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Gardening on Vacant Land –Through Calgary's Lens

By David Laidlaw

Comment:
Gardening on Vacant Land in Calgary – Part II

The ABlawg post Part I of Gardening on Vacant Land in Calgary, Verdant History, Volatile Endeavor, described the rich history of gardening on vacant land in Calgary, and discussed law and policy challenges posed by the *Occupiers Liability Act*, RSA 2000, c O-4. This ABlawg post turns to issues of vacant land use for gardening in Calgary.

Land Use Regulation in Calgary – A Long History

Land use regulation in Calgary has a long history. The "Great Fire of 1886" that destroyed 14 buildings, fortunately without any injuries, led to perhaps the earliest regulation that mandated fire resistant materials such paskapoo sandstone in "buildings frequented by the public". Some 250 sandstone buildings were built (link) and the National Historical Register lists 50 sandstone buildings in Calgary (link) with many others not listed being used today. Similar early building codes included locations where certain kinds of buildings could be built.

After Alberta became a province in 1905, the *Land Titles Act*, SA 1906, c 24 was passed. This act included subdivision provisions which included requirements for every lot in a subdivision to have road access, road widths were set at 60 feet and alleys as 20 feet etc. The developers of subdivisions would often impose "restrictive covenants" that benefited and burdened all of the lots in the subdivision. These covenants were registered against title and they "ran with the land," any subsequent purchaser would buy the lot subject to the terms of the restrictive covenant. Getting agreement to amend the covenants would require approval from all the other lot owners in the subdivision - an almost impossible task. These covenants were a "building scheme" described by Justice Slatter in *Potts v McCann*, 2002 ABQB 734 (CanLII) at paragraph 42 "... as a method of providing planning control over lands at a time when municipal planning was in its infancy, if it even existed." Scarboro is an example of this as is Mount Royal, Hillhurst etc. The lands in Scarboro were originally owned by Canadian Pacific Railway, annexed to Calgary in 1907 and subdivision plans were approved in 1910-11 that included restrictive covenants such as a minimum thirty-foot setback and the construction of only single-family residences (link). These restrictive covenants are not enforced by the City and owners must go to court to enforce or contest these restrictive covenants.

The Calgary Planning Commission was established in 1911 and one of its first steps was to hire Thomas Mawson, an internationally renowned planner (link) to prepare a report (link) that envisioned a radically different Calgary. While the *Town Planning Act*, SA 1913, c 18 was passed – a real estate collapse and World War I intervened to derail any serious efforts in urban

planning. The Mawson Report was ignored, perhaps in part because implementation would have cost an enormous "$10 million dollars in 1914."

The next flurry of planning legislation in Alberta came about in 1928 and 1929 when Alberta passed the *Town Planning Act*, SA 1929, c 49 described as "… one of the most comprehensive planning acts adopted anywhere in Canada up to this time", from J. David Hulchanski, "The Origins of Urban Land Use Planning in Alberta, 1900-1945 (PDF). The Great Depression intervened and little planning was done but Calgary did develop its first Zoning Bylaw No. 2835 in 1932 (effective July 23, 1934). Development would now be subject to zoning which specified what could be built in an area.

The first Zoning Bylaw takes 12 legal sized pages of closely typed text consisting of 14 sections of some complexity. In section 3, Calgary was divided into nine districts: (A) Single Family; (B) Two-family; (C) Multiple-Dwelling; (D) Local Commercial; (D-1) Intermediate Commercial; (E) General Commercial; (F) Light Industrial; (G) Factory and (H) Unzoned. Within each district certain types of buildings were permitted with allowable heights, set-backs and front yard requirements; the uses of land and buildings were set out and even some architectural restrictions. An example of architectural controls is in section 12 (2)(b) where "[a]ny room which is used or is designed to be used as living quarters by human beings shall have an opening window facing on a street, lane, yard or court. [not being an inner court]." Uses were regulated, for example in the Single Family District (A) section 5 provided:

> 5. Single Family District - In (A) Single Family Districts:
> (1) Only the following buildings and use of buildings and land are permitted:
> (a) Single family dwellings.
> ……
> (e) Use of land only, for nurseries, farming, or truck gardening.

Two-Family (B) and Multiple Dwelling (C) Districts all permitted the uses allowed in Single Family District. Scarboro was zoned as a Single Family District. The front and side-yard measures in the first Zoning Bylaw have set the pattern for residential construction to this day.

In this first Zoning Bylaw there was an enforcement mechanism and an appeal process to the Calgary Zoning Appeal Board. Relaxations to zoning were permitted on application to the clerk and refusals could be appealed to the Calgary Zoning Appeal Board.

The end of World War II and in particular the discovery significant reserves of oil at Leduc No. 1 in 1947 saw a boom in real estate development in Alberta. The 1948 & 1958 amendments to the Planning Act required approval from the Minister for Municipal affairs on development in "proposed subdivisions located in an area which is not subject to the provisions of a zoning bylaw" as an interim measure pending the development of such bylaws. Bylaw 4271, effective March 1, 1952 Calgary created a development control model whereby developments required approval by the relevant Planning Commission. The Planning Act was consolidated in 1953 and Edmonton and Calgary were delegated subdivision approval authority and permitted to establish general plans.

However Calgary returned to the zoning model with Zoning Bylaw 4916 effective June 19, 1958. This bylaw expanded the Districts to 24 categories and incorporated "permitted uses" and "conditional uses" which were listed for each district. Permitted uses were those allowed automatically in certain zones and conditional uses were allowed on application to the Planning

Commission under section 7(1)(b) and 11. Bylaw 4916 was replaced with Zoning Bylaw 7500 on February 3, 1969 that expanded and continued the use of zones and permitted and conditional uses.

Alberta's planning legislation was amended with the passage of *The Planning Act, 1963*, SA 1963, c 43 (Act) this continued the practice of municipalities to make a General Plan but these General Plans now required public hearings and reviews every five years. Calgary developed a General Plan through bylaw 597 which was initiated before the new Act but approved after the new Act became effective without engaging in public hearings. The Alberta Court of Appeal in *City Abattoir (Calgary) Ltd. v Council of City of Calgary* (1969), 70 WWR 460 ruled on September 12, 1969 that the Calgary plan was invalid and Bylaw 7500 was a nullity. The old Bylaw 4916 was also invalid because no new plan was ever made within the 5 year review requirement.

For six months Calgary had no regulation of land development. Calgary passed a new Development Control Bylaw No. 7839 on March 16, 1970 and the general plan was "refreshed" by a resolution of City Council in September 22, 1969 to prepare a new General Plan: *City of Calgary and Pai-Lin Li v The Queen ex ret. Otto Bartel Homes Ltd.*, [1972] 5 WWR 644 (ABCA). The General Plan for Calgary was subsequently adopted in 1970. Bylaw No. 7839 provided, for the first time in section 3 that no development could be made without a development permit. The exceptions were set out in section 5 which mirrored the current exceptions.

Out of an abundance of caution, City Council passed bylaw 8600 on May 29, 1972 which revoked all of the previous bylaws. Any developments made prior to May 29, 1972 were safe but thereafter all new developments, including changes to existing developments, required a development permit: *Riverdale Properties Ltd. v Calgary (City)*, [1973] 3 WWR 558 (ABCA).

The *Planning Act, 1977*, SA c 89 was the product of some 5 years of negotiation and public consultation. Significantly while it did mandate a Municipal General Plan it did not require a review of the General Plan every five years as had the old *Planning Act, 1963* which led to the problems in Calgary. Calgary enacted Bylaw 2P80 on March 31, 1980, now entitled the Land Use Bylaw this new term reflected Alberta's blend of development control and zoning. This has been replaced in 2007 with a new Land Use Bylaw. Additional historical links are at the bottom of this post.

Current Land Use in Calgary

Land use in Calgary is governed the Land Use Bylaw, Bylaw 1P2007 (large PDF) passed pursuant to requirements of section 639 of the *Municipal Government Act*, RSA 2000, c M-26 (MGA - link) in 2007. The Land Use Bylaw (LUB) is used as a tool for implementing Calgary's Municipal Development Plan, Area Structure Plans, Area Redevelopment Plans (made under sections 632, 633 and 634 MGA respectively) and other municipal policies such as Transportation Planning. A Community Guide to Planning Process (CGPP) outlines these policies and their interaction and can be found here (large PDF). The LUB is described by the City of Calgary's website as a hybrid of two approaches to regulating the use of land and involved:

- *Zoning* which establishes land use zones along with rules governing what can be developed. If a proposed development meets the rules, it is approved.

- *Development Control* creates land use districts with rules governing what can be developed and how it must be built in each district. Every proposal is evaluated on its own merits and in the context. The public can comment on the development before a decision is made and an appeal from that decision is allowed.

Calgary's Land Use Bylaw includes two types of uses in every land use district:

- permitted uses which mirror the zoning approach in that proposed developments that meet the rules must be approved and there is no public comment or appeal; and

- discretionary uses which mirror the Development Control model in that each proposed development is circulated for comment, evaluated on its merits and the decision can be appealed.

There is a third category, that of Direct Control (DC) designation which involves a specific bylaw that is made for one area or project and includes the rules of use and development for that area. Each DC is a separate land use district and passage or change requires public hearings by City council.

The approach in the Land Use Bylaw gives property owners some certainty as to what they can build on their lands as well as added flexibility for special types of development under the DC category. The cost is added complexity with some developments being governed by as many as five or more regulatory documents.

The Land Use Bylaw specifies three general categories of lands:

- Downtown Core (Map 1 at page 2 in the current Land Use Bylaw) governed as a "temporary measure" by Part 10 of 1P2007 which is the re-purposed old Land Use Bylaw 2P80 (large PDF);
- Developed Area (Map 2 at page 16 in the current Land Use Bylaw); and
- Developing Area includes areas appropriated from local municipalities and generally speaking are lands set aside until development plans can be finalized. A map indicating the history of land annexation in Calgary is located here.

The boundary between the Developed Area and Developing Area is fixed and will not change. This distinction in described in the CGPP at page 28, as:

> In a Developed Area, property owners want assurances that redevelopment and additions will respect the pattern of development already established. Residential districts for use only in the Developed Area contain a "C" in the district notation (i.e. R-C1, R-C2, M-CG, M-C1) for "Contextual." Contextual rules mean that new developments must take into consideration existing building height, massing and setbacks of neighbouring properties. In a Developing Area, where no established pattern of development yet exists, the focus is on ensuring efficient development and providing opportunities for innovative housing.

The particular classification of a parcel can be identified using the maps which are appended to the LUB. These can found at the City Clerk's Office or they are accessible through the City of Calgary's website here (but reference should be made to the official plans). My Property is a

link to an interactive map of Calgary that can identify by address a parcel's details of zoning category, policy documents that apply, and the status of building permits, development permits (in the past three years) and pending change of use applications.

Gardening as a Development?

"Development" is broadly defined in the MGA in clause 616 (b) as excavations, construction or a change in the use or intensity of the use on land. The Land Use Bylaw duplicates the MGA in subsection 13 (52), as follows:

(52) "*development*" means:

a) an excavation or stockpile and the creation of either of them;
b) a *building* or an addition to or replacement or repair of a *building*, and the construction or placing of any of them on, in, over or under land;
c) a change of *use* of land or a *building* or an act done in relation to land or a *building* that results in or is likely to result in a change in the *use* of the land or *building*; or
d) a change in the intensity of *use* of land or a *building* or an act done in relation to land or a *building* that results in or is likely to result in a change in the intensity of *use* of the land or *building*.

Under section 23 of the Land Use Bylaw there can be no lawful development in Calgary without a development permit unless exempted in the bylaw.

Section 25 lists specific exemptions. Some notable exemptions include:

- a fence - 1.2m high for front yard fences, 2.0 m for backyard fences and .75m on corners in residential areas with height not being limited in industrial zones
- a deck being within 0.3m at the main building and 1.5m above grade not in a setback
- retaining walls of less than 1.0m height
- internal modifications unless the intensity of the use is changed
- a temporary "party tent" on the same land as a drinking establishment
- the use as a motion picture filming location for less than a year
- city projects, utility projects
- temporary political offices
- festival facilities under City sanctioned events or the Parks and Pathways Bylaw.
- Secondary suites 75m^2 or less when listed as a "permitted use" in the Land District
- minor additions i.e. first floor additions of 40m^2 or second story additions of 10m^2 in the Developing Area.

There is no explicit reference to gardening as an exemption.

Is a Development Permit Required for a Garden?

In *R v Reid*, 2006 BCCA 251 (CanLII), the British Columbia Court of Appeal was dealing with a significant change in elevation on lands without a development permit in Vancouver. The Court noted that

> [5] …… Mr. Reid then deposited and distributed soil, gravel and other materials on his property (the "materials") such that the backfilled area covered an area approximately 20' x 20' and reached a height of three feet where it adjoined the retaining wall at the southwest corner of the property.

It was agreed that the construction of the retaining wall did not require a development permit under Vancouver's Charter. The issue revolved around the definition of development in section 559 of the Charter namely that: "development" means a change in the use of any land or building, or the carrying-out of any construction, engineering or other operations in, on, over, or under land" [Emphasis added]. At trial in Provincial Court, and on appeal to the Superior Court Mr. Reid was exonerated because even though it was found that he substantially changed the elevations - his actions did not constitute a development within the definition. However at the Court of Appeal that Court characterized Mr. Reid's actions differently at paragraph 22:

> The effect of this activity was to raise the level of the land over an area 20' x 20' by up to three feet or so to the point where it abutted the southwest corner of the property. …. This activity cannot be equated with the simple deposit or distribution of small volumes of soil or other materials to make flower beds or to reconfigure existing flower beds such as is done by hundreds of gardeners every spring in tending their gardens. Those types of deposits do not alter the configuration of land and could not reasonably be viewed as a "development" requiring a permit. [Emphasis added]

Thus in Vancouver at least, "…not every deposit or distribution of materials on land will amount to a development or trigger the need for a development permit. In this context, only those operations which significantly alter the configuration of land raise legitimate regulatory concerns." (at para 29).

Your Grandparents Garden?

Reid is a British Columbia Case and is not binding on Alberta Courts. While the Vancouver Charter is not strictly comparable, the scheme of the respective Land Use Bylaw and Vancouver's Charter are similar and in particular their silence on dealing with "…hundreds of gardeners every spring in tending their gardens." Given the emphasis in *Reid* characterizing gardening as involving "the simple deposit or distribution of small volumes of soil or other materials" one possible exemption is in subsection 25(r):

(r) excavation, grading or stripping provided:
  i) the area of land to be excavated, stripped or graded is less than 1000.0 square metres;
  ii) it is part of a *development* for which a *development permit* has been released; or
  iii) the person carrying out the excavation, stripping or grading has signed a Development Agreement with the *City* for the area to be excavated, stripped or graded and that Development Agreement contemplates excavating, stripping or grading;

If gardening is included in the category of development as being "excavated, stripped or graded" then new gardens of roughly 2 standard urban lots of 50 ft by 100 ft are allowed without a development permit in the Developed and Developing Areas in areas where a development permit has been released.

There is a missing "or" between (i) and (ii) which may be deliberate – the older version Bylaw 2P80 includes the missing "or". This omission may be significant if the exception is read to say "(i) the area of land to be excavated, stripped or graded is less than 1000.0 square metres; [*and*] (ii) it is part of a *development* for which a *development permit* has been released." There are many areas, such as Scarboro where development permits have never been released. While

Bylaw 8600 which revoked all prior development bylaws and ensured that older developments were "grandfathered in" that bylaw does not mention the release of development permits. Further, there is an issue when a building was renovated or rebuilt with a development permit whether that qualifies the land as "a part of a development where development permits have been released."

Counter staff at the Development Department disagree as to the applicability of the exemption in 25(r). Their argument is that gardening is not just a simple deposit or distribution of soil but includes *planting* and this would convert the land use into a "storage yard" for produce. This counter advice is not necessarily the official position of the Development Department or the City but does suggest how the City may react to a claimed exemption from Development Permits under 25(r).

Home Gardens

Counter staff also advised that Calgary's Development Department does not concern itself with owner's gardens in residential areas, including multi-family residential districts, as that is considered an associated use of a dwelling unit ***provided*** the produce is not used for a purpose which requires a business licence. Business Licences are administered by the same Department of the City.

The principle Business Licence Bylaw is 32M98 (PDF), there are other specific business licence requirements such as the Concert Bylaw, Exotic Entertainers, Downtown Pushcarts etc. that do not apply to gardening. The purpose of licensing businesses is described at the City Website (link) as ensuring public safety, assisting legislative compliance (pawnbroker), consumer protection especially when services are provided at the consumer's residence, operations of the business – aside from its location will have negative consequences in the surrounding area, tax fairness and moral values.

Section 3(1) of the Business Licence Bylaw says "[a] *person* shall not *carry on* a *business* listed in Part ll of this Bylaw unless that *person* has a valid and subsisting *licence*." Business is defined in subsection 2(1)(f) as "a commercial, merchandising or industrial activity or undertaking, …a profession, trade, occupation, calling or employment; or an activity providing goods or services…whether or not for profit." [emphasis added]

Part II does not explicitly list private gardens but it does list restaurants, catering companies, retail operations, storage yards etc. Thus to avoid the requirement for a business licence, the products of the garden cannot be used in a restaurant, or catering business or sold even if the proceeds go to charity. However, any produce may be eaten by the occupant/owner, given to another person or charity for no compensation without requiring a Business Licence. The exchange of produce for labour in the garden in a structured fashion may be problematic and even the giving of a tax receipt for a donation to charity may be seen as compensation – although these are "grey areas."

There may be concerns that with more gardeners this may be seen as a change in the "intensity of the use of land" under sub-subsection 13 (52)(c) of the LUB and trigger the requirement to obtain a Development Permit. The Scarboro potato garden involved some twenty people for a day or two in the initial lot clean-up but the regular gardener(s)/users were likely more limited in number.

Subject to these conditions, an owner and a limited number of properly authorized gardeners could, *provided there is a dwelling unit* on the lot or lots owned by the same person, plant a garden or even an extensive garden covering the whole lot(s) without a development permit. This garden would see some produce consumed and the rest given away to friends, neighbours and willing charities. This is something that has been happening for years in Calgary.

Gardening on Vacant Lots: Trespass

Any use of property, including gardening that is not authorized by the owner/occupier is a trespass – no matter how well intentioned.

The *Petty Trespass Act*, RSA 2000, c P-11 (link) governs privately owned land. Entry on land is prohibited under subsection section 2.1(1) by *notice* or without notice on lands that are "… a lawn, garden or land under cultivation, … surrounded by a fence, [and/or] a natural boundary … enclosed in a manner that indicates the … occupier's intention to keep persons off the land or to keep animals on the land." Notice is defined in subsection 2.1(2) to include oral advice (get off my lawn), written advice or posting. It is an offence under subsection 2(1) for any person who has entered onto land to fail to leave when asked to do so by the owner/occupier or their agent.

Exceptions are made for those having lawful reasons to trespass like peace officers and there is a rebuttable presumption that entry for lawful purposes on pathways to a door are not considered trespass. Powers of arrest without a warrant is given in section 4 to peace officers i.e. police, transit police and to owner/occupier or "the servant of, or any person authorized by the [owner/occupier]". A first offence can result in fines up to $2,000 and a subsequent offence on the same land to a fine of up to $5,000.

Permission was not obtained from the property owner in the case of the Scarboro potato garden and one report indicates that the land was posted (here). The Calgary Herald article cited in the last post here reported that trespass charges would not be pressed by the owners "provided the property was cleaned up." This appears to have occurred.

Gardening on Vacant Lots: Permission?

Owners can grant permission to use lands under several legal instruments including, among others: leases, licence to occupy, or share-crop agreements. Whatever the choice of instrument, some considerations include, among others:

- the clear identification of the two parties (owners/gardeners),
- authorization of the gardeners to occupy the land and exclude others i.e. trespass,
- authorization of the gardeners to apply for a development permit if required,
- insurance provisions naming the owners as an additional named insured with proof of insurance to the owner's satisfaction,
- compensation for the use of the land to be paid by the gardeners,
- utility bills (water if metered and electricity) in the name of the gardeners,
- any restrictions on the methods used by the gardeners,
- notice provisions as to the return of the land when required by the owner,
- cooperation in the change of use development permit; and
- disposition of any improvements by the gardeners.

This is not a complete list.

Gardening on Vacant Lots: Gardens as a Use?

The Development Department's position is that a vacant lot has no use associated with it. In terms of vacant lots, it matters in one sense whether there ever was a building on the parcel – if so the most recent use i.e. as a residential use will govern and only a Change of Use – Development Permit is required. It is arguable that a currently vacant parcel can trace its origin to a consolidated parcel that historically had a building on it – at least in the Developed Area. On vacant lots that have always been vacant, gardens will require a full blown Development Permit application.

Gardens are not a specified use. Gardening can fit into several analogous uses which are described in Part 4 of the Land Use Bylaw 1P2007. The description of Uses is divided into two parts, Part I which list the uses that are applicable in all areas and the rules for interpreting the uses listed in Part II. For our purposes, gardening can fall into multiple categories – this is allowed on a development permit application but subsection 130(5) states that "[w]here a development is capable of being more than one use, the use under which the development more clearly fits must govern."

An open air garden on a vacant lot can fit into several uses. One is:

191 "Extensive Agriculture"

(a) means a use:
  (i) where land is used to raise crops or graze livestock;
  (ii) where crops and livestock are not covered by structures;
  (iii)where trees and shrubs are intensively grown; and
  (iv)that may have agricultural buildings required for the operation of the use;
(b) is a use within the Agriculture and Animal Group in Schedule A to this Bylaw;
(c) does not require motor vehicle parking stalls; and
(d) does not require bicycle parking stalls – class 1 or class 2. [Emphasis added]

The reference in subsection 191(b) to the "Agriculture and Animal Group" refers to general categories in Schedule A which under 130 (2) "is referenced only to compare and contrast related uses." The other uses in the group include Kennel, Tree Farm (a use where trees are not sold commercially) and Veterinary Clinic which do not fit gardening. The reference in subsection 191(c) and (d) to motor vehicle and bicycle parking stalls indicates the minimum requirements, for example a Fitness Centre use in section 195 requires 5 motor vehicle parking stalls per 100 square metres and a minimum of 1 bicycle parking stalls (class 2) per 250 square metres of gross usable floor area. Extensive Agriculture does not require any parking.

Unfortunately, Extensive Agriculture is only a permitted use in two districts:

- Special Future Urban Development Districts (S-FUD) which are described in section 1085 as being intended to apply to "… lands that are awaiting urban development and utility servicing …protect from premature subdivision … [with] temporary uses that can easily be removed when land is redesignated to allow for urban forms of development." The minimum parcel size is 64 hectares, although a smaller parcel at the time of annexation will be permitted.
- Special Transportation Corridor Districts (S-TUC) the Provincial designated corridors in Map 8 on page 669 which is essentially the area around ring road. Any development permit expires after five years.

Extensive Agriculture is a permitted use in the floodway (see Map) in the districts it is permitted (S-FUD and S-TUC). Extensive Agriculture is not a discretionary use in any districts unless it is listed in a DC District bylaw as permitted or discretionary.

A garden may also qualify as a Park use,

> 249 "Park"
> (a) means a use:
> (i) where open space is set aside for recreational, educational, cultural or aesthetic purposes; and
> (ii) that may be improved for the comfort of park users;
> (b) is a use within the Infrastructure Group in Schedule A to this Bylaw;
> (c) may have washroom facilities;
> (c.1) may have small sheds less than 10.0 square metres in gross floor area for park maintenance equipment and materials;
> (d) may have a parking area, provided it is located a minimum of 3.0 metres from the nearest property line;
> (e) does not require motor vehicle parking stalls; and
> (f) does not require bicycle parking stalls – class 1 or class 2.

Gardening can be a recreational activity, if guided tours are offered to the public there may be an educational component, flowers can certainly be considered aesthetic and a garden may be considered an improvement "… for the comfort of park users".

A Park use is permitted in every district except Residential Cottage Housing (R-CH), Industry Heavy (I-H) and Special Purpose Urban Nature (S-UN), and is a permitted use in the floodway where otherwise allowed.

Other use categories could include gardening as an "athletic activity" under section 248's Outdoor Recreation Area, although that use would require parking study if it was listed as a Discretionary Use in the particular District. It could be a Storage Yard under section 313 where "goods, materials and supplies are stored outside" although this would require one parking stall for three "employees" (gardeners) at the parcel. A garden could be an industrial use, Heavy (203.1) or Medium (203.3) and an enclosed garden (greenhouses) would qualify as a Light Industrial Use (203.2) or 309.1 "Specialized Industrial," all of the industrial uses have parking requirements which could be relaxed as part of the Development Permit process. Intensive Agriculture is listed as a use in the City Core which is governed by Part 10 but is restricted to DC Categories under subsection 21(3) in Part 10. Finally a garden may qualify as a Social Organization Use under section 307.

Other uses would not be compatible with vacant lot gardening for various reasons, for example: a Freight Yard Use in section 199 would prohibit "production" that is growing produce, a Community Recreation Facility Use in section 169 would require the use to be on the same parcel as the communities building, Natural Use Areas in section 243 are intended to allow "disturbed areas to be naturalized, Special Function Uses in section 308 & 309 are limited to 15 days and Home Occupation uses (section 207 & 208) prohibits "(k)…any activities related to the *use* tak[ing] place outside of a Dwelling Unit, which includes the outside storage of materials, tools, products or equipment".

Gardening on Vacant Lots: The Development Permit Process

It appears that a development permit will be required if a vacant lot is “free-standing” that is there are no buildings on contiguous land that are owned by the same person granting permission. Whether the owner must have a building on the same contiguous land or whether it could be in the same area is a potential argument.

The Development Department has created a series of checklists, the Complete Application Requirement listed at their website (link). Incomplete applications can be rejected for additional information and will delay the process.

A full blown Development Permit Application would be involved if there never was a building on the land for example farmland. The particular District the vacant land is in will govern the choice of CARL. A full blown development permit may be expensive with triple the cost of a Change of Use Development Permit. The 2012 fees are found here.

A Change of Use Development Permit would be applicable if a building has ever been on the parcel, including the possible argument that historically a building would be on the lot from which titled was derived. In that case a “Change outside a building” CARL would appear to be appropriate (link PDF). This Change outside a Building contemplates minor change in the landscaping and should qualify for the $552 fee.

Ideally, one would seek a Change of Use Development Permit to allow for a Park Use. As noted before other uses may be included in the application but a Park Use has several advantages, firstly it is a permitted use in all but three districts and secondly it does not appear to require “notice posting” on or near the land under section 27, and thirdly, only approved development permits notices are published in the local papers under section 34. The development permit is not released to the applicant until the expiry of the 14 day appeal period under the MGA. It should be noted that the City can still impose various conditions on permitted uses like a Park use under section 28 such as construction of public utilities, vehicular and pedestrian access etc. or to enter into a Development Agreement to do the same.

In general, other uses that vacant lot gardening “may” qualify for such as an Outdoor Recreation Use, industrial uses etc. are Discretionary Uses – even in the Districts that are named after the uses. These uses usually require notice posting and advertising for public comment prior to granting a Development Permit.

However, as noted in the CGPP at page 34.5:

> Community garden groups can either informally organize with private land owners (e.g. churches, businesses) to develop gardens or can submit applications to The City year round to apply for approval to develop a public community garden on public lands. The time required to process an application is site-specific. Each applicant receives a written response outlining approval in principle and conditions, or alternate suggestions if sites are not feasible.
> Each community garden is unique. Applications are reviewed from a site specific perspective to determine if the plan for the garden is compatible with existing site use and any limitations such as environmental conditions, future development plans and/or access considerations. A diversity of garden styles are encouraged to address the variety of sites and incorporate conditions of development. Site elements such as irrigation, tree cover

and slope are considered, along with distance from other recreational and residential spaces.

For those seeking further information, a useful first step is to contact the City of Calgary Parks Department.

Comments and Notes on Methodology

These posts are not legal advice; consult a lawyer. I have reviewed the language of the relevant by-laws and conducted preliminary enquiries at the City Clerk, Corporate Records and the Development Department. I am grateful for all of these City employees for their assistance, knowledge and helpfulness. As noted these are my interpretations of the documents. These interpretations do not necessarily reflect current City practices, any official City Policy or legal positions. The Development Department is very helpful.

Conclusions

Vacant lot gardening has a long history in Calgary. Some legal barriers to this practice, such as Occupiers' liability can be overcome by adequate insurance. Others such as interpretations of the Land Use Bylaw are more uncertain.

One report (audio at 6:15) said there were approximately 167 vacant lots in Calgary similar to the Scarboro vacant lot. Whether for environmental reasons, food security or aesthetic reasons, The City of Calgary may want to look at policies to allow for gardening on vacant lots on a temporary basis.

Historical Links

J. David Hulchanski, "The Origins of Urban Land Use Planning in Alberta, 1900-1945 (PDF).

Michael Gordon and J. David Hulchanski, "The Evolution of the Land Use Planning Process in Alberta, 1945-1984 (PDF)

Nelson Medeiros, "A New Land Use Bylaw for the City of Calgary, Alberta" (PDF)

Max Foran, "Expansive Discourses: Urban Sprawl in Calgary, 1945-1978 (link) (PDF)

Interesting Links

Calgary Urban Agriculture Blog

Urban City Farms

Mission Community Garden - Interview

How big does your garden need to be?

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