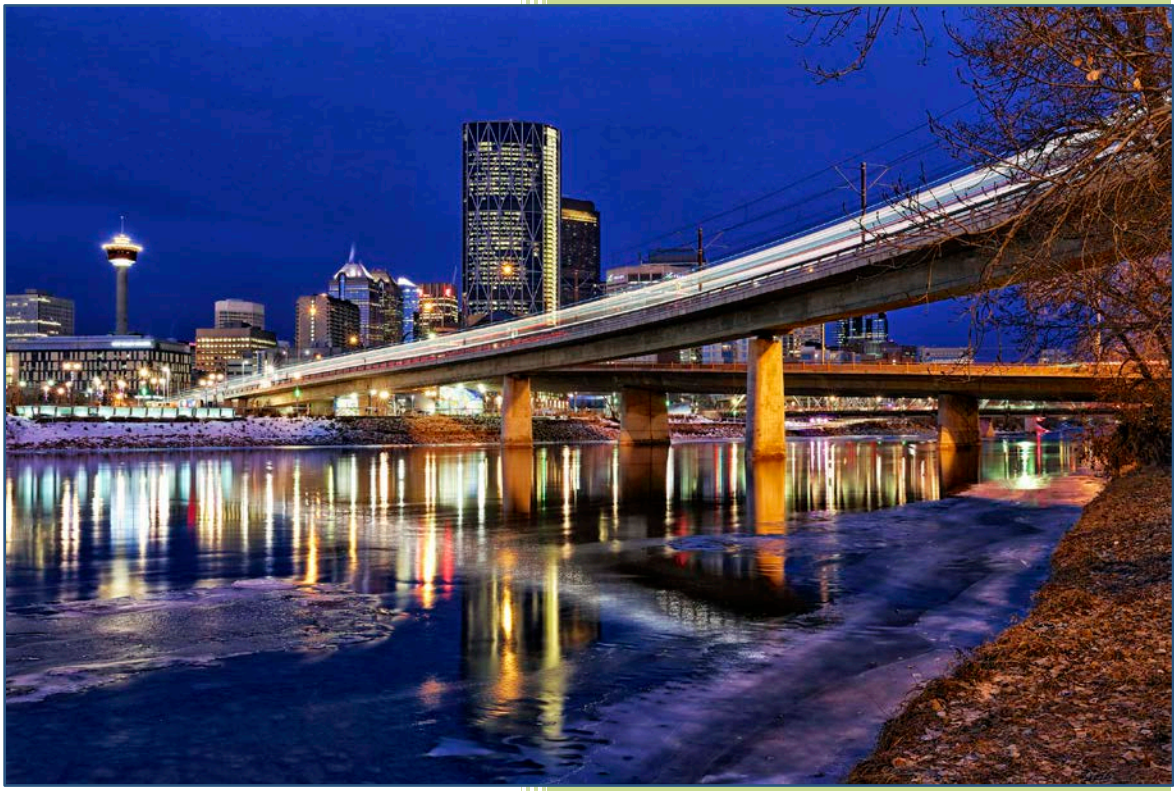
Municipalities and Environmental Law

Part 3: Municipal Management of Industrial Development



Environmental Law Centre

A Community Conserve Project
Building environment and conservation capacity for municipalities

May 2018

Municipalities and Environmental Law
Part 3: Municipal Management of Industrial Development

May 2018

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Acknowledgements

The **Municipalities and Environmental Law Part 3: Municipal Management of Industrial Development** was made possible through the generous support of the Max Bell Foundation and an anonymous foundation, and was produced under the Community Conserve collaboration (www.communityconserve.ca) led by the Environmental Law Centre and the Miistakis Institute, with the support of the Alberta Urban Municipalities Association, and the Alberta Association of Municipal Districts and Counties.

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Municipal Management of Industrial Development

The interface of municipal planning and industrial development poses a challenge for most municipalities. Generally, municipalities are not major players in deciding whether industrial development proceeds in the province. While this undermines local governance to an extent, there are also good reasons for taking a centralized approach to regulating many industrial activities. Alberta's natural resources are publicly owned and there is a collective interest in their development and management.[1] Centralized decision-making ensures there is some predictability with respect to the applicable rules and regulations and prevents forum shopping.[2] It also ensures that local concerns are not allowed to prevail over the greater good.

Still, the negative impacts of industrial development are primarily felt at the local level. Industrial activities can cause water, air, noise and light pollution, unpleasant odours, dust, heavy traffic and increased use of municipal services and infrastructure, all of which can have serious consequences for the environment, health, safety and quality of life of those in a given community. As a result, Alberta municipalities are increasingly being asked to respond to landowner and constituency concerns and to regulate the development occurring within their borders.[3]

This publication sets out the sources of municipal authority to regulate industrial development, as well as the various challenges and limitations to the exercise of these powers.

Municipal Powers to Regulate Industrial Development

Sources of municipal authority were previously discussed in Part 1 of the Municipalities and Environmental Law Series, The Scope of Municipal Powers and the Environment. Many of these same sources of authority are relevant to

[1] Nickie Vlavianos & Chidinma Thompson, "Alberta's Approach to Local Governance in Oil and Gas Development" (2010) 48:1 Alberta Law Review 55 at 56.
[2] Vlavianos & Thompson at 56.
[3] Vlavianos &Thompson at 63.

regulating industrial development within a municipality. They include municipal bylaw making powers and land use planning powers.

a) Municipal Bylaw Powers

Business licensing and regulation

Municipalities have the power to pass bylaws licensing and regulating most businesses within their borders. Section 7 of the *Municipal Government Act* (*MGA*)[4] provides municipalities with the general authority to pass bylaws relating to various general subject matters, including "businesses, business activities and persons engaged in business".[5]

The *MGA* defines "business" as:

> (i) a commercial, merchandising or industrial activity or undertaking,
>
> (ii) a profession, trade, occupation, calling or employment, or
>
> (iii) an activity providing goods or services,
>
> whether or not for profit and however organized or formed, including a co-operative or association of persons.[6]

Section 8 of the *MGA* lists various powers a municipal council may exercise through bylaws passed pursuant to section 7. These include the power to (a) regulate and prohibit, (b) deal with any development, activity, industry, business or thing in different ways and divide them into classes, and (c) provide for a system of licenses, permits or approvals.

Note that decisions regarding acceptable locations for different types of businesses and industrial facilities, as well as site-specific development conditions, are made through the land use planning process (discussed in greater detail below). Land use concerns should not be addressed through municipal business licensing powers.[7]

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[4] RSA 2000, c M-26 [*MGA*].
[5] *MGA*, s. 7(e).
[6] *MGA*, s. 1(1)(a.1).
[7] See for example, *Leisureland Sports Bar Inc. v. Edmonton*, 2001 ABQB 745 [*Leisureland*]. In *Leisureland*, the Alberta Court of Queen's Bench found that the City of Edmonton's consideration of land use issues when deciding whether to grant a business license was outside its jurisdiction and rendered its

Safety, health and general welfare

Municipalities are also empowered to pass bylaws respecting the safety, health and welfare of people and the protection of people and property.[8] This power, referred to as the general welfare power, has been broadly interpreted by the courts[9] and provides municipalities with a wide latitude to respond to the particular health and environmental concerns of their residents.[10] It has been used to enact bylaws to control issues such as smog, smoking, the aesthetic use of pesticides, and manure management within municipalities.[11]

There are some limitations. Bylaws passed under the general welfare power must concern matters where a municipality can usefully intervene.[12] They must also be for a permissible purpose.[13] Section 3 of the *MGA* sets out the purposes of a municipality and includes: to provide good government, to foster the well-being of the environment, and to develop and maintain safe and viable communities.

Arguably, the general welfare power permits municipalities to regulate for genuine health, safety and environmental purposes in the context of industrial development. This could include bylaws addressing "emerging air and water quality concerns, the long-term effects of potentially toxic substances, and other pressing environmental issues".[14]

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decision unreasonable. More specifically, the City of Edmonton refused to give Leisureland Sports Bar Inc. a business license based on a police report which opined that there were already too many bars in the proposed area. Leisureland Sports Bar Inc. had previously obtained a valid development permit. The Court found that this was a planning issue which ought to be the subject of a rezoning application, and not a business license application.

[8] *MGA*, s. 7(a).

[9] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* [2001] 2 S.C.R. 241 at para. 19 [*Spraytech*].

[10] Marcia Valiente, "Turf War: Municipal Powers, the Regulation of Pesticides and the *Hudson* Decision" (2002) 11 J.E.L.P. 327 at 328.

[11] Vlavianos & Thompson at 86.

[12] *Spraytech* at para. 53.

[13] *Kozak v. Lacombe (County)*, 2017 ABCA 351 at paras 28-30.

[14] James S. Mallett, *Municipal Powers, Land Use Planning, and the Environment: Understanding the Public's Role* (Edmonton: Environmental Law Centre, 2005) at 6.

Nuisances

Municipalities may also pass bylaws respecting nuisances and unsightly property.[15] "Nuisance" is not defined in the legislation, leaving municipalities with some flexibility to determine what behaviours constitute a nuisance. In the context of industrial development, a nuisance could include smoke, flaring, emissions, odours and noise.[16]

Note that municipal bylaws must not conflict or be inconsistent with provincial or federal law that deals with the same subject matter, or else the bylaw is of no effect to the extent of the conflict or inconsistency.[17]

[15] *MGA*, s. 7(c).
[16] Vlavianos & Thompson at 87.
[17] *MGA*, s. 13.

b) Land use Powers

Municipalities can also regulate business and industrial development through their planning and development powers set out in Part 17 of the *MGA*. Part 17 is concerned with the planning for, and regulation of, development land in Alberta.[18] Its provisions aim to "achieve the orderly, economical and beneficial development" of land within the municipality, and to "maintain and improve the quality of the physical environment" that supports human settlements.[19] Part 17 planning instruments include intermunicipal and municipal development plans, area structure plans, area redevelopment plans, land use bylaws, and subdivision and development permits:

- An **intermunicipal development plan** is a plan to address, among other things, future land use, transportation systems, and the coordination of intermunicipal programs relating to the physical, social and economic development in the areas of land lying within the boundaries of two or more municipalities.[20] Intermunicipal development plans are mandatory for municipalities that are not members of a growth region as defined in section 708.01 of the *MGA* (i.e. Edmonton and Calgary);

- A **municipal development plan** is a mandatory plan to address, among other things, future land use within a municipality, the manner and proposals for future development, the provision of transportation systems, municipal services and facilities.[21] In the absence of an intermunicipal development plan, they must also coordinate land use, future growth patterns and other infrastructure with adjacent municipalities. A municipal development plan may also address environmental matters, financial resources, and economic development within a municipality;

[18] Frederick A. Laux, *Planning Law and Practice in Alberta*, 2nd ed. looseleaf, (Alberta: Carswell, 1998) at 2-3.
[19] *MGA*, s. 617.
[20] *MGA*, s. 631.
[21] *MGA*, s. 632.

- An **area structure plan** provides a framework for subsequent subdivision and development of an area of land.[22] It is mostly employed by urban municipalities to plan the layout of new areas of development;[23]

- An **area redevelopment plan** provides a framework for the redevelopment of an area of land.[24] It is mostly employed by urban municipalities to plan the revitalization of a previously heavily developed area;[25]

- A **land use bylaw** provides a detailed blueprint for future development in a municipality. It divides a municipality into districts and designates the types of permitted uses and developments in each district, as well as the decision-making processes for evaluating and approving development permits.[26] Land use bylaws must establish the number of dwelling units permitted on a parcel of land and may also provide specific guidance with respect to design standards, landscaping, lighting, etc. Land use bylaws are mandatory for all municipalities;[27]

- Land use bylaw compliance is secured through the use of **development permits** and the **subdivision approval** process. A development permit is required before a person can commence any development[28] whereas a subdivision approval is required before a person may register any instrument that has the effect of subdividing a parcel of land.[29]

Collectively, these instruments assist municipalities to develop the framework and plans for present and future land use, and help approving authorities make decisions on proposals to subdivide, develop or set aside land within municipal borders.[30] Strong statutory plans and bylaws can also help hold developers accountable for protecting and conserving environmentally significant areas within the municipality.

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[22] *MGA*, s. 633.
[23] Laux at 2-19.
[24] *MGA*, s. 634.
[25] Laux at 2-19.
[26] *MGA*, s. 640.
[27] *MGA*, s. 639.
[28] *MGA*, s. 683.
[29] *MGA*, s. 652.
[30] Vlavianos & Thompson at 61.

For example, a recent Subdivision and Development Appeal Board ("Board") decision from Parkland County illustrates how a local government's municipal development plan (MDP) and land use bylaw can be used to uphold standards for industrial development.[31] Burnco Rock Products ("Burnco") sought to develop a gravel extraction and processing pit in Parkland County, but the Development Authority ("DA") refused Burnco's development permit application. The land in question was located within an Agriculture/Nature Conservation (ANC) District (as per the land use bylaw) and was adjacent to a national Environmentally Significant Area (ESA). The DA determined that the proposed pit carried a high risk from an environmental perspective and was not consistent with the applicable MDP or land use bylaw. In particular, the DA was concerned that Burnco's application did not detail any specific mitigation measures to address a potential 1:50 year flood in the area. Burnco appealed the decision to the Board.

On appeal, the Board upheld the DA's denial. The Board noted that the fact the proposed pit was located adjacent to an ESA meant the application merited increased scrutiny. The Board reviewed both the applicable MDP and land use bylaw. The DA's MDP included the objective "[t]o protect, preserve and/or enhance the County's High Priority Landscapes, Environmentally Significant Areas and other natural features through effective and appropriate conservation and management practices".[32] Meanwhile, the land use bylaw stated that its purpose was to protect the areas with special natural features, while providing an opportunity for development.

The Board found that Burnco's development application did not adequately address specific flood mitigation measures and had not provided emergency flood procedures. The application did not satisfy the conditions of the MDP and therefore failed.

[31] Decision 17-D-525 (December 11, 2017) (Parkland County Subdivision and Development Appeal Board), online: Parkland County https://www.parklandcounty.com/en/county-office/resources/SDAB-Minutes/2017-12-11---SDAB-Decision-17-D-525.pdf.
[32] Decision 17-D-525 at para. 76.

Limitations on Municipal Authority to Regulate Industrial Development

As previously stated, municipalities are not major players when it comes to approving most industrial development in the province. The following limitations to municipal authority help to explain why municipal influence in this area is constrained.

a) Lack of Consultation Regarding the Disposition of Mineral Rights

Municipalities have little in the way of input or control with respect to the disposition of mineral rights or surface access within their boundaries. The Government of Alberta owns most of the province's mineral rights and has wide discretion to dispose of these rights. They are not required to consult or notify local governments with respect to the sale of mineral rights within municipal boundaries.[33] The Government of Alberta is also not required to involve municipalities in the surface access disposition decision making-process.[34]
In addition, municipalities struggle to participate in the approval process for proposed energy developments. The Alberta Energy Regulator (AER) has exclusive jurisdiction over energy extraction applications.[35] Concerned municipalities may file a statement of concern with respect to a proposed energy development, however, the AER retains the discretion on whether to grant a hearing and whether to give standing to a municipality to participate in a hearing.[36] Despite the fact that energy

[33] Vlavianos & Thompson at 69. Disposition of rights to mines and minerals is conducted pursuant to the *Mines and Minerals Act*, R.S.A. 2000, c. M-17 and related regulations.
[34] Vlavianos & Thompson at 71.
[35] *Responsible Energy Development Act*, SA 2012, c R-17.3, s. 30(1) [*RESA*].
[36] *RESA*, ss. 32-33.

developments often impact local infrastructure, roads, emergency response[37] and land use planning, a municipality is not always granted standing to participate in the hearings.[38] The sometimes substantial costs to participate in a hearing are yet another barrier for municipalities.

b) Legislative Limitations on Municipal Authority

Oil and Gas Wells, Batteries and Pipelines

Section 618 of the *MGA* states that Part 17 and the regulations and bylaws made under it do not apply when a development or subdivision is effected only for the purpose of an oil and gas well, battery, or pipeline.[39] Accordingly, companies proposing to drill a well, install a battery, or erect a pipeline are not required to apply to a municipality for a development permit or subdivision approval, nor are they subject to a municipality's statutory plans or land use bylaws.

According to Frederick A. Laux, the rationale behind s. 618 is that oil and gas are the lifeblood of the provincial economy and should not be subjected to local control that might vary from place to place.[40] Moreover, oil and gas wells are already subject to an approval process through the AER.[41] Pipelines are also subject to provincial legislation, including the *Pipeline Act*[42] and *Pipeline Regulation*.[43]

Agricultural Development

Section 618.1 of the *MGA* also exempts confined feeding operations and manure storage facilities from Part 17 planning provisions. These operations are not required to obtain subdivision approvals or development permits. Instead, they are subject to approval, registration or authorization by the Natural Resources

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[37] Pursuant to Alberta's *Emergency Management Act*, RSA 2000, C E-6.8 [*EMA*], municipalities are responsible for responding to emergencies within their borders. They are responsible for the direction and control of their emergency response and are required to prepare and approve emergency plans and programs (unless the Government of Alberta assumes direction and control) (s. 11 of *EMA*). Municipalities also have primary responsibility for declaring a local state of emergency (s. 21 of *EMA*).

[38] For example, see Vlavianos & Thompson at 73-75.

[39] Section 618 of the *MGA* also excludes highways and roads from application of Part 17.

[40] Laux at 4-35.

[41] Laux at 4-35.

[42] RSA 2000, c P-15.

[43] Alta Reg 91/2005.

Conservation Board (NRCB) pursuant to the terms of the *Agricultural Operation Practices Act*.[44]

An approval officer with the NRCB must still consider whether the application is in line with the relevant municipal development plan land use provisions and, if there is an inconsistency, it must deny the application.[45] But, in determining whether a proposed activity is consistent with the MDP an approval officer will not consider conditions related to the construction of, or the site for a confined feeding operation or manure storage facility, nor provisions related the application of manure.[46] This has the effect of further limiting the application of local planning.

Energy Development: NRCB, AER or AUC authorizations

Section 619(1) of the *MGA* provides that a license, permit, approval or other authorization granted by the NRCB, AER, or Alberta Utilities Commission (AUC) prevails over any municipal planning authorization. Section 619(2) also states that municipalities must approve a development application issued by any of the aforementioned bodies, to the extent that the application complies with the licence, permit, approval or other authorization granted.

In addition, section 619(4) of the *MGA* specifies that if a municipality considering an application holds a hearing, it may not address matters already decided by the NRCB, AER or AUC except as necessary to determine whether an amendment to a statutory plan or land use bylaw is required. Pursuant to s. 619(5), if a municipality does not approve an application under s. 619(2), the applicant may appeal to the Municipal Government Board (MGB), which may dismiss the appeal or order the municipality to amend the plan or land use bylaw to comply with the licence, permit, approval or other authorization.

Provincial Conditions Prevail

Section 620 of the *MGA* provides that a condition of a licence, permit, approval, or other authorization granted pursuant to an enactment by the Province of Alberta prevails over any condition of a development permit that conflicts with it.

[44] RSA 2000, c A-7 [*AOPA*].
[45] *AOPA*, s. 20(1).
[46] *AOPA,* s. 20(1.1).

Impact of these Legislative Limitations on Municipal Authority

The effect of ss. 618, 618.1, 619 and 620 of the *MGA* is to prevent municipal land planning from interfering with provincial decisions in the above-noted areas, as there is some potential for overlap. That is not to say, however, that provincial agencies will disregard municipal land planning entirely when making important development decisions in these areas.

For example, a brief review of various NRCB, AER and AUC (or their predecessors') decisions that consider s. 619 of the *MGA* suggests that boards do consider municipal land use issues when granting authorizations. For example, the following cases state:

- In reaching decisions regarding energy projects, the public interest, as expressed in the energy statutes, obliges the Board to consider the impacts of energy-related activities on neighbouring lands. Note the effect of Section 619 of the *MGA* is to give Board licences and approvals precedence over land-use bylaws or other planning instruments enacted by municipalities, as well as over decisions of local development appeal boards or other planning agencies. The provision does not empower the Board to assume authority for land-use planning responsibilities [*Shell Canada Ltd., Re*[47]];

- In assessing whether a proposed development is in the public interest, the AUC should consider whether a proposed project location is consistent with a municipality's planning and land use decisions. The AUC will also consider future development plans on and in the vicinity of a site, although the weight given to such plans varies with the circumstances [*Alberta Electric System Operator, Re*[48]];

- Applicants should be aware of municipal planning processes and bylaws and should incorporate them into development planning to the greatest extent possible, especially where special circumstances exist, such as the establishment of a watershed protection district. The onus is also on counties and municipalities to engage the board processes, given that they

[47] 2000 CarswellAlta 1835 [EUB] at para 58.
[48] 2017 CarswellAlta 928 [AUC] at paras 131-132.

> also share a responsibility to assess any potential impacts of a proposed energy development on their community [*Ketch Resources Ltd., Re*[49]].

Still, the boards do not "stand in the shoes" of the planning authorities when it comes to making a decision on an application.[50] In *ENMAX Shepard Inc., Re*[51] the AUC stated that its governing legislation does not direct it to conduct a parallel land use planning and development approval process to those conducted by municipal planning authorities. It acknowledged, however, that the AUC had routinely looked at planning documents and other matters in previous proceedings.

Nevertheless, it is important to note that section 619 does not actually prohibit municipalities from addressing the issue of energy development in their land use plans or bylaws. This differs from the more absolute language used in section 618 and, presumably, leaves room for municipalities to address various land use issues. In issuing a development permit, a municipality retains jurisdiction to address planning considerations not touched on by the relevant authorizing board. For example, in the case cited above, *ENMAX Shepard Inc., Re* the AUC also noted that it did not believe that its ruling precluded or otherwise limited the intervenors from pursuing the issues they raised with regard to siting, planning, and water use.

The matter of *AES Calgary ULC, Re*[52] is also illustrative. At issue was an appeal before the MGB from AES pursuant to Section 619(5) of the *MGA*. AES sought the approval of the Alberta Energy Utilities Board (EUB) (predecessor to the AER) to build a power plant near Chestermere Lake in the Municipal District of Rocky View (MD). It received a favourable EUB ruling and applied to the MD for a bylaw amendment redesignating 44 acres of land. The MD declined to pass the amendment and AES appealed the decision to the MGB.

The MGB concluded that MD did not have discretion as to whether or not the bylaw amendment should be approved. Nevertheless, that did not mean that MD was without authority or involvement in the implementation of the EUB approval. Rather, "[s]ection 619 was written to allow a municipality some control over how a mega-project is developed" and "[t]here are many planning considerations despite

[49] 2005 CarswellAlta 2187 [EUB] at para 41.
[50] *ENMAX Shepard Inc., Re*, 2010 CarswellAlta 2225 [AUC] [*ENMAX*] at para. 57.
[51] *ENMAX* at para. 55.
[52] 2002 CarswellAlta 2246 [*Alberta Municipal Government Board*] [*AES Calgary*].

the overall approval".[53] The MGB concluded that MD had "substantial control over the issuance of development permits and the rules under which the power plant must be constructed".[54]

These included traffic impacts, access and construction of access roads, construction management, dust and noise control, chemical storage and waste disposal, landscaping, storm and water management and reclamation, among others. Conditions imposed by the municipality would be consistent with the Board approval pursuant to s. 619 because they were identical to those given by the EUB, or because the EUB had not specifically set out the details on these matters in its decision.[55]

In short, while ss. 618, 618.1, 619 and 620 of the *MGA* give precedence to provincial decision-making in the areas of agricultural and energy development, caselaw that considers s. 619 suggests that municipalities still have a role to play with respect to planning considerations that are not touched on by the relevant authorization board(s).

c) Areas of Provincial Jurisdiction

Municipal authority is generally subordinate to any provincial legislation that covers the same subject matter. With respect to industrial development, provincial legislation that takes precedence includes, among others, the *Mines and Minerals Act*, *Public Lands Act*,[56] *Oil and Gas Conservation Act*,[57] *Oil Sands Conservation Act*[58] and *Pipeline Act*. The *Alberta Land Stewardship Act* (*ALSA*)[59] is also significant as it takes priority over certain municipal planning powers.

Alberta Land Stewardship Act

The *ALSA* provides the legal basis for regional land-use planning and the Land-use Framework (LUF) in Alberta. The *ALSA* empowers the Government of Alberta to enact a regional plan for each of the seven watershed-based regions in the

[53] *AES Calgary* at para. 86.
[54] *AES Calgary* at para. 88.
[55] *AES Calgary* at para 71.
[56] RSA 2000, c P-40.
[57] RSA 2000, c O-6.
[58] RSA 2000, c O-7.
[59] S.A. 2009, c. A-26.8 [*ALSA*].

province. These plans are intended to manage the effects of development with environmental and community objectives, as well as support economic, infrastructure and recreational needs. Once implemented, these plans are legal and binding. To date, only the Lower Athabasca Regional Plan (2012) and the South Saskatchewan Regional Plan (2014) are in force.

All municipal planning and development must now comply with *ALSA* regional plans. Section 622 of the *MGA* provides that every statutory plan, land use bylaw, and action undertaken pursuant to Part 17 must be consistent with the relevant *ALSA* regional plan. Any existing regulatory instrument that conflicts will be superseded by the regional plan.

The *ALSA* also requires municipalities to undertake a review of its regulatory instruments and to decide whether changes are needed.[60] A statutory declaration must be filed with government about compliance with regional plans within the timeframe set out in the regional plan.[61] It is also notable that the *ALSA* has some compensation provisions in relation to the impacts of regional plans on property, however, the Act also clearly states that rights to compensation do not apply to decisions under Part 17 of the *MGA*.[62]

[60] *ALSA*, s. 20.
[61] *ALSA*, s. 20.
[62] *ALSA*, s. 19.1(9).

d) Areas of Federal Jurisdiction

Municipal authority is also subordinate to any federal legislation that covers the same subject matter. *The Constitution Act, 1867*[63] establishes that the federal government has exclusive legislative authority over the following areas, among others.

Airports

The power to legislate in relation to aeronautics falls within the exclusive jurisdiction of the federal government by virtue of s. 91 of the *Constitution Act, 1867*. All airports (even intra-provincial airports) must be licensed by the Minister of Transport. Municipal bylaws have no application to airports themselves, even in the absence of any conflicting federal laws. They may, however, apply to developments on airport lands that are not actually related to the operation of an airport. In other words, federal jurisdiction expels provincial planning laws only to the extent that a particular development is directly related to airport purposes.[64]

Nevertheless, section 640(4)(l)(iii) of the *MGA* permits municipalities to provide in its land use bylaw for the development of buildings within a specified area around an airport. This power is subject to section 693 and 694(6) of the *MGA*. Section 693 empowers the Lieutenant Governor in Council to establish "international airport vicinity protection areas" surrounding Calgary and Edmonton international airports as well as to control, regulate or prohibit any use and development of land within those areas. Section 694(6) empowers the Lieutenant Governor in Council to make regulations that permit municipalities to define land in the vicinity of an airport and prescribe how municipalities are to manage this land.

Railway Lands

Generally speaking, inter-provincial railways fall within federal jurisdiction, while intra-provincial railways fall within provincial jurisdiction.[65] The latter are subject to all provincial planning rules, while the former are exempt.[66] Note that some intra-provincial railways may be placed under federal jurisdiction by operation of s.

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[63] *The Constitution Act*, *1867*, 30 & 31 Vict, c 3.
[64] Laux at 4-27 and 4-28. See also *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453.
[65] *Constitution Act*, *1867, s. 92(10)(a)*.
[66] Laux at 4-32.

92(10)(c) of the *Constitution Act, 1867*, which permits the federal government to declare a work to be for the general advantage of Canada or two or more provinces.

Telecommunications

Radio, television, cable and much of the telephone industry have been held to fall under federal jurisdiction.[67] Accordingly, municipal planning laws that affect the "vital part of the management and operation of the [telecommunications] undertaking" are inoperative.[68]

e) Constitutional Issues

Clearly, many areas that fall under municipal jurisdiction also have the potential to overlap with other levels of government. In some instances, it is readily apparent which level of government takes precedence. In others, the hierarchy is not clear and a constitutional law analysis is engaged.

To the extent that a validly enacted bylaw is inconsistent with federal or provincial law, the bylaw is invalid. Generally, there is no conflict unless there is an "express contradiction" between the bylaw and the statute in question, where obeying one necessarily means disobeying the other.[69]

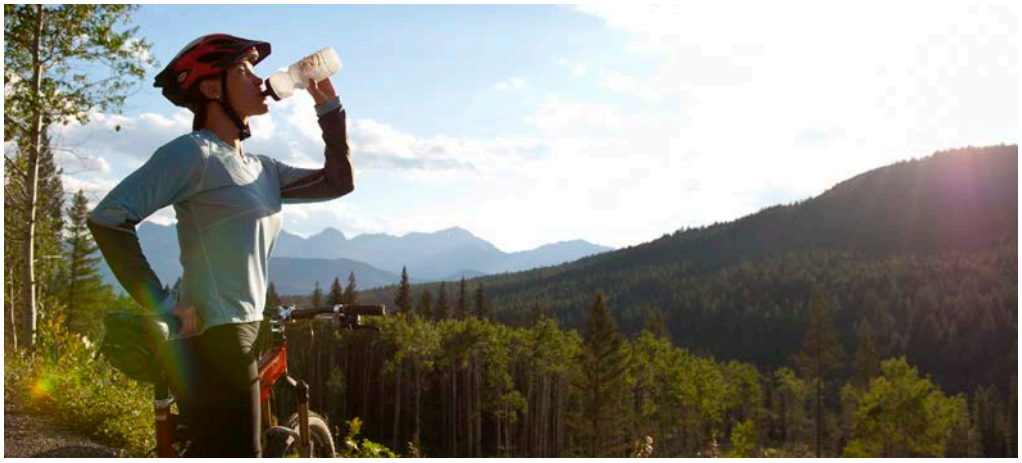
A bylaw can also be inconsistent if it displaces or frustrates the provincial or federal legislative intent.[70] This was the case in the recent National Energy Board (NEB) decision that considered whether Trans Mountain Pipeline ULC ("Trans Mountain") had to comply with select bylaws of the City of Burnaby ("Burnaby") for its pipeline twinning project.[71] The NEB found that Burnaby's application of section 7.3 of the Zoning Bylaw and section 3 of the Tree Bylaw frustrated a federal purpose. Specifically, Burnaby's processes to review applications and consider permits was causing unreasonable delay and frustrating Trans Mountain's exercise of its authorizations under the NEB certificate and associated orders. The doctrine of paramountcy applied to render sections of the bylaws inoperable, but only to the

[67] Laux at 4-33.
[68] Laux at 4-33.
[69] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 SCR 188, 2005 SCC 13 [*Rothmans*] at para 11.
[70] *Rothmans* at para. 12.
[71] Reasons for Decision, NEB Order MO-057-2017, January 18, 2018.

extent that they prevented Trans Mountain from performing its work. Subsequent court cases in the British Columbia Supreme Court and Court of Appeal challenging the NEB decisions were unsuccessful (although further challenges appear likely at this time).[72]

A municipal bylaw will also be struck down if it is in "pith and substance" aimed at regulating an issue under the exclusive jurisdiction of either the provincial or federal legislatures. The pith and substance analysis looks at the purpose and effect of the impugned legislation to ascertain its essential character.[73]

In still other instances, a bylaw can fall equally under both heads of power. These circumstances trigger the "double aspect doctrine", which acknowledges that the legislation could be enacted by either the provincial or federal legislature and permits the law to stand.[74]



[72] See for example *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2017 BCCA 132.
[73] *Smith v. St. Albert (City)* 2014 ABCA 76 at para 22 [*Smith*].
[74] For example, in *Smith* a smoke shop alleged that a City bylaw restricting the sale and display of drug-use paraphernalia was unconstitutional on the grounds that the law was, in pith and substance, criminal law and therefore outside the municipality's jurisdiction. The Court of Appeal found that the impugned bylaw fell under both the federal power to regulate criminal law pursuant to s. 91(27) of the *Constitution Act, 1867* and the provincial power over licensing and regulating business in the community under ss. 92(9) and 92(13). The federal and provincial aspects were of roughly equal important, and the Court applied the double aspect doctrine to uphold the validity of the bylaw.

Conclusion

As discussed, municipalities have a range of tools to regulate industrial development within their borders. However, there is tremendous potential for overlap with provincial or federal jurisdiction in the area, as well as specific legislative limitations on municipal authority. Given the circumstances, how can a municipality determine whether they have jurisdiction to regulate a particular development?

The following questions highlight some of the relevant issues a municipality may wish to consider: Do provisions of the *MGA* (or any other relevant legislation) prohibit the municipality from regulating the development in whole or in part? Does the development require a provincial or federal permit or authorization? If so, do municipal bylaws or plans conflict with matters covered by the provincial or federal permit or authorization? Are there any remaining areas not touched on by the provincial or federal permit or authorization? If so, does the municipality have jurisdiction to regulate these areas? For ease of reference, the flow chart below attempts to organize these queries in a linear fashion.

Despite the obvious challenges, there remains considerable opportunity for a municipality to regulate industrial development within its boundaries. These include matters under the exclusive jurisdiction of municipalities and matters not touched on by provincial or federal permits or authorizations.

Flow Chart: When can a municipality regulate industrial development?