



Memo

July 28, 2021

To: Business Advisory Committee (BAC)

From: Law

Re: **Follow-up on Stakeholder 'What We Heard' Report (2021-0434)**

Purpose

This memo provides a response from Law to the Business Advisory Committee (BAC) on the 2019 confidential whiteboarding session ("Whiteboarding Results") with certain external legal counsel (the "Stakeholders") to receive feedback on City Land Transactions.

Background

On September 11, 2019 the Stakeholders participated in a confidential whiteboarding session with the Business Advisory Committee to provide feedback on City Land Transactions. Law was unaware of the meeting, did not attend and excepting two individuals, participant identity was undisclosed and remains unknown to Law. The results of the session were provided to the City Solicitor & General Counsel informally in early 2020 and formally during the BAC meeting March 17, 2021.

Conclusions

- Many of the issues raised in the BAC report are not within the purview or control of Law and were forwarded to Real Estate & Development Services (RE&DS) for further handling.
- The Whiteboarding Results do not reflect uniform experience across the law firms with which The City conducts the most land transactions. Further, some of the concerns raised were situation specific that had been previously raised with Law and reviewed, and either addressed or concluded to have no merit. The remaining concerns suggest Stakeholder misunderstanding about The City's land transaction process, setting of corporate risk tolerance, the importance of legal advice in supporting the advancement and protection of corporate interests for collective citizen and local business benefit, and Council and Administration's entitlement to confidential legal advice. Details are below to clarify misunderstandings.
- City Council establishes the risk tolerance for the corporation. Law supports informed decision making within corporate risk tolerance through the provision of advice on legal issues, business practice and

risk. As is the case with any legal advice, the client (whether Council or members of Administration) is entitled to confidential legal advice that is protected through privilege. That advice forms one input into the decision-making process.

- Law has always been and continues to be amenable to discussing issues, opportunities and otherwise collaborating with members of the legal profession on file specific matters, legal service delivery generally, matters associated with the legal profession, and corporate governance and procedure. Individuals are strongly encouraged to discuss concerns with the Manager of the particular Section, Deputy City Solicitors or the City Solicitor & General Counsel.

Analysis

The Whiteboarding Results were condensed with limited detail, and further discussion was necessary to fully understand and respond to the results. Despite requests for Stakeholder names so that meetings could be held to explore concerns, the names of attendees were confidential and only two participants agreed to be identified. Two meetings were held in early 2020 with those individuals and resulted in some minor modernization improvement opportunities in the real estate practice.

Since the identity of all Stakeholders was unknown, it was impossible to have full engagement and explore the issues of concern. As such, Law connected with members of the most frequent law firms with which The City conducts real estate transactions (some of whom were not participants in the Whiteboarding session) to provide input and feedback on the Whiteboarding Results.

Law's Engagement revealed:

- Whiteboarding Results do not reflect uniform experience with Law;
- Law's participation in Real Estate transactions is considered beneficial by third parties in bringing land transactions to completion; and
- Confirmation that when concerns arise with any member of Law, external law firms contact the City Solicitor and General Counsel, Deputy City Solicitors or Manager of the relevant Section directly.

The engagement also enabled useful discussion about opportunities for technology improvements within Law. The lawyers we spoke with were extremely generous in sharing their thoughts and experiences, for which we are very appreciative. This information has proven particularly helpful, as Law is currently developing its technology strategy as recommended in the 2020 ZBR. As this strategy is developed, there may be a need for further technology investment, but it is too early in the process to make that determination.

Response to Whiteboarding Results

The organization of the Whiteboarding Results made it difficult to respond to the items raised, so the concerns were regrouped into three general categories: unclear roles and responsibilities; transparency of process; and business considerations. The concerns were then analyzed to determine:

- a. which business unit the concerns were most appropriately assigned for handling and response;
- b. quick wins that could be immediately implemented; and
- c. issues where further dialogue would be helpful.

A summary of the Whiteboard concerns and responses to the specific questions are contained in Attachment 1.

Many of the concerns raised reflect what appears to be a stakeholder misunderstanding of the corporate land transaction process, who sets corporate risk tolerance and the role of legal advice in the decision making process, the importance of and entitlement to legal advice to support informed decision making by Council and Administration, and government limitations and the important role the private sector has in helping to realize improvement opportunities. A brief explanation is provided under the following headings to help clarify any misunderstanding.

Corporate Land Transaction Process

Corporately, The City has a robust framework governing land transactions. The framework consists of applicable legislation and Council approved policies and bylaws. Much of the framework is based upon experience from historic transactions. Guided by the framework, purchase and sale transactions are negotiated by Land Agents in RE&DS and high-level terms and conditions are set out in a non-binding offer letter between the parties. Law is then engaged as the specifics of the deal are worked out. Once the business terms of a transaction have been settled by those having the authority to do so (either Administration or Council depending on the nature of the transaction), Law implements the instructions and completes the transaction including preparation of agreements and supporting documents and completing the transaction through the Alberta Land Titles Office. Both Law and RE&DS must ensure that that agreements and supporting documents align with approvals, and when they do not, additional approvals are required.

Corporate Risk Tolerance

City Council determines the corporate risk tolerance.

Law provides advice to both City Council and members of Administration on legal issues, business practice and risk to support informed decision making. This advice is necessary to support the decision maker's understanding of risk and decision to accept, mitigate or eliminate risk, resulting in decisions that are made within corporate risk tolerance. Council does not set a uniform risk tolerance for the corporation,

and risk tolerances of individual Council Members and different Councils (following each election) may differ, resulting in a somewhat unpredictable and evolving corporate risk tolerance.

Legal Advice to Support Informed Decision Making

The practice of law is a professional endeavour regulated by the Law Society of Alberta, and all lawyers practicing in Alberta are subject to the Law Society's Code of Conduct. Lawyers are required to provide confidential legal advice and act in the best interests of their clients. As an in-house law department, Law only has one client, The City of Calgary, and to discharge our professional obligation, members of Law provide confidential legal advice to decision makers (Administration and City Council). This enables decisions to be made in the best interests of The City (and by extension citizens and local businesses) above all else. Advice on legal issues, including identification of risk and opportunities to accept, mitigate or avoid such risk must not be confused with an absence of risk tolerance. Rather, that is the very advice required to support decision making that is intentional, informed and within the corporate risk tolerance.

Lawyers acting for third parties have the same duty to their clients and are almost certainly providing confidential legal advice to support their clients' decision-making.

While The City and a third party may appear aligned in interest when pursuing a mutual outcome (such as the purchase and sale of land), throughout the negotiation each party will make many individual decisions in accordance with their interests to arrive at a conclusion. What may seem to be a simple transaction on the surface can ultimately lead to complicated litigation if things go awry. It is therefore important to be aware that from a legal perspective, the parties must be considered potentially adverse in interest and each must understand their specific legal risks as part of informed decision making. This underscores the necessity and importance of confidential legal advice for decision makers, whether Council or Administration, whether in a closed or public Council discussion or a business meeting.

Based upon the Whiteboarding Results, it appears that external stakeholders may misunderstand Administration's and Council's entitlement to confidential legal advice and its important role in supporting intentional and informed decision making within corporate risk tolerance. This supports the advancement and protection of corporate interests for collective citizen and local business benefit. It also seems that in years past, Council and certain members of Administration may have foregone confidential legal advice in the context of land transactions. Although that may have been the case (on which we are only able to speculate), it does not negate the requirement of lawyers to abide by the Law Society's Code of Conduct, it is not a recommended practice as it does not further fully informed and intentional decision making within corporate risk tolerance, and it does not prevent Council and Administration from exercising that right in the present and future.

Government Limitations and Private Sector Role in Realizing Improvement Opportunities

Government entities, such as municipal corporations, must operate within the scope of their legislation (the Municipal Government Act), appropriately delegated authority (The Real Property Bylaw) and with as much fairness, openness and transparency as reasonably possible. These constraints can sometimes lead to cumbersome processes that are absent from business practices in the private sector.

Standardization of processes and agreements allows for predictability and efficiencies for external parties and citizens. While it is important to be flexible when circumstances warrant it, it should be noted that customizing processes and agreements results increases turnaround time and delay for not only the individuals involved in the immediate customization, but it also delays the completion of third party items in the workflow. Balancing standardization with innovation when appropriate can be challenging and Law is committed to a continuous improvement mindset, including understanding private sector challenges and providing advice to decision makers when asked to modify standardized agreements and processes. Law is interested in pursuing the resolution of issues expeditiously and welcome feedback from external lawyers who have concerns with how a file is progressing. However, it is important to remember that members of Law provide legal advice to support informed and intentional decision making within corporate risk tolerance and have a professional obligation to ensure its advice does not compromise the interests of its client.

Law is committed to maximizing the value of its service to the corporation and by extension to the citizens and businesses of Calgary, and actively support the corporate goals embodied in the Rethink to Thrive Strategy, which includes discussing and addressing corporate barriers that business stakeholders face in their everyday operations. To that end, we are currently implementing the Law Zero Based Review (ZBR) recommendations which identified strategies to deliver resilient legal services to Administration and Council in a continuously evolving environment with workloads that are continuing to increase in volume, velocity and complexity. We are interested in conversations with all members of the legal profession, including the representatives from the confidential Stakeholders group, to explore best practices, such as the enhanced use of technology, as part of our continuous improvement commitment.

Further questions can be directed to Denise Jakal, Deputy City Solicitor at denise.jakal@calgary.ca or David Mercer, Manager Planning & Real Estate at david.mercer@calgary.ca.

Sincerely,

Jill Floen
City Solicitor & General Counsel
Law, Legal Services

Denise Jakal
Deputy City Solicitor – Corporate
Law, Legal Services

David Mercer
Manager, Planning & Real Estate
Law, Legal Services

cc: David Duckworth, City Manager
Christine Arthurs, General Manager, People, Innovation & Collaboration Services