
CITY OF KELOWNA

MEMORANDUM

Date: March 5, 2004
File No.: 6480-00
To: City Manager
From: Planning and Corporate Services Department
Subject: Ability to Require Development Permits for Institutional uses

1.0 RECOMMENDATION

THAT Municipal Council receive the report dated March 5, 2004 from the Planning and Corporate Services Department for information.

2.0 BACKGROUND

City of Kelowna Council directed staff to investigate the ability to require Development Permit applications for Institutional uses in 2002. Staff reported their findings back to Council on December 9, 2002. During recent consideration of a rezoning application for an Institutional use (Sikh Temple), Council asked staff to update them on the issue of Development Permits for Institutional uses.

3.0 DISCUSSION

At Council's direction, staff consulted with the City Solicitor on the issue of the ability of the City to require Development Permits for Institutional uses with respect to the opinion letter received from Lidstone Young Anderson dated November 25, 2002. The City Solicitor advised that the original opinion would not be affected by the recent enactment of the Community Charter and that the opinion was still valid in its original form. The opinion was the basis for the staff report to Council dated December 5, 2002, a copy of which is appended to this report as Schedule A.

City Council passed the following resolution after considering the December 5, 2002 staff report:

R1022/02/12/09 THAT Municipal Council direct staff to prepare an amendment to the City of Kelowna Official Community Plan as described in the report from the Planning and Development Services Department dated December 5, 2002;

AND THAT the OCP amending bylaw be advanced to a public hearing;

AND FURTHER THAT Council's Task Force on the Community Charter be instructed to include in their review of the draft Charter, a request that local governments be given the ability to require development permits for all Institutional uses.

Carried

4.0 CONCLUSION

At the time Council passed the above noted resolution, the five year review of the OCP was still in progress. Staff made the decision to include the suggested amendments in the first revision to the OCP after the five year review was completed. Unfortunately, the five year review took longer to complete than either staff or Council would have desired. As such, the suggested amendments regarding Development Permits for Institutional uses, as outlined in the staff report to Council dated December 5, 2002, have only recently been initiated and are expected to be forwarded to Council as part of a package of OCP amendments to be considered later this spring.

Alternately, staff could separate these amendments and advance them sooner if Council so desires. In either case, Council had also directed staff to provide notice of this particular amendment to stakeholders such as the Urban Development Institute and Homebuilders' Association, which staff will do. Should Council members wish to receive a copy of the original legal opinion, staff can make it available outside of an open meeting of Council.

Andrew Bruce
Manager of Development Services

Approved for inclusion

R.L. (Ron) Mattiussi, A.C.P., M.C.I.P.
Director of Planning & Corporate Services

SCHEDULE A

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1.0 RECOMMENDATION

THAT Municipal Council direct staff to prepare an amendment to the City of Kelowna Official Community Plan as described in the report from the Planning and Corporate Services Department dated December 5, 2002.

2.0 BACKGROUND

City of Kelowna Municipal Council has frequently questioned why proponents of Institutional development proposals are not required to apply for a Development Permit application to address the form and character of Institutional buildings. To date, the Planning and Corporate Services Department has considered that since the relevant sections of the Local Government Act do not prescribe the ability to require a Development Permit application for Institutional development and that the Local Government Act is a prescriptive piece of legislation, a municipality did not have the authority to require Development Permits for Institutional developments. At the core, this position stands. However, recent advice from the City's solicitor suggest several options for requiring some Institutional developments to apply for and be subject to a Development Permit application.

3.0 DISCUSSION

3.1 Provisions of the Local Government Act

Section 919(1) stipulates an Official Community Plan may designate areas where Development Permits are required to address certain aspects of development. For the purpose of this discussion, the following relevant subsections of Section 919(1) list the potential purpose of a Development Permit area as follows;

- (d) revitalization of an area where commercial use is permitted;
- (e) establishment of objectives for the form and character of intensive residential development;
- (f) establishment of objectives for the form and character of commercial, industrial, or multi-family development.

There is an important distinction between subsection (d) and subsections (e) and (f). Subsection (d) contemplates that a broad but defined area may be identified as a Development Permit Area for the purpose of achieving certain objectives and subsections (e) and (f) contemplate that the Development Permit area is limited to

specific types of development (or development sites). Clearly, Institutional uses are not mentioned in subsections (e) and (f) and therefore it follows that a local government cannot require a Development Permit for a proposal that is specifically classified as an Institutional development. However, subsection (d) is not so specific as it deals with a broader but defined area. If any development, including an Institutional development, is proposed within a Development Permit area designated under the provisions of subsection (d), a Development Permit application can be required to address the objectives identified in an Official Community Plan.

In the Kelowna context, Map 6.2 of the City of Kelowna Official Community Plan designates Urban Centre and Village Centre Development Permit Areas under the provisions of S.919(1)(d) of the Local Government Act. Therefore, within these designated areas, any kind of development, including Institutional developments, should be required to be subject to a Development Permit application.

3.2 Use vs Zoning

As mentioned above, subsections (e) and (f) allow a municipality to designate Development Permit areas for a limited type of development based on specific land use. In the Kelowna context, we have not yet included a category for intensive residential development as provided for in subsection (e) although this is one avenue that will be investigated through upcoming discussions on residential infill policies. We have established provisions for requiring Development Permits as prescribed by subsection (f) in that Map 6.2 of the Official Community Plan identifies the following:

- Any development within the boundaries of the City of Kelowna on lands that are zoned for multiple family residential use shall be required to submit a Development Permit application; and
- Any development on lands that front onto roads shown red on Map 6.2 or Okanagan Lake that are zoned for commercial or industrial use, shall be required to submit a Development Permit application.

While this approach currently relies on zoning categories for the classification of types of development (i.e. commercial, industrial and multiple family), our legal advice implies that zoning categories are not the only way to make this determination. A building that contains a mix of uses including a commercial, industrial or multi-family use could fall under the provisions of a Development Permit requirement pursuant to Sec.919(1)(f) even if it is not within a commercial, industrial or multiple family zone. This clarification may help the Planning and Corporate Services Department review the Institutional zones found in the City of Kelowna Zoning Bylaw No. 8000 with the intent of clarifying what combination of uses can be considered strictly Institutional and what combination of uses would imply a mixed use with a commercial, industrial or multiple family component. This latter combination of uses could then be identified as requiring a Development Permit application. If zoning categories are no longer used to be the sole determination of development type, it also follows that a specific Institutional use in a commercial, industrial or multiple family zone would be exempt from a Development Permit requirement.

It is important to note that our solicitor made the distinction that the determination of what constitutes a commercial use must clearly be based on the use of land as opposed to the users of land. For example, it is unlikely that a public school and a private school could be differentiated because of the difference that one is a school open to all and the other is open only to those that pay tuition. Rather, the difference could be determined on whether the school was a business enterprise requiring a business license or not-for

profit school that did not require a business license. A very aggressive approach would be to consider that any use that requires a business license is a commercial use and therefore requires a Development Permit. This approach is not recommended by staff at this time as it would require an extensive review of the City of Kelowna Business Licensing Bylaw.

3.3 Government vs Private Sector

It has been the position of Council that the exclusion of Institutional uses from the provision for requiring Development Permit applications is rooted in protecting development by senior levels of government from being subject to design controls by local government. While this very well may have been the original intent, there is nothing evident in the Local Government Act that helps local government discern any difference between government Institutional uses and private sector Institutional uses. It is worthy to note that senior levels of government are not bound by local government bylaws, policies and regulations. However, it has been the experience of the Planning and Corporate Services Department that the majority of development by senior levels of government has complied with local practices.

3.4 Institutional uses and the Zoning Bylaw

The question has been raised by Council as to whether there are uses in the City of Kelowna's Institutional zones that could be transferred into other zones where a Development Permit can be required. Section 877 of the Local Government Act stipulates, in part, that an Official Community Plan must include statements and map designation for the area covered by the plan respecting the following:

- (b) the approximate location, amount and type of present and proposed commercial, industrial, institutional, agricultural, recreational and public utility land uses; and also,
- (g) the approximate location and type of present and proposed public facilities, including schools, parks and waste treatment and disposal sites.

The provisions under this section seem to be the only clear reference to Institutional uses with respect to a local government's obligation to identify them. There are no further references to Institutional uses in Division 7 of the Local Government Act that identifies how a local government can control or create zones in a zoning bylaw.

In the City of Kelowna context, the Official Community Plan does acknowledge present and some proposed Institutional land uses on Map 19.1, Generalized Future Land Use. Furthermore, some Institutional uses, such as churches, schools, parks and child care uses are identified to be included or ancillary with most of the residential land uses identified in the OCP. In general, Institutional uses have been established as having a closer relationship to residential uses than any other land use, such as commercial or industrial.

Given the relationship of Institutional use to residential uses, it would be difficult to rationalize moving all Institutional uses to a commercial land use designation due to the fact that commercial land uses have a more limited relationship to residential land uses. For example, if uses such as churches or schools are not found in an Institutional zone, what is an appropriate zone or land use category for them to be located in?

The Planning and Corporate Services Department does recognize that there are some uses found in our Institutional zones that may be closer to a commercial use than an Institutional use. Some of the uses can be removed from the Institutional zone yet others may still be valid ancillary uses to a pure Institutional use. For commercial uses that make sense in combination with Institutional uses, the approach outlined in Section 3.2

of this report can be used to require a Development Permit for those combinations of uses. The Planning and Corporate Services Department will review the Institutional zones in Zoning Bylaw No. 8000 and identify commercial uses that should no longer be permitted in those zones. However, due to the relationship between specific Institutional uses and other land uses within the City of Kelowna, it is not recommended to move all or even a majority of Institutional uses out of Institutional zones.

4.0 CONCLUSION

Current legislation and provisions of the City of Kelowna Official Community Plan allow staff to require a Development Permit for any development proposal within Urban and Village Centre Development Permit Areas. Furthermore, with some slight changes to the way uses are currently categorized and differentiated, staff will have the ability to broaden the scope of Development Permits beyond zoning categories. However, it is clear that pure Institutional uses, as the municipality chooses to define them, will remain exempt from the Development Permit process.

The Planning and Corporate Services Department recommends that Council direct staff to prepare an amendment to the relevant sections of the Official Community Plan that will achieve the following:

- Clarifies that Institutional uses within Urban and Village Centre Development Permit Areas are subject to a Development Permit application;
- For the purposes of determining Development Permit areas, broadens the definitions of commercial, industrial and multiple family uses beyond zoning categories; and,
- Clearly defines mixed use development that includes commercial, industrial or multiple family residential components as requiring a Development Permit, regardless of zoning.

The Planning and Corporate Services Department also undertakes to review the current Institutional zones in Zoning Bylaw No. 8000 to ensure that the permitted uses in those zones are consistent with an Institutional land use designation.

Andrew Bruce
Current Planning Manager

Approved for inclusion

R.L. (Ron) Mattiussi, A.C.P., M.C.I.P.
Director of Planning & Development Services