of municipal infrastructure and servicing to the proposed subdivision/development and to facilitate payments for infrastructure and offsite levies. The development agreement is, however, a commercial contract and a municipality may be able to rely upon its natural person powers to negotiate and incorporate other terms and conditions related to a valid and proper planning and/or municipal purposes, such as the providing of Canada Post services within a subdivision. However, we caution that municipalities be careful with its use of natural person powers in negotiating a development agreement and that it not attempt to impose requirements which it is not otherwise entitled to impose (e.g. recreation levies or fees as addressed in the Alberta Court of Appeal decision in *Prairie Communities Development Corp. v. Okotoks (Town of)*).

If a municipality includes a condition to pay for Canada Post services in a development agreement, the municipality may receive pressure to ensure compliance. Notwithstanding, we note that enforcing a development agreement condition is not a statutory requirement and that the municipality has the discretion as to whether it will enforce any provision of a development agreement, including a condition to pay for Canada Post services.

2. How does a municipality clearly address the types of Major Home Businesses that are allowed in Residential Neighbourhoods within the Land Use Bylaw?

As with all land use planning, it is important that the creation of a new land use defines the scope of the use and whether such use is permitted or discretionary. Where a use is permitted, the applicant is entitled to a permit as of right, subject only to those conditions that are specifically listed in the Land Use Bylaw. Therefore, home based businesses that may have an off-site impact are generally classified as discretionary uses in order to provide flexibility respecting conditions that are designed to mitigate the off-site impacts.

Many Land Use Bylaws incorporate a distinction between a Minor Home Business and a Major Home Business. Although each Land Use Bylaw may differ in its definitions, generally Major Home Businesses encompass commercial or industrial uses with the occupant being allowed to use the exterior of the residence for parking, storage and signage for the business. Minor Home Businesses tend to be utilized for professional services with no, or limited, client visits. In addition, Minor Home Businesses generally do not allow visible changes to the exterior of the residence, or in the area surrounding the residence; therefore, any storage respecting the Minor Home Business is restricted to within the residence or an accessory building. We generally recommend that a Major Home Business be classified as discretionary in any Residential Districts where the use is listed. A Major Home Business should also be subject to a number of conditions that may be appropriate in the opinion of the development authority. Classifying a Major Home Business as discretionary will allow the municipality's development authority greater flexibility in prescribing appropriate conditions to mitigate the negative impact on neighbouring residential uses.

Factors that the planning authority should consider when imposing conditions on these developments might include the character of the neighbourhood, any unique aspects of the development, as well as how many employees/customers can visit the business each day and the duration of their stay. The Land Use Bylaw could also contain a provision that the development permit may only be issued for a specified term (i.e. 3 years or 5 years).

It may also be appropriate to include certain parameters as part of the definition itself so these criteria cannot be waived by the SDAB on appeal. For example, the definition could contain

limiting criteria based on factors which Council has determined should not be varied (e.g. maximum number of vehicles, use being incidental to residential, no outdoor storage, or maximum number of employees).

3. What steps can a municipality take to prove that a landowner is renting out an illegal suite and how does the municipality enforce compliance with the Land Use Bylaw regarding these suites.

Generally, whether or not an illegal suite is occupied, a municipality can rely on its Land Use Bylaw, as well as any evidence collected through an inspection, to establish that a landowner has an illegal secondary suite in his/her residence. Typically, evidence that is useful in establishing the existence of an illegal secondary suite includes, but is not limited to, the following: the presence of a secondary kitchen (including working plumbing and power supplies for large appliances like stoves); a separate entrance,; a locked or barred internal doorway (to separate suites); heating and hot water services; or the physical presence of a tenant.

A municipality's Designated Officer may enter onto private lands to conduct an inspection, including an inspection for an illegal secondary suite (MGA, Section 542). Additionally, the Designated Officer may request that anything that would assist in the inspection or enforcement be produced by persons present on site (for example, relevant documentation such as records, receipts, lease agreements, etc.) and may make copies of anything related to the inspection.

Owners and occupants can, and often do object to an inspection, or may interfere with the effective conduct of the inspection when it is occurring. When this occurs, a municipality may make an application to the Court of Queen's Bench by way of an Originating Notice for an Order authorizing the inspection (MGA, Section 543).

For further information regarding a municipality's authority to inspect private lands pursuant to Section 542 and 543 of the MGA, and how to take enforcement action against such contraventions, please see the 2013 Emerging Trends Paper titled "COURT-ORDERED COMPLIANCE: Unsafe/Unsightly Properties and Injunctive Relief" which is available on the Brownlee LLP website.

4. If a violation tag has been issued, and the non-compliance of a municipal bylaw continues, can the municipality levy a fine for each day that the non-compliance continues?

Although the law with respect to municipalities imposing additional fines for every day that a continuing offence occurs has not been judicially considered, it has generally been our opinion

that a municipality is not able to treat each day, or part of a day, as a separate offence, where the activity in question is, in truth, one continuing course of conduct.

If a municipality were to treat a continuing offence as a series of separate offences it is arguable that to convict a person multiple times in such circumstances would violate the double jeopardy principle incorporated into Section 11(h) of the *Charter of Rights and Freedoms* which states that no person should be convicted more than once for the same offence. By attempting to turn each 24 hour period over which a continuing offence occurs into a separate offence, it could be argued that the municipality is attempting to convict a person multiple times for the same illegal act.

The more appropriate method of addressing continuing offences is to either seek a permanent injunction from the Court pursuant to section 545 of the *Municipal Government Act* (the "MGA"), or alternatively, to impose increasingly higher fines for subsequent or continued offences. If a bylaw imposes a higher fine for each subsequent offence, the person must be convicted of that offence prior to the municipality imposing the higher fine. Also, it should be noted that a violation tag does not impose a fine; rather is it is a request for a voluntary acknowledgement of a contravention and a payment to the municipality for that contravention. If a violation tag is not paid, no legally enforceable fine exists. To impose a fine, the municipality must commence a prosecution of the offender, by issuing a violation ticket under part II of the *Provincial Offences Procedures Act*, and successfully convicting that person.

For questions regarding enforcement issues, contact any member of our Municipal Enforcement Practice Team found at www.brownleelaw.com/practice-areas/municipal-bylaws-a-enforcement.

For questions regarding planning and development, contact any member of our Planning and Development Team found at www.brownleelaw.com/practice-areas/planning-and-development.