Clarity Required in Joint Use Agreements

Issue

Municipalities are now required to operate and maintain utility infrastructure on any private property which provides service to more than one parcel within a development versus entering into joint use agreements with developers.

Background

On August 1, 2019, the Alberta Court of Appeal issued a decision which requires municipalities to operate and maintain privately owned utility infrastructure on private property which provides service to more than one parcel within a development. Many municipalities have utilized joint use agreements effectively in a number of scenarios and developments in the past. Concerns are now arising that this decision has eliminated opportunity to use these types of agreements, resulting in significant impacts on municipalities and private industry throughout Alberta. This will likely result in municipalities and private development experiencing increased costs for operation and maintenance of utility infrastructure, with more stringent conditions on subdivisions, which will ultimately increase costs for taxpayers and property owners. This decision has the potential to impose a chilling impact on development, which is why municipalities and private development must be able to utilize joint-use agreements to manage privately owned infrastructure that services more than one parcel of land.

As a result of the Alberta Court of Appeal decision on August 1, 2019 [Citation: Condo Corporation No. 0410106 v Medicine Hat (City), 2019 ABCA 294]1 an enduring precedent has been established, requiring municipalities to take responsibility for the operation and maintenance of privately-owned water, sewer and storm infrastructure located on multiple parcels that service more than one parcel (i.e. shared infrastructure) previously considered the responsibility of a private owner. This decision affects all Alberta municipalities resulting in significant financial and administrative impacts.

The decision was based on a specific example whereby a condo community comprised of five adjoining parcels of land, each registered under separate titles with four parcels registered as Condominium Corporations. Four of the five parcels (one parcel is currently undeveloped) share some water, sewer and storm infrastructure. However, joint servicing agreements did not exist amongst the various Condominium Corporations. Shared services, such as found in the five-parcel development, is not uncommon in Alberta municipalities and has been a long-standing interpretation of allowance through the Municipal Government Act. In this instance, the applicant Condominium Corporations applied to the Court to require the City to operate and maintain the privately-owned water, sewer and storm infrastructure that was on privately owned lands. At the Court of Queen's Bench, the court held the City was not responsible for private infrastructure, but the decision was overturned by the Alberta Court of Appeal. As a result, the City has been directed to operate and maintain those privately-owned parts of the water, sanitary and storm infrastructure that service more than one parcel. As the Appeal Court decision is an interpretation of the duty to provide a utility service under the Municipal Government Act,

[1] Citation: Condo Corporation No. 0410106 v Medicine Hat (City), 2019 ABCA 294
https://www.canlii.org/en/ab/abca/doc/2019/2019abca294/2019abca294.html

the decision has implications beyond this one development, to other existing and future developments in all municipalities in Alberta2.

MGA Chapter M-26 does state that the Government of Alberta recognizes that Alberta's municipalities have varying interests and capacity levels that require flexible approaches to support local, intermunicipal and regional needs.3

Going on to state in 37(1) The owner of a parcel of land is responsible for the construction, maintenance and repair of a service connection of a municipal public utility located above, on or underneath the parcel. (2) If the municipality is not satisfied with the construction, maintenance or repair of the service connection, the municipality may require the owner of the parcel of land to do something in accordance with its instructions with respect to the construction, maintenance or repair of the system or works by a specified time

Restoration and costs

Within 39(1) After the municipality has constructed, maintained or repaired the service connection located above, on or underneath a parcel of land under section 37 or 38, the municipality must restore any land entered on as soon as practicable. (2) The municipality's costs relating to the construction, maintenance or repair under section 37 or 38 and restoration costs under this section are an amount owing to the municipality by the owner of the parcel.

References such as these within MGA Chapter M-26 give pause to why this decision was overturned in the court of appeal with the decision now resulting in new standards of interpretation being implemented.

Many municipalities have utilized joint use agreements effectively in a number of scenarios and developments in the past. Concerns are now arising that this decision has eliminated or significantly minimized the opportunity to use these types of agreements.

While the decision dealt with water, sewer and storm water, it likely applies to all municipal public utilities servicing more than one parcel and impacts whether municipalities agree to permit joint use agreements.

This decision will have significant impacts on municipalities and private industry throughout Alberta and is likely to result in municipalities and private development experiencing increased costs for operation and maintenance of utility infrastructure. Municipalities will start imposing more stringent conditions on subdivisions, ultimately driving up costs for taxpayers and property owners and resulting in a chilling impact on development.

The Alberta Chambers of Commerce recommends the Government of Alberta:

[2] AUMA 2019 Extraordinary Resolution https://auma.ca/sites/default/files/Events/Convention2019/2019_resolution_-_responsibility_for_utility_infrastructure_on_private_property_-_city_of_medicine_hat.pdf

[3] Municipal Government Act Chapter M-26 https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-m-26/latest/rsa-2000-c-m-26.html

1. Modify the Municipal Government Act to clarify that a municipality should not be responsible for the repair and maintenance of a portion of a “public utility” unless it is an owner of that portion of the “public utility” and to provide transitional provisions to address existing situations where infrastructure crosses parcel boundaries; and

2. Restore the ability for industry to utilize joint-use agreements to manage privately-owned infrastructure that services more than one parcel of land by clarifying the long-standing common interpretation of the Municipal Government Act that municipalities have no obligations of operation and maintenance for privately-owned portions of utility infrastructure, provided that construction of all infrastructure meets current codes, regulations and safety standards.