THE COMMUNICATOR

Alberta Development Officers Association (ADOA) November 2022

Fall Issue

In this Issue:

Words from the Editor

Happy Fall Y'all! What an amazing season. Just when you think it doesn't get any better than Spring flowers you get Fall colors.

Big shout out to Camrose, what an amazing job they did on their conference.

The speakers, venue, door prizes and extra touches on everything was over the top. Thank you Camrose!

In addition to the conference, Camrose is a lovely city and great place to visit.

In the County of Newell things are winding up from our busy time and now we can work on some projects. We get quite a bit of summer down here so the construction season lasts a while.

I have been doing a lot of reading and research on Alberta since I have been creating the Communicator newsletter and even though I was born and raised in Alberta I have learned a lot. And now, I'm going to share with all of you.

Did you know?

Alberta was established as a district of Northwest Territories in 1882 and became a province in 1905.

The early explorations in the 1750's were fur traders. In 1872 the Dominion Lands Act was established and the building of the Canadian Pacific Railway. The Dominion Lands Act was a Canadian law that encouraged settlement in the prairies. Canada invited mass emigration by European and American pioneers and settlers from eastern Canada and offered them 160 acres of land for free. Any adult farmer that agreed to cultivate at least 40 acres of the land and build a home within 3 years qualified. Once the farmer made certain improvements they could buy the neighbouring land for only the $10 administration fee.

The Canadian Pacific Railway was formed to physically unite Canadians. In the Prairies the construction was quicker as the land was relatively flat, sometimes 5 miles of track was laid each day. This involved 2800 railway tiles for each mile of track carried on the shoulders of workers from flatcars to wagons. Much of the labourers were Chinese and a portion of the railway in BC is names after labourer Cheng Ging Butt tor recognize the sacrifice made by the Chinese.

This encouraged more development of agriculture, followed by oil, gas, coal and timber. These resources led to more population growth and an increase in industrialization.

Alberta has a diverse culture. Alberta has inhabited various First Nations groups for at least 10 000 years. The immigration following World War 2 brought in migrants from the British Isles and Europe. Today there are people from all over the world immigrating to Canada.

More Alberta facts in the next newsletter.

Why would you go anywhere else when we already live in the most amazing place

ALBERTA!

The Communicator will continue to showcase our lovely province in every issue.

Please send me an email if you live in an area or have visited an area in Alberta that should be showcased.

Adrenaline rush anyone?

Red Deer Canyon coaster, a 1.35 km long monorail track taking you through trails and slopes. The coaster can reach up to 40 km per hour but each coaster has a brake where you can control the speed.

In addition, Red Deer has a spectacular indoor Farmers Market while you're in the area.

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Trail Rides

Year round trail rides in the Rocky Mountain Foothills and Kananaskis Country. This photo was taken off the Moose Mountain Horseback adventure website.

They offer rides for people of all levels of experience and they have a beautiful lodge that you can rent that includes 5 bedrooms.

ADOA LEGAL CORNER with:

BROWNLEE LLP
Barristers & Solicitors

Environmental Considerations and Provincial Paramountcy

Article 5 of Brownlee LLP's Processing Development Permit Applications Series

Both provincial and municipal decision-makers have environmental responsibilities to consider when approving development. Despite the provincial government: (1) providing the legislative framework for municipal planning bodies to follow; and (2) in certain situations having "paramountcy" over the decisions of its municipal counterparts, both levels of government typically need to consider the environmental impacts within its jurisdiction to ensure safe and appropriate development is being approved.

In this fifth article in a series of articles by Brownlee LLP, we will discuss issues which are critical to understanding the dual role of provincial and municipal decision-makers in approving development that impacts the environment. In particular, it is important for municipal planning bodies to understand and consider the following 3 issues when considering development permit applications:

- ☑ Environmental Concerns are Planning Concerns
- ☑ Impossibility of Dual Compliance Test
- ☑ Examples of Applying Different Levels of Provincial Paramountcy

We provide further details on each of these points below.

☑ Environmental Concerns are Planning Concerns

The *Municipal Government Act* ("MGA") acknowledges that a municipal planning body is expected to consider environmental concerns when approving development. Section 3(a.1) of the MGA states that "to foster the well-being of the environment" is a core municipal purpose. Likewise, Part 17 of the MGA expressly provides that its purposes (and the purposes of the planning and development regulations and bylaws thereunder) include "to maintain and improve the quality of the physical environment within which patterns of human settlement are situation in Alberta" (s. 617(b)).

Alberta case law also emphasizes that environmental issues are relevant municipal planning considerations. In a dispute over issues connected to a proposed landfill operation, the then Court of Queen's Bench in *Robertson v Edmonton* noted that "council must also take into account environmental issues in the context of making its planning decision … it would be incorrect for

city council to ignore environmental issues altogether as they are relevant planning considerations in and of themselves" (para 75). In the end, the Court held that a failure of a municipality to take into account relevant factors, including environmental factors constituted a jurisdictional error. The area structure plan and redistricting bylaws at issue before the Court were quashed.

Although environmental matters have been clearly outlined by statute and case law as relevant municipal planning considerations, the overarching paramountcy of provincial decision-making is also evident in both the environmental legislative framework and its interpretation in the judicial system. For example, section 619 of the MGA provides a very high level of provincial paramountcy, given that a licence, permit, approval or other authorization granted by certain provincial bodies (namely the Natural Resources Conservation Board, the Energy Resources Conservation Board, the Alberta Energy Regulator, the Alberta Energy and Utilities Board and the Alberta Utilities Commission) prevails over any subdivision or development decision. In fact, pursuant to section 619(2), such an authorization from one of these provincial bodies forces a municipality to approve a statutory plan or land use bylaw amendment, or a subdivision or development application, to the extent that it complies with the provincial authorization. Alternatively, section 620 of the MGA, provides a somewhat more balanced level of provincial paramountcy. Under section 620 of the MGA a municipal planning body may make its own decision with respect to a development permit, including imposing conditions, provided that the development permit and its conditions do not conflict with a condition of a licence, permit, approval or other authorization by one of the listed provincial authorities, in which case a conflicting condition will be negated.

Despite the paramountcy of provincial decisions, a municipal planning body (whether it be the development or subdivision authority, or the appropriate appeal tribunal) still has significant control of environmental decision-making within its jurisdiction. In fact, a municipal planning body should not be making a decision respecting development or subdivision without sufficient environmental information before it.

☑ Impossibility of Dual Compliance Test

In many cases, a municipality may regulate environmental planning matters in areas where jurisdiction between federal, provincial and municipal authority overlap, provided that it is not impossible to comply with the multiple sets of regulations and the purpose of a government enactment is not frustrated.[1] Where it is not possible to comply with the above requirements, the federal or provincial government regulation will prevail to the extent of the incompatibility. This is the test that will apply in most situations where other provincial or federal approvals will also be required.

The Courts have provided guidance on the process to follow should an operational conflict arise between a municipal bylaw and a provincial or federal statute that regulates the same subject matter. Known as the "impossibility of dual compliance test", if a valid municipal bylaw (or approval) deals with similar subject matter as a valid statute and obeying one necessarily means

[1] See: *114957 Canada Ltée (Spraytech, Irrigation Company) v Hudson (Town)*[*Spraytech*], 2001 SCC 40*; British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23; *Alberta (Attorney General) v Moloney*, 2015 SCC 51; *Calgary (City) v Bell Canada Inc*., 2020 ABCA 211.

disobeying the other, or frustrating the purpose of the other, the statute will prevail to the extent necessary to eliminate the conflict. In *Spraytech*, a Quebec municipality passed a bylaw restricting the use of pesticides within its boundaries. The appellants argued that the bylaw was *ultra vires* the municipality's authority, because it replicated statues under provincial and federal jurisdiction. The Supreme Court of Canada ("SCC") applied the impossibility of dual compliance test and held that there was no barrier to dual compliance with both the bylaw and either the federal or provincial legislation. A potential inconsistency was not enough to invalidate the bylaw; there must be a real conflict, in that compliance with one set of rules would require a breach of the other. The SCC also noted that there was no concern with the municipal bylaw frustrating or displacing the purpose of Parliament.

While the impossibility of dual compliance test was utilized by the SCC in the context of a municipal bylaw, a similar interpretation was made by the Alberta Court of Appeal in the context of a development permit for a transloading facility (truck to rail). In *Source Energy Services Canadian Logistics LP GP Ltd v Wembley (Town)*, the Court of Appeal held that an appeal board had jurisdiction to impose conditions on industries that were subject to provincial or federal regulation so long as those conditions relate to legitimate municipal purposes as set forth in the MGA and were not otherwise proscribed in sections 619 and 620 of the MGA. While section 620 of the MGA has a similar effect to the impossibility of dual compliance with respect to a conflict between development permit conditions, the Court further noted that multiple jurisdictional approvals may be operative and require an affected party to comply with both if no conflict arises between the development approval and the federal regulation. Federal legislation is not addressed in section 620 of the MGA, so the Court's specific reference to federal regulations illustrates an approach within the development approval process that closely mirrors an operational conflict in the impossibility of dual compliance test.

☑ Examples of Applying Different Levels of Provincial Paramountcy

As alluded to above, when disputes arise as to whether, or to what extent a provincial planning decision should prevail over a municipal decision, a court will often look to see if section 619 or 620 of the MGA is applicable in the given circumstance.

Section 620 - First, we will consider the impact of s. 620. In *Northland Material Handling Inc. v Parkland (County)*, county council denied an application for an extension to a development permit for sand and extraction and dry land fill operation. The applicant sought judicial review of the decision, on numerous grounds, including, that its Alberta Environment permit prevailed over the municipal zoning decision, as a result of section 620 of the MGA. The then Court of Queen's Bench denied the application and noted that section 620 of the MGA does not purport to give any kind of precedence or paramountcy to Alberta Environment permits over municipal zoning or other decisions. Specifically, the Court provided that a decision, permit, or approval that falls under section 620 of the MGA only prevails over <u>any condition</u> of a development permit <u>that conflicts with</u> the permit or approval (para 47). The Court expressly noted that there was no operational conflict between the two types of approval and no barrier to dual compliance (para 57).

Section 619 – Now we will consider the impact of s. 619. As noted above, section 619 of the MGA provides that an approval of a provincial regulatory body prevails over a municipal approval. There

is a significant level of provincial paramountcy placed on the regulatory bodies listed under section 619, as a municipality may be forced to redistrict lands or grant a development approval if a project has received approval from a subject provincial board. If a municipal planning body does not comply with the decision of a provincial regulatory body listed in section 619, pursuant to section 678 and/or 685 MGA the matter can be appealed to the Land and Property Rights Tribunal, which can require the municipal planning authority to comply with the provincial decision.

Given the significance that a decision of a provincial regulatory body can have on municipal approvals, the question often arises as to which approval should come first, if both a provincial and municipal decision is required. In *Borgel v Paintearth (Subdivision and Development Appeal Board)*[*Borgel*], the Alberta Court of Appeal clarified that unless there is a prescribed statutory chronology for events, a municipal development authority must follow the deadlines provided in the MGA and need not wait for the provincial approval. In *Borgel*, the appellants appealed a decision of the Subdivision and Development Appeal Board ("SDAB") to issue a development permit in respect to a windfarm project. The project required both municipal and provincial approval from the Alberta Utilities Commission ("AUC"). The municipal development authority issued 74 development permits for the project approximately 10 months before the AUC issued its approval of the project. Within the window between municipal and AUC approvals, the appellants appealed the issuance of 10 of the development permits. The SDAB adjourned hearing the 10 development permit appeals until the decision of the AUC with respect to the project. Once the hearing took place, the SDAB upheld the 10 development permits. Permission to appeal the SDAB's decision was granted on a number of grounds, including whether the SDAB erred by failing to hold that subsections 619(2) and (4) of the MGA required the municipal development authority to wait for the AUC approval before issuing the development permits. The Court held that the SDAB correctly concluded that the municipal development authority was not required to wait for AUC approval before issuing development permits. Specifically, with respect to the timing of municipal and provincial approvals, the Court held that "The language of section 619 [of the MGA] does not prescribe a statutory chronology for events that is to be followed when an application is made to a municipality for a development permit or other approval with respect to a project that will also require an approval or authorization from any of the provincial bodies identified in the section … a municipality's development authority is required to make a decision on an application for a development permit within 40 days, absent a written agreement to extend by both parties" (paras 26-27).

Further, in accordance with section 619 of the MGA, the Court held that the SDAB was to approve the development permits to the extent that the applications were consistent with and complied with the AUC approval, and that the SDAB was not to address matters already decided by the AUC. Even though the provincial legislation does not prescribe which level of approval goes first (provincial or municipal), municipalities may wish to have the provincial process precede the municipal – this would result in the complex and lengthy hearing occurring before the provincial board, with any municipal hearing being more streamline. Further, because of the paramountcy of the provincial board's approval, the municipality may wish to intervene in the provincial proceedings to ensure that any municipal concerns are addressed.

Conclusion

Understanding that both provincial and municipal decision makers have a key role to play in many environmentally issues is critical to ensuring that appropriate considerations go in to development permit application reviews and approvals. Although the provincial regulation over environmental planning matters is extensive and can override municipal decision-making in certain instances, a municipal planning body still has a critical role to play when it comes to environmental regulation within its jurisdiction. If there is an overlap in jurisdiction between a municipal planning body and a higher level of government, a municipal planning body can still regulate environmental planning matters to the extent that there is no operational conflict in compliance, or with the purpose of the government regulation. Further, a municipal planning body need not wait for a provincial authorization before approving a planning application. However, in such a situation, we recommend the approval being granted subject to authorizations granted by other levels of government and/or specific performance criteria, which if not met would render the approval void.

The Brownlee Municipal Law Team is pleased to offer our services in a number of planning and development areas, including processing development permit applications, addressing environmental or cross-jurisdictional issues, and passing or amending land use 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).

Congratulations on the Education Subsidy

* Reminders *

If you are leaving your job or Alberta, please let us know…

This way we can keep our membership current.

Thank you for your cooperation!

- *Remember your membership is to you the Individual if you leave your job for whatever reason your membership stays with you for the rest of the year.*

ADOA Fees & Education Subsidy

Membership fees include a subsidy program for education to advance your knowledge. If you have any educational needs related to being a Development Officer please contact admin@adoa.net to apply.

Contributions Wanted

Would really like to hear from other municipalities!

- Perfect snapshot?
- Topics of concern?
- Spotlight an interesting or unique development?
- Have an original article you'd like to have published?
- Nominate a Development Officer for the spotlight?

Please make a submission at admin@adoa.net

2021-2022 Board of Directors

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