

Submitted to the City of Calgary, Business Advisory Committee: June 16, 2021

The Issue:

The City of Calgary in recent years altered the change of use application process to remove the requirement for applicants to provide a **signed letter of authorization by the property owner** and replaced it with a declaration signed by the applicant.

Unintended Consequences & Impacts:

- This change has resulted in significant unintended consequences impacting both property owners and tenants, in both cost and time, when an unauthorized, improper change of use application is submitted and approved;
- The removal of the letter of authorization has compromised owners' legal rights and interests, and the ability of owners to successfully manage properties for the best interest of the owners and tenants alike;
- See the attached **Memorandum** dated June 16, 2021 expanding upon the consequences and impacts with Detailed Industry Comments and Examples.

The Business Perspective: BILD's Member Comments

- Our shopping and business centres are designed and managed so that tenants are successful; the success of the centre is dependent on the success of the tenants; we do not want empty spaces and that is directly linked to our tenants doing well;
- To manage a first class retail centre; the tenant mix is curated and historically Change of Use process is a tool that is used as a management or control mechanism:
 - Owners attempt to curate a successful mix of uses;
 - Consideration is given to adjacency – some uses are compatible in proximity and other are not;
 - Parking – with the removal of parking minimums for commercial/retail uses, Owners are cognizant of Tenants' parking needs to support their businesses;
- Our role is to provide assistance and guidance to the tenants e.g. reviewing drawings and signage as well as making sure that the use is correct - we do not want to slow business down but rather help tenants' businesses thrive and prosper;
- Tenants often negotiate lease provisions which include exclusivity in certain uses, in their agreements; sometimes protecting for exclusivity in current uses / sometime protecting for potential future uses for business expansion; and there is significant potential for multiple use conflicts without the owners' diligent oversight;
- Tenants want protection – particularly given the difficulties for tenants' businesses since the economic challenges since 2014 and most recently with the impacts from COVID 19;
- A great deal of time, energy and cost has been expended for both Owners and Tenants alike with Subdivision Development Appeal Board (SDAB) – cannabis exacerbated the issue but the problem is significant and continues to exist beyond this specialized use;
- **By example**, on one Commercial/Condo project, there were change of use applications submitted on units that had not even been sold yet; At one time there were 20 active applications and the property developer/owner was aware of ONLY 2 of them.

The Solution:

Short term: Immediately **Reinstate the Owner's Letter of Authorization** as a requirement of the change of use application process

Longer term: Engage stakeholders to identify opportunities to improve efficiencies and preserve property owners' rights

Memorandum

Date: June 16, 2021
Issue: Change of Use Application Process
To: Business Advisory Committee, City of Calgary
From: BILD Calgary Region
Purpose: For Information – Seeking Direction on Action

Background

The City of Calgary in recent years altered the change of use application process to remove the requirement for applicants to provide a signed letter of authorization by the property owner and replaced it with a declaration signed by the applicant. It is understood the intent was, in large part, to streamline the application process for applicants. Unfortunately the change has resulted in significant unintended consequences impacting property owners and tenants alike, both in cost and time.

BILD and its members were not consulted regarding this change and did not have a prior opportunity to vet it for negative outcomes. However, it was brought to the attention of the BILD Commercial/Industrial Committee, when a member encountered an unauthorized application made by a tenant that resulted in significant costs and time to rectify the situation (see appendix example 1). Subsequently, other members have expressed concerns for the process change citing their own negative experiences as a result.

Industry Recommendations

The current process is extremely problematic. The letter of authorization from the property owner must be reinstated into the change of use application process to preserve property owners' rights, protect business owners and avoid liability of those involved in the process of issuing approvals which impact the legal rights and interests of others, and have unintended consequences.

Memorandum

Appendix 1

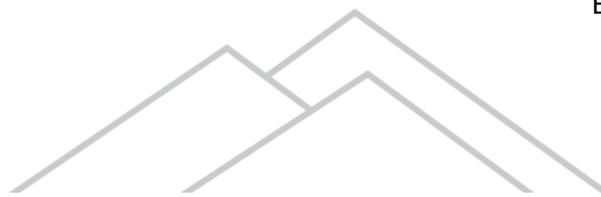
Detailed Industry Comments

The rationale for our concerns is set out in more detail below-

- Impact on Landowner Rights. Without landowner authorization for an application (or control over the application's processing or approval because it's not "their" application), a landowner loses a very basic right associated with land ownership – the right to control use and development of its land.
- Contrary to Landowner Interests. Non-owner applications may be contrary to a landowner's interests (business or otherwise) or its obligation to others involved with the lands. For instance:
 - A parcel may have many occupants such as a shopping centre. In that case, it is absolutely critical for a landowner or its agent to exercise control over those lands (e.g., ensure compatibility of uses, operational and management logistics, meeting business objectives, shareholder obligations, ensuring compliance with third parties). Approval of a non-owner application (processed without landowner authorization) does not allow a landowner to effectively manage and control its own land.
- Contrary to Legal Obligations. Non-owner applications may be contrary to a landowner's legal obligations or others. For instance:
 - A landowner may have an agreement with a tenant prohibiting the same or incompatible uses nearby (restrictive covenant). The details may be confidential and not registered on title. If the agreement is registered on title, it may be by way of caveat that references the existence of an agreement but with few (or no) details about the use restriction. Approval of a non-owner application (processed without landowner authorization) for uses prohibited in a restrictive covenant, puts that landowner in breach of its obligations to another tenant.
- Confusion with Multiple Applications. Landowners cannot navigate and manage multiple occupants and applications relating to their properties if they do not have notice of them and control them in some fashion. For instance:
 - A landowner may apply for a use that is not allowed within a certain distance of another use as per the land use bylaw, and the landowner's application may automatically be refused because an occupant received previous approval for a use thus triggering the refusal.
 - An occupant may have made application which was refused, and the landowner may be limited in making another similar application within six months of that refusal.
 - A non-owner applies for a permitted use without relaxations without landowner authorization, and the approving authority must approve the application.

Memorandum

- Unclear as to Who has the Right to deal with a Problem Application or Approval. Remedies available for a landowner to deal with a non-owner application that is being processed (or an approval that has been issued) is not always simple. There are questions as to who “owns” the application or approval, and who has the right to cancel or otherwise deal with the application or approval. Sometimes the applicant owns the application while it is being processed, and then the landowner owns the approval once it is issued because it “runs with the lands”. However, that line is very often not clear causing undue conflict and costs to address.
- Landowner Largely Responsible. A landowner is the main party responsible for what takes place on its lands, will most likely have to take the lead to rectify unauthorized applications, and will largely bear the monetary and other costs associated with correcting problems.



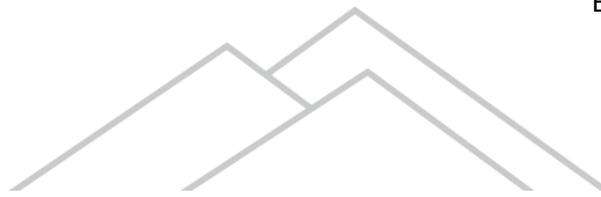
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Appendix 2

Industry Examples of Problematic Change of Use Applications

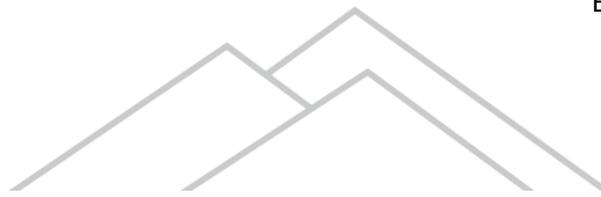
The following is a collection of random examples and not intended to be representative of all scenarios or comprehensive.

Example 1	<p><u>Scenario</u> An existing dry cleaning tenant applied for a change of use to a cannabis store (personal use to cannabis) without owner’s knowledge after owner had already undertaken negotiations with a different cannabis operator on a vacant space in the centre</p> <p><u>Impacts to owner</u></p> <ol style="list-style-type: none"> 1) Time spent trying (unsuccessfully) to compel the City to cease its review of the submission. 2) Lost credibility (and potentially a new tenant) with a group that was seeking the same use for a different location within the property. 3) Spent money to legally demand (via the court) that the applicant, who was not even our tenant, withdraw its application. 4) Pushed most of the legal costs back onto our original tenant that was working with the cannabis operator. This is a difficult thing to do with a small business that has otherwise been a good tenant. 5) Owner absorbed the remaining legal costs.
Example 2	<p><u>Scenario</u> Tenant gets a permit for a change of use and/or construction without owner approval; midway/after commencement tenant has financial difficulty; and tenant has insufficient security to satisfy all creditors including the City for unfinished work.</p> <p><u>Impacts to Owner</u></p> <ol style="list-style-type: none"> 1) Any unfinished work or problems will always fall back on the owner not the City 2) Owner must rectify and incur costs for a situation they were not aware of, nor authorize
Example 3	<p><u>Scenario</u> In 2018 an existing commercial tenant in a commercial center applied for a change of use DP to a “cannabis use” for their retail unit without owner’s knowledge or approval. In 2019, the owner submitted an updated DP for the commercial center including the commercial unit with the 2018 approved cannabis use. In 2020 the owner learned that the Cannabis Use” approved in the 2018 Change of Use DP has now lapsed; however, the 2018 Cannabis Applicant is still in control of the Cannabis Use in the shopping center. Therefore, as the owner was not an entity on the 2018 Change of Use DP they are not in control of the “cannabis use” within their shopping center and now need to go through a process</p>



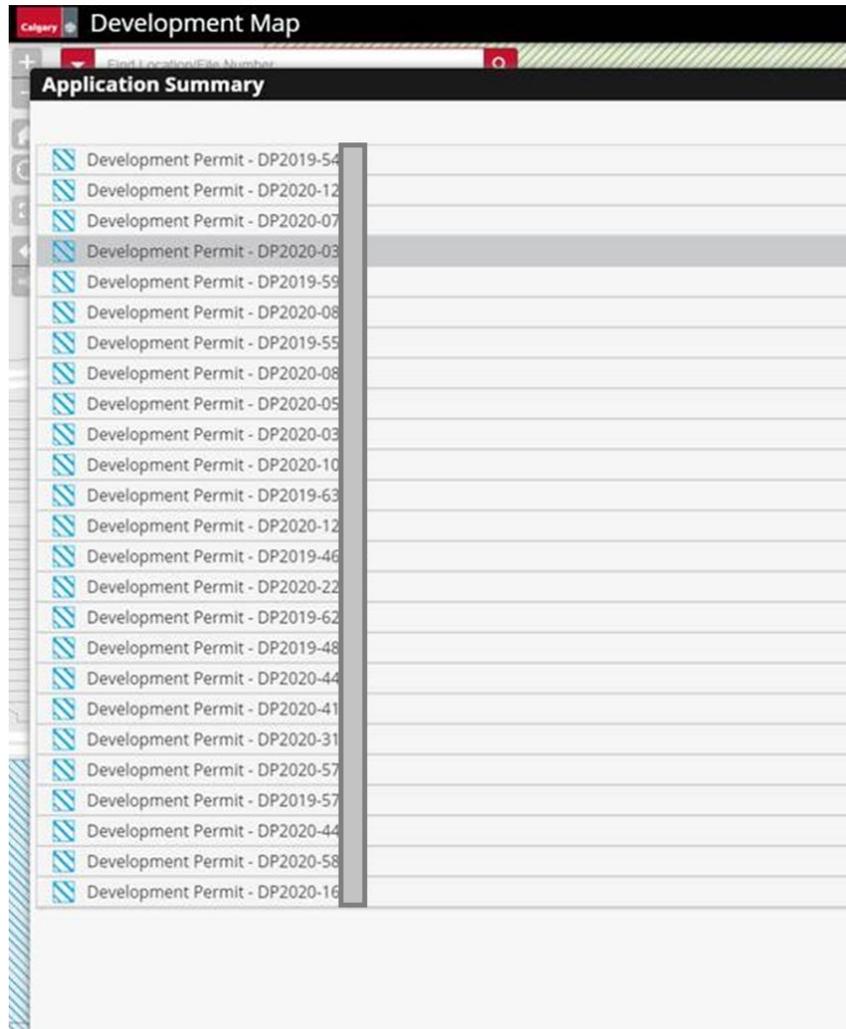
Memorandum

	<p>to try and obtain control of the “Cannabis Use” within their own shopping center as owner would still desire to have a Cannabis Store at the shopping centre.</p> <p><u>Impacts to owner</u></p> <ol style="list-style-type: none"> 1. Time spent trying to work with the City to sort out the uses on the Shopping Centre site. 2. Delay in leasing of a “cannabis use” within the shopping Centre 3. Difficult to control the site, makes the lease deals difficult, risk of appearing disorganized, co-tenancy challenges could arise when the owner is not informed of the proposed “Change of Uses”
<p>Example 4</p>	<p><u>Scenario</u> An application is placed by an authorised agent of a party (with legal or equitable interest) applies for a DP on behalf of a party that has an easement, mortgage, etc. If the DP is for a permitted use with no relaxations, the City has to approve the DP.</p> <p><u>Impacts to owner</u></p> <ol style="list-style-type: none"> 1) There are limited rights of appeal to the SDAB for permitted uses with no relaxations, and the SDAB has typically said that they won’t wade into whether a registration on title is valid. 2) The owner may have little to say about the City’s issuance of the DP to the applicant because 1P2007 says the legal or equitable interest holder (or authorized rep) can apply, and the SDAB refuses to wade into whether that legal or equitable interest is valid.
<p>Example 5</p>	<p><u>Scenario</u> A Tenant wanted a change of use and discussed with the owner. The owner went and prepared a “Change of Use” application and went down to the City to submit only to find there was already a “Change of Use” DP approved for the tenant’s space. The owner was confused and followed up with the Tenant. The tenant was confused as they had not prepared the application; however, the Tenant’s consultant had gone ahead and prepared the “Change of Use” DP application and submitted without the Tenant or owner being notified. The consultant had not selected the same use as the owner; this situation caught a number of parties by surprise.</p> <p><u>Impacts to owner</u></p> <ol style="list-style-type: none"> 1. Time spent preparing the application for a commercial unit. 2. Surprise to learn at the City of Calgary counter that another Change of Use DP had been recently approved for the same commercial unit. 3. “Change of Use” DP process is hard for owners to track when they are not informed of changes happening in their commercial Centre(s)

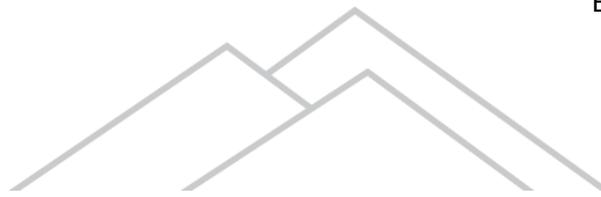


Memorandum

4. A new community shopping centre site has multiple (over 15) change of use DPs and the owner has only undertaken two (2) DP for the shopping centre as per the screen shot list below



Application Summary	
<input type="checkbox"/>	Development Permit - DP2019-54
<input type="checkbox"/>	Development Permit - DP2020-12
<input type="checkbox"/>	Development Permit - DP2020-07
<input type="checkbox"/>	Development Permit - DP2020-03
<input type="checkbox"/>	Development Permit - DP2019-59
<input type="checkbox"/>	Development Permit - DP2020-08
<input type="checkbox"/>	Development Permit - DP2019-55
<input type="checkbox"/>	Development Permit - DP2020-08
<input type="checkbox"/>	Development Permit - DP2020-05
<input type="checkbox"/>	Development Permit - DP2020-03
<input type="checkbox"/>	Development Permit - DP2020-10
<input type="checkbox"/>	Development Permit - DP2019-63
<input type="checkbox"/>	Development Permit - DP2020-12
<input type="checkbox"/>	Development Permit - DP2019-46
<input type="checkbox"/>	Development Permit - DP2020-22
<input type="checkbox"/>	Development Permit - DP2019-62
<input type="checkbox"/>	Development Permit - DP2019-48
<input type="checkbox"/>	Development Permit - DP2020-44
<input type="checkbox"/>	Development Permit - DP2020-41
<input type="checkbox"/>	Development Permit - DP2020-31
<input type="checkbox"/>	Development Permit - DP2020-57
<input type="checkbox"/>	Development Permit - DP2019-57
<input type="checkbox"/>	Development Permit - DP2020-44
<input type="checkbox"/>	Development Permit - DP2020-58
<input type="checkbox"/>	Development Permit - DP2020-16



Memorandum

Additional General Comments

Large tenants in Commercial Centres frequently have a variety of 'exclusive uses' within their lease agreements which protect for the large tenant's current use and potential future uses – many of which may not be apparent based upon the primary use. Other tenants are not apprised of those agreements and, in the current process, can (and do) make change of use applications for uses that are protected by existing lease agreement with other tenants.

Condominium Boards are responsible for overseeing management of condominium property. Under the current change of use process, individual tenants, and even unit owners themselves, would not be required to obtain the permission of the Condominium Board in order to submit a change of use application. It may be worthwhile considering this unique circumstance in the seeking ultimate solutions.

Other Alberta municipalities (which are subject to the Alberta Municipal Government Act and related provincial legislation), including the City of Edmonton, DO require the property owner's authorization in processes comparable to Calgary's change of use process.

From industry's perspective, the prior change of use process was well-established and reasonable, and worked well before this process change