

Rocky View County

Proposed Off-Site Levy Bylaws

Bylaw C-7801-2018: Regional Storm Water Off-Site Levy Bylaw

Bylaw C-7802-2018: Water and Waste Water Off-Site Levy Bylaw

Bylaw C-7805-2018: Regional Transportation Off-Site Levy Bylaw

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Introduction

Municipalities have broad discretion in designing their off-site levies. However, the Municipal Government Act and the accompanying Off-Site Levy Regulation set out guidelines, principles, and criteria that municipalities must follow. The Regulation also sets out consultation obligations that municipalities must fulfil.

One of the core principles is to ensure that the methodology for calculating levies is “clear and reasonable” (Section 4(1)(d) of the Regulations). While we realize that whether something is “clear and reasonable” may be partly a subjective judgement, there are legal standards by which it must be judged.

The legal definitions of these terms provide the following guidance:

- Clear – plain, evident, free from doubt.
 - Can people understand what has been done? If yes, then it is “clear”.
- Reasonable – just, rational, appropriate, usual in the circumstances.
 - Would a prudent, well-informed outsider conclude that the chosen approach is rational and appropriate in the circumstances? If yes, then it is “reasonable”.

Rocky View Forward believes that the proposed off-site levy bylaws are, in general, “clear”. However, we have serious doubts as to whether they are “reasonable”.

In giving the proposed bylaws a passing grade on clarity, we would like to flag that the bylaws themselves do not disclose enough information to be immediately transparent to even a well-informed reader. However, when questioned, Administration has been very co-operative in explaining the assumptions and approaches used in their calculations.

Unfortunately, this transparency has resulted in Rocky View Forward’s conclusion that the proposed bylaws do not satisfy the requirement that levy calculations are based on “reasonable” methodology.

We also have serious concerns that the proposed bylaws do not meet the test of providing a “correlation between the levy and the benefits to new development” as is required by Section 5(5) of the Regulations.

Summary of Assumptions & Methodology Used to Calculate Off-Site Levies

According to information provided by Administration, the methodology used to calculate the levies assumes that all currently approved ASPs and Conceptual Schemes will be fully built out within the planning time horizon used for the levy calculations. This is the basis for both the amount of development that will occur to pay the levies and the infrastructure that will be required to support new development.

In terms of other assumptions, it is encouraging to see that the County is proposing to bring its off-site levies into compliance with another core principle stipulated for all off-site levies – that the cost of new infrastructure should be allocated between new and existing development “on an equitable basis related to the degree of benefit”. There remains one exception to this which we will discuss later. But, overall it is a positive step forward that the County’s off-site levies should no longer be at serious risk of legal challenges on this critical design feature.

The methodology for both the transportation off-site levy and the storm water off-site levy (the two based on acreage) use the total acreage in the defined “benefiting area”. For the TOL, this is total acreage in approved ASPs and Conceptual Schemes + 10% and for the storm water levy, it is the total acreage in the area that will benefit from the proposed CSMI regional drainage system.

The cost estimates for infrastructure upgrades and expansions have been carried forward largely unchanged from the existing bylaws. The exception is the local area costs in the storm water off-site levy which were not included in the existing bylaw.

Concerns Regarding Assumptions & Methodology for All Off-Site Levies

The basic calculation to determine the levies is “total cost of necessary infrastructure upgrades” divided by “total development available to pay the levy”. The denominator is usually based on either acreage or capacity utilization.

For the levy calculations to be “reasonable”, as is required by the MGA, both the numerator and the denominator of this calculation must be “reasonable”. Rocky View Forward has serious concerns that neither pass a “reasonableness” test for any of the proposed off-site levy bylaws.

1. Planning Horizon for Levy Calculations

The MGA does not mandate any specific time frame for levy calculations. Municipalities are left to select an appropriate time frame based on local circumstances. Rocky View Forward has examined a number of other Alberta municipalities' off-site levy structures and found that, almost without exception, they use a fixed time period for both anticipated development and required infrastructure, usually 10 - 30 years.

In contrast, Rocky View's time horizon is "full build out" of all approved ASPs and Conceptual Schemes. Administration has acknowledged that this may be at least 75 - 100+ years. The use of full build out as the planning time horizon for development expectations and infrastructure requirements could be justified if there were reasonably certainty that the development plans in those ASPs would actually occur.

As the Town of Cochrane pointed out in its off-site levy review, a full build out model is "typically most appropriate for well-defined build-out areas with a limited number of projects." Unfortunately, these criteria are not met by many of the ASPs and Conceptual Schemes in Rocky View.

Even if these criteria were met, the reasonableness of Rocky View's choice of methodology is questionable since most other Alberta municipalities have chosen to use a fixed time frame for determining their off-site levies. This means that Rocky View's levies are not comparable to those in neighbouring municipalities. This may lead to difficulties when developers attempt to compare costs in alternative locations.

Before leaving this issue, we would like to acknowledge that it is often necessary to plan potential transportation infrastructure requirements far into the future for the purposes of securing rights of way before development occurs. However, this reality does not justify basing levy calculations on comparable time frames.

2. Consistency With Other County Planning Documents

If the County is going to continue with its "full build out" methodology for calculating levies, it is critically important that the development levels assumed as "full build out" are consistent with other County planning documents. Unfortunately, there are a number of significant inconsistencies that raise serious doubts about the "reasonableness" of basing the levy calculations on full build out of approved ASPs.

The 2016 Residential Land Inventory, released last year, concluded that many of the developments in approved ASPs are very unlikely to ever be built. The report identifies at least four ASPs as having “a low likelihood of ever being completed at the densities currently approved” (pg. 3). It identifies five others that have between 100 and 400+ years of development potential given past construction rates. The residential land inventory points out that even in Langdon, one of the fastest growing areas in the County, there is still 64 years of development potential left in its ASP.

In spite of the cautions expressed in the residential land inventory report, the levy calculations assume that all these ASPs will be fully built out.

The Bragg Creek ASP provides another example of inconsistencies between the assumptions used in the levy calculations and other County documents. The Bragg Creek ASP describes its population forecast as “unrealistic maximums” (pg. 22). It is not clear how it can be reasonable to plan water/waste water infrastructure capacity upgrades on population projections that were identified as “unrealistic” in the source document.

3. Ability to Forecast for Time Periods Assumed in Levies

Given the extremely lengthy time horizons anticipated in the Residential Land Inventory for full build out of approved ASPs, it appears to be questionable whether forecasting development and/or infrastructure needs that far into the future can be done with any reasonable level of reliability.

At the County’s twenty-year average construction rate, it will take 154 years to fully build out the already-approved ASPs. At the more recent five-year average, it will take 210 years. These are timeframes over which detailed forecasting becomes highly suspect.

4. Consistency with other “Tests” of Reasonableness

The County’s overall growth target is for 2.5% - 3% growth per year for the foreseeable future. At these growth rates, the benefits of compounding indicate that it would take at least 55 - 60 years to reach full build out in the already-approved ASPs. (It is important to note that County growth has not reached these targets for the better part of the last decade.)

As well as needing a planning horizon over which it is reasonable to expect reliable forecasting, the anticipated development has to be supportable. The anticipated growth should incorporate reasonable assumptions about potentially limiting factors such as availability of potable water. Given the

restrictions on water licences in the Bow River watershed, it is not clear whether adequate potable water will be available to support the forecast development levels.

5. *Correlation between Levies Paid and Benefits for New Development*

The Regulations state that “there must be a correlation between the levy and the benefits to new development” (Sec. 5(5)). It is much easier to see a correlation between the levies paid by new development and the benefits received if the infrastructure being financed through the levies is constructed within a reasonable time after the levies have been paid.

By using the full build out assumption for their planning horizon, Rocky View’s proposed levy structures include costs for infrastructure that may well not be required for 75 - 100+ years. There is, at best, a very weak correlation between levies paid now and the potential benefits that might be obtained from infrastructure to be build that long into the future.

6. *Use of Gross Acreage Versus Net Acreage*

The MGA stipulates that a specific parcel of land can only be charged once for each type of off-site levy a municipality chooses to impose. As a result, in determining the amount of land that potentially may be subject to levies in the future, it is important to exclude land that has already paid levies.

Rocky View’s proposed transportation and storm water levies are based on total acreage within the benefiting areas and, hence, have not deducted land that has already paid the respective levies.

By using gross rather than net acreage, the levy rates will be artificially low since the denominator will be larger than appropriate.

7. *Ensuring that Cost Estimates are Current*

The Regulations state that “the information used to calculate the levy must be kept current” (Sec 5(3)). It is not clear that Rocky View’s levies satisfy this requirement since the cost of infrastructure upgrades included in the proposed bylaws are, for the most part, identical to the costs included in the existing bylaws that were passed in 2013 and 2014. In some cases, those cost estimates were carried forward unchanged from even earlier versions. We would have expected construction costs to have changed during that period.

Concerns Regarding Council Discretion

The proposed transportation off-site levy and storm water off-site levy carry forward provisions that permit Council, “in its sole and unfettered discretion” to waive part or all of the applicable off-site levies. For whatever reason, comparable provisions do not appear to be included in the provisions of the water/waste water off-site levy bylaw.

Rocky View Forward acknowledges that this is a discretionary power that Council has used on a number of occasions. However, we believe that such waiving of levies is completely inappropriate. Council should ensure that all taxpayers face a level playing field - that the same rules apply to everyone. Having a good sob story should not result in more favourable tax treatment.

Allowing Council to reduce or waive levy charges is parallel to giving provincial politicians the right to reduce the amount of income tax someone has to pay based on their pleadings. This is not how the system should work. Maintaining this discretionary power leads applicants to expect special treatment and places Council in an awkward position.

Using this discretionary power to alleviate perceived inequities in the current levy structure is not the optimal way to deal with these problems. That only addresses the symptoms. Fixing the levy structure addresses the cause.

Comments on Specific Off-Site Levies

1. Transportation Off-Site Levy

The proposed TOL is improved relative to the existing version. The most significant improvements include:

- Allocating a portion of the costs of road upgrades to existing users to address the questionable legality of the existing levy structure;
- Substantial reduction in the number of acres that are assumed will be developed, reduced from 60 - 65% of total County land to approved ASPs plus 10% (12 - 13% of total land). There are still concerns with this assumption, but it is a move in the right direction.
- Only charging the TOL on the incremental parcels created in a subdivision when there is an existing dwelling.

There are, however, still a number of serious weaknesses in the proposed TOL. These include:

- The flaws in basing levy calculations on the full build out assumption that have been discussed above are exaggerated in the TOL because it proposes to create a two-tiered base levy, split between “urban” and “rural” areas.

- The TOL assumes that just under 60,000 acres will be developed as less than 2-acre fully-serviced parcels. This estimate relies on the maximum that could be developed under already-approved ASPs. The lack of reliability and reasonableness in this assumption were discussed above.
- For the TOL, this questionable assumption is particularly problematic since it is critical in maintaining the much lower “rural” base levy rate.
- To the extent that this higher density development does not materialize, the TOL will fall seriously short in providing the financing needed for road upgrades.
- The differential between the “rural” and “urban” base levy rates are likely to provide an incentive to developers to push for substantially higher densities of at least 3 - 4 upa to recoup the incremental levy costs. This would not be consistent with most of the County’s planning documents.
- To the extent that the special area levies are designed to fund localized infrastructure, they have a logical rationale. However, there are some inequities in the special area levies where there has been poor matching between the special area and the benefits from specific infrastructure projects. This is particularly evident in the Springbank special area where a substantial portion of the costs are only of benefit to a very small fraction of the land within the special area.

2. Water/Waste Water Off-Site Levy

The major concern with the water/waste water levies is whether they will actually recover the costs already incurred by the County on a timely basis. To date, the levies have not been overly successful in achieving this objective.

At this point, it is not possible to fully assess this concern since Administration has acknowledged that the financial information in the levy schedules is incorrect, but has not yet released corrected information. Until new information is shared publicly, any evaluation of the proposed water/waste water off-site levy is premature.

It is possible at this point to question the reasonableness of including the substantial capacity upgrades in the proposed 2018 bylaw. The need for these upgrades is driven by the full build out assumption, the weaknesses of which have been discussed above. Given the reality that most components of the County’s water/waste water infrastructure operate well below capacity, the rationale for including substantial capacity upgrades in current levy rates is not clear.

3. Storm Water Off-Site Levy

As with the water/waste water off-site levy, the major concern with the storm water off-site levy is whether it will be able to cover the costs of the storm water management infrastructure.

There also appears to be an internal inconsistency in the assumptions made for the base and local area storm water off-site levy rates. The base rate, which is to cover Rocky View's share of the costs of the regional CSMI drainage system, has been calculated on the assumption that 100% of the benefits will accrue to new development. In contrast, the local area rates, which cover the costs of connecting each area to the CSMI system and the costs of area-specific upgrades, have been calculated on the assumption that both existing and new development will benefit from the storm water infrastructure.

It is not clear how connecting to the regional system can be of benefit to existing development if that regional system itself is not of benefit to the existing development. It would appear to be more logically consistent to allocate some of the benefit of the regional system to existing development.

Requirements to Consult in Good Faith

The new Off-Site Levy Regulations includes detailed consultation requirements mandating that "the municipality must consult in good faith with stakeholders" as follows:

- Prior to making a final determination on defining and addressing existing and future infrastructure, transportation infrastructure and facility requirements (Sec. 8(1));
- When determining the methodology on which to base the levy (Sec. 8(2));
- On the calculation of the levy with stakeholders in the benefitting area where the levy will apply (Sec. (3)).

This section of the Regulations also makes it clear that, as part of these good faith consultations, the "municipality must make available to stakeholders on request any assumptions, data or calculations used to determine the levy" (sec. 8(4)).

There is no question that the County and Administration did undertake some consultations with stakeholders. There were two open houses and a number of meetings with organizations representing stakeholders. The question is whether these consultations met the statutory requirement to consult in good faith on these three specific and critical aspects of levy design.

1. *Good Faith Consultations Prior to Making Final Decision*

Rocky View Forward contends that the County has not satisfied these mandated requirements. The County's consultations have focused almost exclusively on the Sec. 8(1) requirement to consult prior to making a final decision on the levies.

Given the relatively low turnout at the open houses, it is not clear whether even these consultations truly meet the "good faith" standard that has been legislated in this area. The County could have undertaken far more proactive consultations with their residents to ensure that relevant information was thoroughly disseminated. For example, information pieces in the newspaper could have described the proposed levies; a special issue of Vantage Point could have been issued to do the same. An effective Communications Department should have been able to engage a far larger fraction of the County's population on an issue that is of relevance to many, if not most, of them.

2. *Good Faith Consultations When Determining Methodology*

If there were any consultations with stakeholders that satisfy the requirements of Sec. 8(2) it is not clear which stakeholders were consulted and when. From our perspective, as a group clearly representing key stakeholders, no such consultation occurred. The draft levies were presented with their methodology intact. We are now providing our feedback on the appropriateness of that methodology. But, this feedback is after the fact, contrary to what is required under the Regulations.

3. *Good Faith Consultations with Stakeholders in Benefitting Areas*

Our concerns with this aspect of the County's statutory consultation obligations are very similar to our concerns with the County's Sec. 8(1) obligations. The limited extent of consultation and the lack of effort to engage more stakeholders means that the "good faith" requirement appears to have been dealt with in a very cursory manner.

This is accentuated by the fact that the County appears to have decided to not hold public hearings on these bylaws. This choice further limits residents' awareness of the bylaws and limits their ability to provide input on them. The MGA's requirements for public hearings are minimum requirements. They do not stop a municipality from holding public hearings on matters such as these off-site levies.

4. Good Faith Consultation - the Availability of Data, etc

As was mentioned in our comments on the water/waste water off-site levy, Rocky View Forward has significant concerns that inaccurate financial information was released and used for calculating the proposed water/waste water off-site levies. This should not be `acceptable.

We understand that mistakes and misunderstandings happen. However, on matters as significant as levy calculations, there need to be adequate checks and balances in place to ensure the utmost accuracy of information that is publicly released. It should also be unacceptable that these substantial errors only appear to have been discovered as a result of our questions to Administration. Had we not asked these questions, the County might well have gone forward charging levies based on wrong information.

These errors and the lack of timely correction are not only problematic for the water/waste water off-site levies. They present a much broader problem for the County. Errors of this magnitude unavoidably raise doubts about the legitimacy and accuracy of the replacement numbers (when they are finally released) and of all other financial information used in all the levy calculations.

From the perspective of meeting the County's statutory obligations to consult in good faith when designing and prior to approving its off-site levies, these errors have raised a substantial road block. The deadline for public input on the off-site levies is today, October 3rd. As of this morning, the corrected financial information and revised levy rates for the water/waste water off-site levy bylaw have not been publicly released. How can the County have consulted stakeholders in good faith when it has failed to release correct financial information critical to the calculation of one of its levies?

Recommendations – Next Steps for Rocky View County’s Off-Site Levies

As should be evident from our submission, Rocky View Forward believes the County’s off-site levies need to be substantially reworked before they will meet the statutory requirement of being “clear and reasonable” and have the mandated “correlation between the levy and the benefits to new development.”

We would strongly recommend that the County adopt the methodology used by most other Alberta municipalities – a fixed planning horizon for forecasting both anticipated development and the infrastructure that will be required to support that development.

This approach does not preclude planning for infrastructure needs over a longer time frame. But, it does require disciplined planning to determine which components of that infrastructure are likely to be required over a reasonably foreseeable time horizon. This determination is critical to meeting the County’s obligation that there must be a correlation between the levies charged and the benefits received by those paying the levies.

Alternatively, if the County continues to insist on using the less common full build out methodology, it is critically important that what it defines as “full build out” passes basic reasonableness tests. It is not reasonable to continue to blindly use the maximum build out potential from all approved ASPs and Conceptual Schemes when the County’s own Planning department has concluded that much of that potential will never be realized.

The fact that many of the approved ASPs were based on what has now been demonstrated as unreasonable growth expectations does not mean that off-site levies should parallel that unreasonableness. Two wrongs do not make a right. Instead, the County needs to determine what are truly reasonable development expectations within those approved ASPs.

Full build out would have to incorporate input from Planning’s Residential Land Inventory. The full build out assumptions would need to demonstrate reasonable consistency with observed and realistically anticipated growth rates and pace of development. It would also need to assess anticipated development levels against potentially limited factors such as the availability of potable water.

Finally, to meet its statutory obligations to consult in good faith with all stakeholders during the development of its levy methodology and before approving any levies, the County needs to initiate much more fulsome engagement from its stakeholders, especially residents who will bear the costs of any shortfalls that may result from flawed levy calculations.