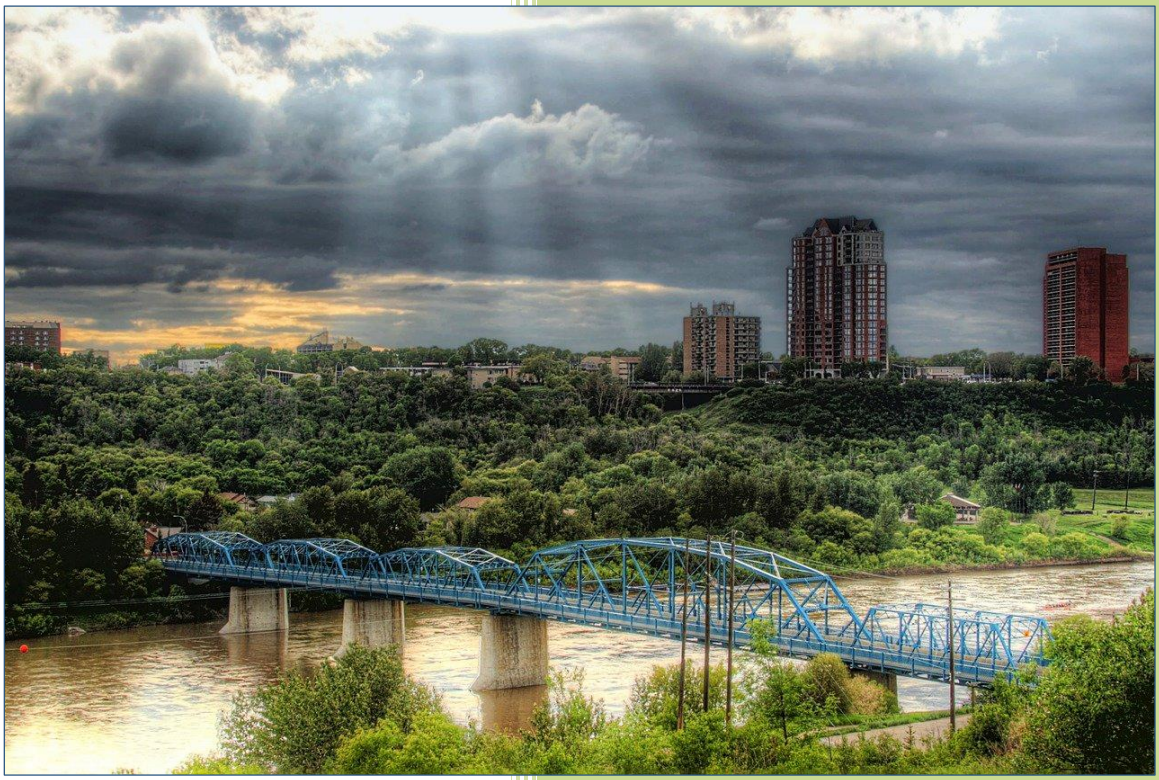
Municipal planning and environmental autonomy:

An update on provincial paramountcy and its implications for progressive environmental planning and decision making



Environmental Law Centre

A Community Conserve Project
Building environment and conservation capacity for municipalities

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Municipal planning and environmental autonomy:

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Municipalities play a central role in how our landscapes develop. This includes how the landscape is managed for environmental and conservation outcomes. Part of this role means reflecting the environmental values and objectives in municipal decisions, whether that is in statutory plans, bylaws or development permits and appeals.

The ability of municipalities to exercise autonomy over environmental outcomes is limited however through legislative changes (some recent) that can undermine municipal objectives and impact on local landowners and environments.

Balancing local environmental impact and provincial objectives

Municipal governments are the level of government closest to their constituents when it comes to impacts of development. Impairment of the environment rarely occurs at a provincial scale, rather individual projects may have localized or downstream impacts that alter the quality of the environment and quality of life for residents in those areas. These impacts may come in the form of impacts on water quality and quantity, air quality, noise, road safety, odours, and others.

If these impacts were not real there would be no need for development regulation and planning at all. This report provides an update to the Community Conserve report *Municipal Management of Industrial Development* and further investigates the issue of progressive environmental municipal planning and how it can be frustrated by provincial authorizations. This report takes an in-depth look at this issue and seeks to answer the question: how can municipalities autonomy over local environmental matters be undermined?

Legally, municipalities are creatures of provincial statute. In this regard, ensuring local environmental planning and protection is effective requires that the provincial government enable the powers of the municipality and seek to make provincial regulatory approaches consistent with the authority and role that a municipality undertakes. Accordingly, some of the challenges around municipal autonomy identified in this report are likely to require law reform.

The rationale for centralizing authorizations by providing provincial paramountcy (i.e. provincial law trumping municipal plans, bylaws and decision making) for certain developments has been summarized by Nickie Vlavianos and Chidinma B. Thompson in the oil and gas context:

> There are good reasons for centralized decision-making in the oil and gas context. Where, as in Alberta, resources are mostly publicly owned, there is a collective provincial interest in their management as well as a legitimate claim on the part of all Albertans to share in the benefits of their development. Centralization also ensures a level playing field for industry no matter where operations are located. It ensures consistency and predictability, at least with respect to minimum standards, and thus prevents the creation of a patchwork of regulations across the province which could lead to forum shopping by industry and a lowering of standards by municipalities to attract development for short-term benefit. Conversely, centralized decision-making guarantees that local concerns do not prevail over the concerns of the greater whole. Allowing all decisions to be subject to a local veto could promote a "not in my backyard" phenomenon that could undermine the well-being of the whole province in the interests of a few.
>
> Still, there are downsides to centralized decision-making in energy development. It may be that the greater interest does not always equate with the local interest. While local communities do enjoy some economic benefits of

> development, they may also be disproportionately exposed to the negative impacts. Those impacts are often felt most acutely by local landowners and other individuals who use the land where the development is occurring. In some cases, the impacts of development may be borne primarily by the local constituency, while the benefits flow elsewhere.
>
> Because municipalities are the natural vehicle for representing the values and interests of their local constituency, they are often on the frontlines in dealing with landowner discontent. Local governments are also often better positioned in terms of local knowledge to anticipate and deal with the social, economic, and environmental impacts of development. The Supreme Court of Canada has acknowledged that local governments are the level of government "closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity." [1]

Of course, this calculus is not so easy as both near term and long-term benefits and costs can be difficult to ascertain. By way of clear example of this, past law and policy around oil and gas abandonment and reclamation requirements has resulted in extensive unfunded liabilities, a suspension of municipal taxation, and questions about who, in the end, will pay for the cleanup of these sites. Decades of liabilities have been foisted onto local landowners and municipalities are faced with budget shortfalls and increased risks within their borders.

This calculus is further challenged where authorizations do not relate to the exploration and production of a public resource but rather for purely private profit. How are we to measure one party's gain (with economic spinoffs) against impairing or destroying a local environment?

The legitimacy of the proposition of short-term economic gain being paramount to localized impacts (some potentially very long term) should always be scrutinized. The legislative framing in Alberta supports the notion that the province knows the collective best, but this notion is countered when there is not clear accountability for provincial environmental quality in our laws. Autonomy of municipalities to pursue more environmentally sustainability planning and development within their borders can fill this gap; whether that is reflected in siting of environmentally significant areas or rejecting certain activities for their potential impact on the land, water, air, and health of the municipal residents.

[1] "Alberta's Approach to Local Governance in Oil and Gas Development" (2010) 48-1 *Alberta Law Review* 55, 2010 CanLIIDocs 167, https://canlii.ca/t/2959.

Contrasting mandates: Local harm reduction versus risk management

A key contrast between municipal and provincial mandates is that municipalities have a clear role in planning and land use development whereas provincial regulators typically approach matters with a focus on managing the risks of specific regulated activities.

The purpose of municipalities is set out in the *Municipal Government Act* (MGA) at section 3 which states:

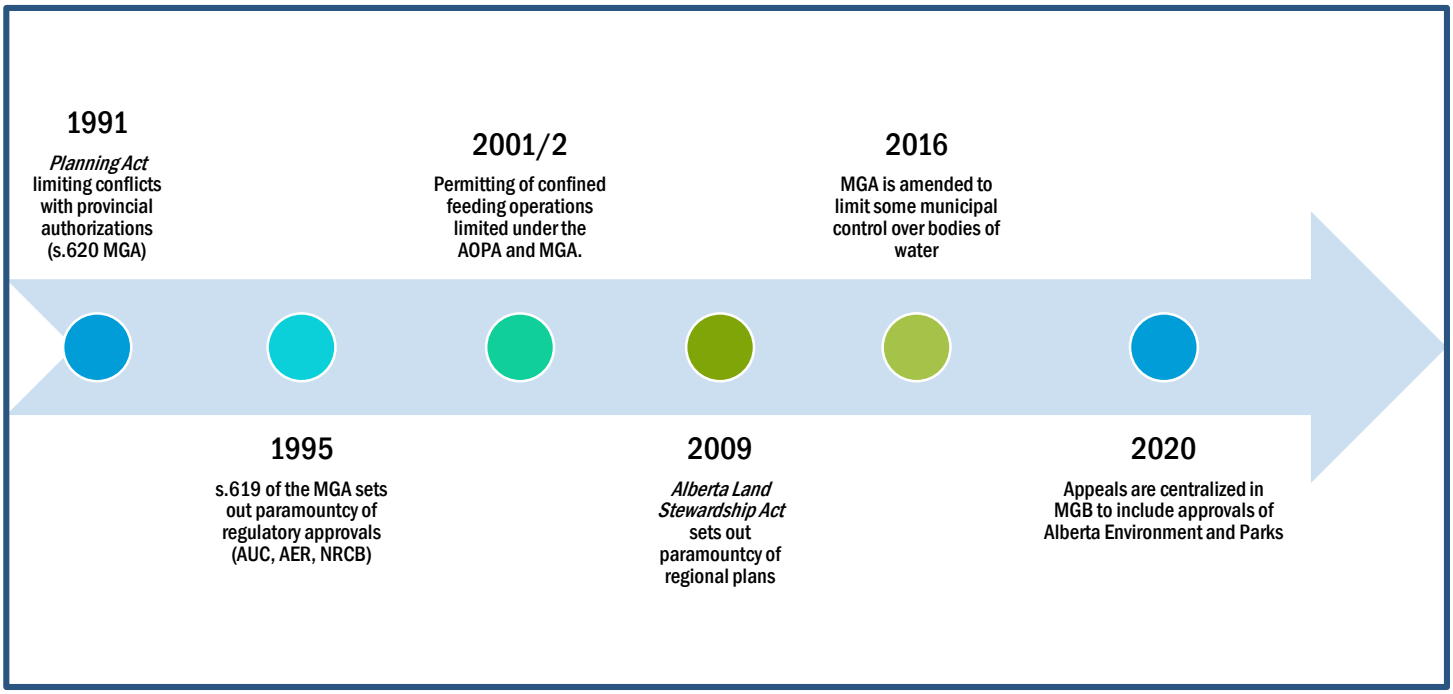
> **3** The purposes of a municipality are
> (a) to provide good government,
> (a.1) to foster the well-being of the environment,
> (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality,
> (c) to develop and maintain safe and viable communities, and
> (d) to work collaboratively with neighbouring municipalities to plan, deliver and fund intermunicipal services.

Several items jump out regarding this purpose, including providing "good government", fostering the well-being of the environment, and maintaining safe and viable communities. Further the MGA enables municipalities to pass bylaws related to the "the safety, health and welfare of people and the protection of people and property". The planning portion of the MGA expands on the MGA section 3 purposes noting a municipality should pass bylaws and plans "(a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta, without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest".[2]

Over the years, however, these purposes and objectives of municipal development and governance have been reduced. It appears that while the heavy lifting of "good governance" for environmental well-being is left to municipalities, legislative amendments have and continue to indicate that municipalities must not seek to raise the provincial bar for their residents' environmental quality. Figure 1 below outlines the timeline of how municipal autonomy has changed over the years.

[2] *Municipal Government Act*, R.S.A. 2000, c. M-26 (*MGA*) at s. 617.

Figure 1: Timeline of diminishing municipal autonomy



On the provincial side of the coin, there is lack of a planning mandate and minimal planning capacity within government departments or provincial regulatory tribunals. While this is offset somewhat by the use of regional plans which bind government departments, arms-length regulators and municipalities, only two regional plans have been approved since 2009. Further the regional plans approved to date cannot be considered to be substantively analogous to land use planning undertaken by municipalities. This issue is dealt with further below.

As compared to municipal land use planning, the provincial approach to development of the landscape is more focused on risk management and mitigation on a project-by-project basis. This is reflected in the tiered oversight activities under the *Environmental Protection and Enhancement Act* as well as relevant resource development law, regulations, and directives. These regulatory approaches reflect a risk-based assessment of project related impacts and may not prevent a host of localized impacts, including noise, traffic, air pollution, water pollution, and impacts on flora and fauna. The provincial regulatory approach then may be viewed as an "approval" system with mitigation measures embedded. In this regard, the province is more limited in its decision making scope, being most concerned with "how" projects may proceed. Planning on the other hand looks more broadly at questions of "why" and "where" activities are appropriate and if they should proceed at all due to conflicting planning objectives.

Redundancy and red tape versus effective environmental planning and good governance

Several of the more recent changes to the MGA have been framed by the provincial government as removing red tape or removing redundancy, however, as will be discussed further, what appears to be at play is removing the ability of local decisions makers to make decisions that are more protective of the environment. In this regard, the municipal–provincial contrast of regulatory approaches often reflects a battle of environmental ethos, wherein the municipality has more direct linkages with its most closely impacted constituents. It is anticipated that this conflict will only intensify as the provincial government seeks to spur a post-pandemic economy.

This report specifically focuses on those municipal decisions that aim to raise the environmental bar: those that are more protective of the environmental interest of local communities than its provincial regulatory counterpart. Fundamentally, the question becomes one of what developments and related impacts are deemed to be in the public interest.

We will now proceed to unpack the implications of each of the legislative changes in reverse order.

2020: Centralizing appeals for developments with Alberta Environment and Parks authorizations

In late 2020, under the pretense of red tape reduction, the provincial government altered the appeal and decision-making structure related to certain appeals of local subdivision and development authorities with direct impacts on localized decision making. This was done by amendment to the MGA and moves subdivision and development appeals which are subject to "licence, permit, approval or other authorization granted by the Minister of Environmental and Parks" (AEP) to the provincially appointed Municipal Government Board.[3] This Board will be amalgamated (on June 2, 2021) into the Land and Property Rights Tribunal (LPRT).[4]

To understand the impact of this, it is important to understand the differing make up of appellant bodies. Municipal Government Board (MGB) members are appointed provincially by the provincial Cabinet (as represented by the Lieutenant Governor in Council (LGC)).[5] Similarly the newly legislated Land and Property Rights Tribunal (LPRT) membership is appointed by the provincial Cabinet (via the LGC).[6] In contrast, a local subdivision and development appeal board

[3] See *MGA* at s. 678(2)(a)(i)(D) (for subdivision appeals) and s. 685(2)(a)(i)(D) (development appeals). Also see *Land and Property Rights Tribunal Act*, SA 2020, c L-2.3, https://canlii.ca/t/54w5l (LPRTA), not yet in force.
[4] See the *LPRTA* at s.41 where it states when it comes into force.
[5] *MGA* at s.486.
[6] *LPRTA* at s.3.

is established through municipal bylaw and appointed pursuant to the bylaw (with some restrictions).[7] A municipal councilor may serve on the appeal board (but not more than one).

Insofar as appeal procedures can be viewed as largely analogous between the MGB (and like the LPRT) and a Subdivision and Development Appeal Board (SDAB), there is likely not procedural red tape diminished by this legislative change (as SDABs will continue to exist and play their role). The valid question that arises then is whether removing local decision making autonomy is the purpose of moving appeals to a provincial body.

There are certain key decision-making areas where review and approval occurs by both AEP and municipalities. Paramount among them are sand and gravel extraction activities, as well as other activities that can result in significant local impacts, such as landfills.

A key concern for any municipality and their constituents should be whether this amendment usurps valid planning and development decision-making around these activities. The level of concern over many of these applications is reflected in litigation and appeals that have occurred in relation to them (see side bar for Alberta Court of Appeal decisions). Earlier case law stated that municipal restrictions on development can be consistent with authorizations of the provincial department of the environment where there is the opportunity for dual compliance. This case interpreted s. 620 of the MGA to note that additional and more stringent environmental measures put in place by municipalities can co-exist with provincial environmental authorizations.

SAND AND GRAVEL ACTIVITES IN THE COURTS

- Northland Material Handling Inc. v. Parkland (County), 2012 ABQB 407 (CanLII), https://canlii.ca/t/fs1pp
- Keephills Aggregate Co. Ltd. v. Parkland (County of) Subdivision and Appeal Board, 2003 ABCA 242 (CanLII), https://canlii.ca/t/1thxr, retrieved on 2021-04-07 (Leave application).
- McKelvie v Ponoka County Subdivision & Development Appeal Board, 2019 ABCA 91 (CanLII), https://canlii.ca/t/hxxdm
- Stuber v County of Barrhead No. 11 (Subdivision and Development Appeal Board), 2015 ABCA 339 (CanLII), https://canlii.ca/t/glzwx. Stuber v County of Barrhead No. 11 (Subdivision and Development Appeal Board), 2017 ABCA 52 (CanLII), https://canlii.ca/t/gxf8>
- Schiltroth v Parkland (Subdivision & Development Appeal Board), 2015 ABCA 231 (CanLII), https://canlii.ca/t/gjx8n
- Lehmann v. Thorhild (County No. 7), 2011 ABCA 79 (CanLII), https://canlii.ca/t/fkdwz
- Koebisch v Rocky View (County), 2019 ABQB 508 (CanLII), https://canlii.ca/t/j2fl3.
- Beaverford v. Thorhild (County No. 7), 2012 ABCA 99 (CanLII), https://canlii.ca/t/fqrvx SDAB decision quashed and reconsidered Beaverford v. Thorhild (County No. 7), 2012 ABCA 99 (CanLII), https://canlii.ca/t/fqrvx
- Burnco Rock Products Ltd. v. Rocky View (Municipal District No. 44), 1995 CanLII 9207 (AB QB), https://canlii.ca/t/28q1k
- Stuber v County of Barrhead No. 11 (Subdivision and Development Appeal Board), 2017 ABCA 52 (CanLII), https://canlii.ca/t/gxf8t
- Alexis v Alberta (Environment and Parks), 2020 ABCA 188 (CanLII), https://canlii.ca/t/j6xd3

In centralizing decisions in the MGB/LPRT, it appears the purpose is to minimize the discretion of local decision making. Undoubtedly there is frustration in some activity proponents facing refusal by a local appeal board due to environmental concerns. In one instance a gravel pit was

[7] *MGA* at s.627.

rejected four times.[8] Other instances of SDAB refusals to grant development permits have also occurred, citing concerns over reclamation, property values, security of the site, and impacts on drainage and cumulative effects.[9]

Approvals for sand and gravel extraction are contentious and frequently result in litigation, with some cases where residents opposed bylaw changes or development permitting decisions, and some with industrial proponents challenging the refusal to issue permits or change bylaws. It is clear that these activities are highly controversial and that locally impacted parties are willing to go to considerable expense in an effort to have their concerns heard. Many of the decisions relate to the applicants seeking leave to appeal a given permitting decision before the Alberta Court of Appeal. Appeals of SDABs lie to the Court of Appeal with leave under s. 688(1) of the MGA on questions of law or jurisdiction. This reflects a narrow ability to appeal as "the legislation reflects the Legislature's intention that planning decisions be left primarily to local bodies with review by the Court of Appeal in very limited circumstances".[10] While specific numbers of appeals of aggregate activities to the local SDABs is not known, there are several instances where the aggregate activities have arisen in the media.[11]

By centralizing appeals in the MGB there is the risk of minimizing the consideration of local planning objectives and outcomes and clearly reduces local environmental decision-making autonomy. This gives rise to concerns as AEP does not pursue environmental planning in the same way as the municipality nor is there any integration of siting with municipal statutory plans as part of the application requirement in the *Approvals and Registrations Procedure Regulation*.[12]

It is notable that this is not the first instance of streamlining for aggregate extraction as under the *Environmental Protection and Enhancement Act* sand and gravel pits greater than 5 hectares required an approval until 2003. After this point, many gravel pits only required a registration under the Act, a fact that remains to this day (although briefly a Court of Appeal decision required they go through an environmental assessment, only to have the legislation amended shortly thereafter).[13] The approval application process (pre-2003)has more oversight

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[8] Red Deer Advocate, "Gravel pit rejected for a fourth time", September 24, 2014, online: https://www.reddeeradvocate.com/news/gravel-pit-rejected-for-fourth-time/ noting "the appeal board says it is "not satisfied that the proposed development would be an appropriate development with the ESA (Environmentally Significant Areas)," a county designation that protects certain areas from "inappropriate development."

[9] Mountainview County Jan 10 , 2017 https://www.mountainviewtoday.ca/local-news/gravel-pit-appeal-denied-by-board-1814741.

[10] Keephills Aggregate Co. Ltd. v. Parkland (County of) Subdivision and Appeal Board, 2003 ABCA 242 (CanLII), https://canlii.ca/t/1thxr.

[11] See note 8 and 9 above.

[12] Alta Reg 113/93. The Regulation outlines various aspects of required information to be included in the application at section 3. The only linkage in the enumerated requirements that directly reference municipalities is in relation to emergency response plans.

[13] Alexis v Alberta (Environment and Parks), 2020 ABCA 188 (CanLII), https://canlii.ca/t/j6xd3

than the registration process and also provides rights to directly affected parties to submit statements of concern and to appeal the proposed pits before the Alberta Environmental Appeals Board.[14] These rights of public participation and appeal are retained in instances where water licences and approvals are required; however, that only deals with issues within the mandate of the *Water Act*.

Overall the MGA legislative amendments appear aligned with shifting to the provincial "mitigate and approve" approach versus leaving decisions to the planning authority, that is the municipality, to decide whether a project should proceed.

2016: MGA amendments to limit municipal opportunities to take Environmental Reserve around certain bodies of water

Conservation of wetlands in the province has been an area of ongoing policy challenges and potential conflict with municipal wetland conservation mandates. While some municipalities may wish to remove and drain wetlands, other municipalities are interested in preserving them for their various functions, including flood attenuation, mitigating storm water impacts on water quality, and biodiversity objectives.[15] While the 2016 amendments to the MGA do not have as far-reaching planning implications as some of the other legislative amendments in this report, they are clearly intended to minimize, at least on the surface, the management and control municipalities have over bodies of water.

Specifically, the amendments added a definition of "body of water" and augmented the language of s. 60 which states "[s]ubject to any other enactment, a municipality has the direction, control and management of the bodies of water within the municipality, including the air space above and the ground below."

Section 1 of the MGA states that reference to a body of water in the Act is to be interpreted to mean "(a) a permanent and naturally occurring water body, or (b) a naturally occurring river, stream, watercourse or lake".

The section previously stated that "subject to any other a municipality has the direction, control and management of **rivers, streams, watercourses, lakes and other natural bodies of water** within the municipality, including the air space above and the ground below."

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[14] *Activities Designation Regulation*, Alta Reg. at Schedule 1.

[15] See Joy B. Zedler and Suzanne Kercher "Wetland Resources: Status, Trends, Ecosystem Services and Restorability" (2005) *Annu. Rev. Environ. Resource* 30:39-74, online. https://www.annualreviews.org/doi/full/10.1146/annurev.energy.30.050504.144248. For the Alberta context see Irena F. Creed, David A. Aldred, Jacqueline N. Serran and Francesco Accatino "Maintaining the Portfolio of Wetland Function on Landscapes: A Rapid Evaluation Tool for the Estimating Wetland Functions and Values in Alberta Canada" Wetland and Stream Rapid Assessments. Online: https://doi.org/10.1016/B978-0-12-805091-0.00027-X.

The MGA amendments relating to "body of water" reflect the approach taken in the *Public Lands Act* and adds the concept of "permanence" to the s. 60 control provision and has implications for how environmental reserve (or environmental reserve easements) can be used during subdivision.

In effect the change in definition removed a broader, more general control over water bodies, whether they were permanent or not and limited it to what might be considered "Crown" owned bodies of water. In so doing, the scope of municipal jurisdiction is limited by curtailing the ability of subdivision authorities to require environmental reserves around semi-permanent or seasonal bodies of water.

That said it would appear that water and hydrology can be broadly considered in the development process, as clearly they impact various aspects of safety and environmental welfare. Indeed, a key challenge that municipalities often face is the impact of developments on the hydrology of an area, including surface runoff (and stormwater), managing impervious surfaces, and augmenting hydrology and hydrogeology with impacts on surrounding parcels. This is reflected in the current *Subdivision and Development Regulation* which requires a subdivision application to include a suite of information relevant to assessing the hydrology of the land, including topography, soil characteristics, and the potential for flooding, subsidence, and erosion.[16]

Further, the augmentation of the Act may cause some confusion as to what is to be considered "Crown" owned beds and shores of bodies of water under the *Public Lands Act*. Municipalities, and more specifically subdivision authorities, are not arbiters of Crown ownership for the purpose of the *Public Lands Act*, giving rise to the potential of inconsistent and potentially conflicting interpretations of what constitutes public land and what does not. This is undoubtedly why there is a referral of subdivision applications involving bodies of water under the Regulation. More specifically, the *Subdivision and Development Regulation* requires the referral of a subdivision application where the application relates to a parcel that is adjacent to a "body of water". The referral is made to the relevant Minister of the Crown (that administers the *Public Lands Act*). However, the regulation does not specify how a body of water is evaluated or defined nor does it assure there will be a Crown response. The regulation does provide for the ability for a municipality to agree to come to a "further define the term of a "body of water" with the Minister.[17]

The apparent objective of augmenting the language of the MGA was to only allow environmental reserves around Crown owned water bodies (as defined under the *Public Lands Act*). This overlooks the fact that water bodies, whether Crown owned or not, will play ecosystem functions that a municipality may wish to preserve. Further, it is not clear that this

[16] *Subdivision and Development Regulation.* Alta Reg 113/93. (SDR) at s.7.
[17] *SDR* at s. 5.

augmentation of s. 60 really diminishes general responsibilities of municipalities to manage around the impacts of a development on hydrology (and the risks that flow from that).

2009: Regional Planning

The Alberta government passed regional planning legislation in 2009, the *Alberta Land Stewardship Act* (ALSA). This piece of legislation does not expressly limit municipal authority and autonomy over environmental objectives, although depending on the language in individual regional plans this may be the effect. When the Act was passed it made a variety of consequential amendments to other legislation, including the MGA.

The MGA was amended to state that relevant municipal authorities and agencies, in exercising planning functions under Part 17, must do so in accordance with an applicable regional plan.[18] Further, the MGA states that "if there is a conflict or an inconsistency between anything that is done under a provision of this Part or a regulation under this Part and an applicable ALSA regional plan, the ALSA regional plan prevails to the extent of the conflict or the inconsistency."[19] Further, the ALSA binds local authorities requiring that municipalities amend their plans and bylaws to comply with the regional plan, and complete "compliance declarations" [20]

The MGA was also amended to include extraordinary powers for the Minister (in the event the Minister finds that a municipality is not in compliance with a regional plan) to suspend the authority of municipal councils to pass certain bylaws, to pass bylaws themselves, and to withhold money, among other powers.[21] This authority is extraordinary in the sense that it is based on whether the "Minister considers" that that the municipal authority is not complying with a regional plan and is not accompanied by procedural or appeal mechanisms to discern compliance. [22]

This legislation is different from the other legislative changes in this report insofar as it was aimed at creating a hierarchy of planning between the municipality and the province. It seeks to answer similar questions a municipality may have at the provincial level.

Notable for its absence is that there are no specific provisions about integrating municipal planning documents into the regional plan although it is clearly theoretically feasible through the use of sub-regional plans. This approach would enable integration of municipal environmental outcomes across government departments and independent regulators. For example, adoption of municipally identified environmentally significant areas into sub-regional

[18] *MGA* at s.618.3.
[19] *MGA* at s.618.3(2).
[20] *ALSA* at s.20.
[21] *MGA* at s.570.01.
[22] *MGA* at s.570.01

plans would reflect adoption of meaningful alignment and integration of environmental planning at the municipal and provincial level. Regional planning has not been used in this fashion to date, and admittedly, there would be a need to augment the timing of review of sub-regional plans to align with changes in municipal planning priorities.

2001: intensive livestock permitting

In 2001, a Bill was passed to amend both the *Agricultural Operations Practices Act (AOPA)* and the MGA to shift development approvals for confined feeding operations to the jurisdiction of the Natural Resources Conservation Board.[23] The Bill added s. 618.1 to the MGA (now moved to 618(2.1)).

> 618.1 This Part and the regulations and bylaws under this Part respecting development permits do not apply to a confined feeding operation or manure storage facility within the meaning of the *Agricultural Operation Practices Act* if the confined feeding operation or manure storage facility is the subject of an approval, registration or authorization under Part 2 of the *Agricultural Operation Practices Act*.

Prior to this time, municipalities were primarily responsible for authorizing these developments (and prior to 1994 the Alberta Planning Board dealt with the matter). Again, this created an area of contention between 1994 and 2001 with the Alberta Court of Appeal dealing with confined feeding operation and municipal disputes on at least four occasions. One may assume that disputes at the SDAB level were likely quite numerous as well.[24]

Importantly, *AOPA* maintains a legislatively recognized role for municipalities in terms of land use planning (unlike other areas dealt with in this report). Specifically, the Act states that an approval officer must deny an approval application if there is "inconsistency with the municipal development plan land use provisions".[25] The ability to manage planning around these developments was recently confirmed in the case of *Ponoka Right to Farm Society v Ponoka (County)*.[26]

Nevertheless, this deference to municipal plans can be limited. This was the case in the Natural Resources Conservation Board (NRCB) decision regarding *1577912 Alberta (Hines Creek Farms)* where the Board overturned an approval officer's refusal to grant an approval due to non-

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[23] See the *Agricultural Operation Practices Amendment Act, 2001, SA 2001, c 16, <https://canlii.ca/t/53mcj>* (*AOPA*).
[24] These cases include *MacGregor-Kennedy v. Provost (Municipal District No. 52) Subdivision and Development Appeal Board*, 2001 ABCA 179 (CanLII), https://canlii.ca/t/5rh6 *Outlook Pork Ltd. v. Lethbridge (Development Appeal Board)*, 1994 ABCA 205 (CanLII), https://canlii.ca/t/2dbcw, *Postman v. Lethbridge (County No. 26), Development Appeal Board*, 1998 ABCA 370 (CanLII), https://canlii.ca/t/5jk3 *Brooks (Town of) v. Newell (County No. 4) Development Appeal Board*, 1998 ABCA 168 (CanLII), https://canlii.ca/t/5sp1
[25] *AOPA* at s.20.
[26] 2020 ABQB 273 (CanLII), https://canlii.ca/t/j6jdm.

compliance with setbacks (including from water bodies) as set out in the planning documents of Clear Hills County.[27] In making the decision the Board simply assumes that the setbacks under *AOPA* were sufficient and that any increase to these setbacks would be require some level of (unnamed) justification. In so doing the Board assessed whether the "exclusion zones" were unreasonable, noting "[t]he Board can find no specific [Municipal Development Plan (MDP)] land use objective related to Hines Creek Farms' proposed CFO that would warrant a setback to water bodies or wetlands greater than that provided by *AOPA*."[28]

Unfortunately, land use objectives may not always be evident in the text of a plan. The Board decision effectively undermines a precautionary approach taken by the municipality, one that reflected input from public in the area. The planners' evidence in this situation was that multiple objectives and public input drove the content of the MDP. In which case the NRCB decision effectively undercut local land and environmental objectives.

This in turn emphasizes the importance of seeking to maintain supportive materials of MDPs and yet it is unlikely that MDPs will become heavily cited documents outlining scientific rationale. Decisions such as Hines Creek raise the spectre once again that municipalities who seek to raise the environmental bar will face challenges, even when legislation clearly reflects deference to municipal statutory plans (as is the case with *AOPA*).

1995: Regulatory approval paramountcy (s. 619)

Section 619 of the *Municipal Government Act* was aimed at ensuring consistency and, arguably, consistent approval of certain types of regulatory developments.[29] Concern over the section was identified in legislative debate in 1995:

> …the provision that causes some great consternation and concern is section 619, and this is something that municipalities are going to have to watch very, very closely. While the Bill supposedly speaks to greater autonomy for municipalities, this is one of the sections that snatches it right back again and centralizes the power with the provincial government. Where a licence, permit approval, or other authorization is granted by the Natural Resources Conservation Board, the Energy Resources Conservation Board, or the Alberta Energy and Utilities Board, any land use planning or bylaw or decision of a municipal government has to be subservient to that decision or authorization made by one of those three bodies. So for any o-f the planning that is undertaken by a municipality, it essentially all

[27] Board Decision 2020-03 / FA19003 1577912 Alberta Ltd. (Hines Creek Farms) April 23, 2020.
[28] *Ibid*. at page 6.
[29] Alberta Hansard (May 10, 1995) at 1718 as cited in *Borgel v Paintearth (Subdivision and Development Appeal Board), 2020 ABCA 192* (CanLII), https://canlii.ca/t/j7c5d at (para 20) (*Borgel)* - SDAB had to bifurcate the appeals to determine whether there were residual matters not dealt with through the AUC. Confirmed in *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 321 (CanLII), https://canlii.ca/t/j9lv6.

> goes by the wayside if it is inconsistent with a decision of the NRCB, ERCB, or AEUB.

The language of the section clearly states that the authorizations of these provincial tribunals/regulators prevail over municipal regulatory documents (such as statutory plans and bylaws). Case law around section 619 have been clear in noting that the section gives provincial authorizations paramountcy over municipal decisions "to ensure projects are not blocked at the municipal level for issues already considered and approved at the provincial level".[30] The section deals with the process for an activity proponent, with authorization in hand, to get municipal alignment with their provincial authorization.

Under the section, the main remaining role of municipal governments is to determine if an application for a statutory plan amendment, land use bylaw amendment, subdivision approval, development permit or other authorizations complies with the provincial authorization of the NRCB, Alberta Energy Regulator (AER) and its predecessors, or the Alberta Utilities Commission (AUC).[31] The municipal role then is to ensure that the contents of an application to amend the municipal document accurately reflects the contents of the provincial authorizations.

If the municipality is holding a hearing regarding an application, then the hearing may not deal with issues dealt with by the provincial authorization except to determine the need for an amendment to the planning documents.[32] Where the municipality fails within the prescribed time (90 days) approval relevant amendments then the matter may go before the Municipal Government Board. The MGB can only consider whether the relevant plan or bylaw is consistent with the provincial authorization and only need hear from the applicant and the municipality on the issue.

For a detailed discussion of the interaction between local governments and oil and gas activities see Nickie Vlavianos and Chidinma Thompson "Alberta's Approach to Local Governance in Oil and Gas Development"[33]

How are municipal objectives treated by s. 619 regulators?

The AER (and its predecessors), the AUC and the NRCB all have both regulatory authorization functions and appeal functions. In exercising both of these functions, municipal statutory plans and bylaws and related environmental objectives may play varying roles. While s. 619 is clear in that it provides paramountcy to the provincial authorizations, it is important to have a sense of how these regulatory bodies consider municipal perspectives and whether they recognize municipal interest sufficiently to warrant granting them legal rights to a hearing (i.e., standing).

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[30] *Borgel* at note 28 at para 22.
[31] *MGA* s.619(2).
[32] *MGA* at s.619(4).
[33] (2010) *Alberta Law Review* 48:1 online: https://canlii.ca/t/2959.

We highlight some examples below from the AER and the AUC to illustrate how municipalities may bring value to regulatory processes and appeals and can contribute to public interest determinations. However, the tribunals understand the nature of section 619 and realistically will adopt those aspects of municipal planning that are consistent with provincial approval processes. In this regard, one could say direct resistance may be largely futile in the face of s.619.

The AER's legislation and related directives provide municipalities with an opportunity to participate in authorization and appeal processes.[34] As a specific example, Directive 056 states that local authorities and municipalities should be incorporated into consultations on proposed activities and the Directive sets out specific notification requirements.[35] Notwithstanding this obligation to consult with municipalities in the application process, whether a municipality will be viewed as directly affected, and thus be able to trigger a hearing over its concerns, will depend on the circumstances.

As Nickie Vlavianos and Chidinma Thompson have noted there are instances where municipalities have been refused "standing".[36] In one instance, the ERCB (the predecessor of the AER) refused to find that Brazeau County was directly affected based on its role and responsibility in the case of emergencies and the interaction with oil and gas emergency response plans.[37] The county was able to participate in a hearing based on another directly affected party but would not have been able to trigger the hearing itself.

In another instance, the Board found that the concerns of the Municipal District of Pincher Creek regarding an application to drill for sweet gas did not justify a hearing. The municipality in this case had concerns over groundwater, roads, weeds, and native grassland impacts that it wanted the company to address. [38] The Board decided the municipality's concerns could be dealt with through the municipality's own authority and that its concerns were of a "general nature" and not specific to the proposed well.[39]

More recently the AER has refused to hold a hearing based on a municipality's concerns regarding a coal mine exploration program. The Municipal District of Ranchland No. 66 had filed a Statement of Concern in respect of Elan Coal Ltd application (Application No.

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[34] This includes participatory rights under the *Responsible Energy Development Act*, related regulations and rules and Directives.
[35] Alberta Energy Regulator, Directive 056 Energy Development Applications and Schedules at s.3.2.1.
[36] Nickie Vlavianos and Chidinma Thompson "Alberta's Approach to Local Governance in Oil and Gas Development" (2010) *Alberta Law Review* 48:1 (Vlavianos & Thompson) at 73. online: https://canlii.ca/t/2959. "Standing" refers to the right of a party to bring a matter to the court. If one doesn't have standing the court will not adjudicate on the matter.
[37] Vlavianos & Thompson at note 35.
[38] Vlavianos & Thompson at note 35.
[39] Vlavianos & Thompson at note 35 at 73-74.

A10104623(CEP200002)).[40] In deciding a hearing was not required the AER concluded that the concerns of the municipality had been adequately dealt with by existing regulatory processes ? and proceeded to approve the application. Among other considerations the AER poignantly noted: [41]

> - In relation to the MD of Ranchland's concern about this CEP interfering with its mandate to pursue development in accordance with its land use bylaw, AER approvals prevail over municipal bylaws pursuant to section 619 of the *Municipal Government Act*.

In rejecting a hearing in relation to this concern it reflects a position that the AER feels that municipal planning is largely irrelevant when it comes to AER jurisdiction and that reliance on existing laws and regulatory procedures were sufficient to address other areas of concern. While this position is supported as a matter of law it begs the question of whether the AER recognizes municipalities as a valid interest in determining when a development will be "efficient, safe, orderly and environmentally responsible" (as mandated in the *Responsible Energy Development Act*).[42]

Similarly, the relevance of municipal planning and zoning has been discussed in the context of a recent Alberta Utilities Commission (AUC) decision. The AUC decision regarding the Acestes Ventures Ltd. Coaldale Solar Project considered a solar plant on private lands within Lethbridge County. The written submission of Lethbridge County highlighted its goal of retaining high valued agricultural lands and that its land use bylaw provided siting criteria of solar installations, focusing them on marginal lands, on 80-acre parcels or less with no irrigation rights, and generally avoiding irrigation lands where feasible.[43] The applicant in this case noted the value of these objectives but also explained the siting's proximity to one of its substations that made it economical. The proponent indicated its intention to continue to consult with the municipality to discuss "how the land use bylaw could be amended to better accommodate solar projects".[44]

The AUC stated in its findings:

> 45. The Commission must have regard for Lethbridge County's land use authority and the land use regime established under its bylaws. The Commission must also have regard for the purpose and object of the relevant legislation, described above, as well as Alberta's policies guiding the development of solar projects,

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[40] See Alberta Energy Regulator, Letter to Municipal District of Ranchland No. 66 Re Statement of Concern No. 31767, Application No. A10104623(CEP200002), online: https://static.aer.ca/prd/2020-09/A10104623_20200910.zip.
[41] See Alberta Energy Regulator, Letter to Municipal District of Ranchland No. 66 Re Statement of Concern No. 31767, Application No. A10104623(CEP200002), online: https://static.aer.ca/prd/2020-09/A10104623_20200910.zip.
[42] Responsible Energy Development Act, SA 2012, c R-17.3, <https://canlii.ca/t/54cw1> at s. 2.
[43] Decision 23821-D01-2019 at para 25.
[44] Decision 23821-D01-2019 at para 25.

including that siting solar projects on cultivated lands avoids impacts on landscape, wetland and wildlife features that must be or should be avoided.

46. In reaching a decision on the applications, the Commission must therefore strike a balance between the competing interests reflected in the legislation and the above policies, all of which bear on the project. In doing so, the Commission has considered that if the project was approved, approximately 150 acres of irrigated agricultural land would be lost for the period of time the project is operating and thereafter, for the time needed to restore the land to another use. However, the land is not forever lost for agricultural purposes. In fact, as noted above, the *Conservation and Reclamation Regulation* requires Acestes to reclaim the project lands as required by Section 137 of the *Environmental Protection and Enhancement Act*.

47. The close proximity of the project to Coaldale 254S Substation (which minimizes or avoids the additional costs and disturbance associated with the longer distribution feeder lines that would be needed if the project was located further from this or another substation), is also significant as is Acestes's statement that all of the lands in proximity to the substation are agricultural lands.

A note on s.619 procedure

Recently case law and tribunal decisions have shed some light in terms of how s. 619 plays out in practice. Specifically, municipal decision makers must not unduly limit hearings on the merits of whether the municipal decision is inconsistent with a decision of one of the provincial regulators covered by s. 618. Specifically, the Alberta Court of Appeal in the case of *Borgal v. Paintearth (Subdivision and Development Appeal Board)* 2020 ABCA 192 (CanLII), https://canlii.ca/t/j7c5d found that the county SDAB had violated principles of procedural fairness by cancelling a hearing on the merits of the case. In this case the SDAB held a preliminary hearing to identify what matters were not dealt with by the AUC but failed to provide the applicants an opportunity to address whether the relevant municipal and provincial authorizations were consistent.[1] At paragraph 43 the court noted:

The statute contemplates the making of development conditions as long as they do not conflict with the decision of the AUC. It May be that the scope and range of potentially appropriate conditions might be quite narrow, but it was premature to decide that question. The mere coincidence of the list of subject matters as between the decision covered by the AUC and the topics raised at the preliminary hearing does not necessarily mean there was nothing further to say.

In so doing the relevance of the land use bylaws and plans of a municipality can clearly be seen as a consideration but not one that will necessarily hold sway. Alignment and consistency with MDPs and relevant bylaws will be preferred by provincial regulators but the weight they will be

given is likely to be limited.[45] Where lands are only temporarily removed from production and where economic interests of an applicant are acknowledged municipal land use planning objectives may be marginalized.

1991: Provincial authorizations and conflicts with municipal permitting (s. 620 MGA)

Section 620 of the MGA originated in the early provincial planning law, the *Planning Act*. Section 620 states:

> A condition of a licence, permit, approval or other authorization granted pursuant to an enactment by the Lieutenant Governor in Council, a Minister, a Provincial agency or Crown-controlled organization as defined in the Financial Administration Act or a delegated person as defined in Schedule 10 to the Government Organization Act prevails over any condition of a development permit that conflicts with it.

This provision and the determination of whether there is a "conflict" between the provincial authorization and a development permit has been clarified through the case law. The case of *Northland Material Handling Inc. v. Parkland (County)* involved an application for judicial review of a municipal development permit condition and whether it conflicted with a sand extraction and landfilling authorization granted by Alberta Environment (now AEP, and notably not one of the enumerated s.619 tribunals/regulators).[46]

In discerning whether a conflict existed, the court concluded that more onerous environmental conditions put in place by a municipality are not in conflict with Alberta Environment's authorization conditions and that the applicant must simply comply with both authorizations.[47] This reflects a similar approach to discerning conflicts of municipal action and provincial laws that was outlined by the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town).* This case held that municipal bans on cosmetic pesticide use by a Quebec municipality was not in conflict with provincial regulations regarding authorized use of pesticides and that a conflict required establishment of an inability to achieve dual compliance or a clear indication that the provincial law intended to preclude municipal action.[48]

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[45] Alberta Utilities Commission, Alberta Electric System Operator Needs Identification Document Application, ATCO Electric Ltd. Facility Applications, Paintearth Wind Project Connection, March 24,2021, Decision 23206-D01-0021, https://efiling-webapi.auc.ab.ca/Document/Get/696679. Wherein the proponent and decision highlights the alignment with the proposed connector was in alignment with the MDP (at paras23-24).
[46] *Northland Material Handling Inc. v. Parkland (County)*, 2012 ABQB 407 (CanLII), https://canlii.ca/t/fs1pp (*Northland*)
[47] 2012 ABQB 407 (CanLII), https://canlii.ca/t/fs1pp.
[48] [2001] 2 S.C.R. 241, 2001 SCC 40.

The court in this case clearly recognized the different approaches taken between sections 620 and 619, noting:[49]

> ….it is noteworthy that there are key differences between s.619(1), which deals with certain types of permits and approvals, and s.620 which deals with Alberta Environment permits and approvals. Although NRCB permits and approvals, for example, clearly prevail over development decisions, permits and approvals of agencies such as Alberta Environment only prevail over any condition or development permit that conflicts with the permit or approval. The Legislature clearly intended to make a distinction between environmental legislation on the one hand, and certain other types of regulation on the other. Therefore, the task here is to determine if the Council's decision to deny an extension contains a condition that conflicts with Alberta Environment's approval.

While the application of the company was set aside on a time limitation issue the court went on to observe:

> …the court is of the view that there is no conflict between the Alberta Environment approval and the Council's decision not to extend the development permit. The Alberta Environment permit does not enjoy any paramountcy. Rather, this is one of the situations where the two types of approval operate concurrently. Neither permit compels what the other forbids or, to put it another way, there is no barrier to dual compliance. There is no operational conflict in the two types of approval. Alberta Environment was not forcing Northland to excavate sand and gravel from its property; rather, it was only saying that if Northland chose to dig holes on its property, and received a permit to do so, then it would have to fill them to a certain height to reclaim the lost topographical contours. Northland required a development permit from Parkland County both in order to dig holes on its property and in order to operate a land fill in order to fill up those holes; there were zoning considerations relating to the look of the property relative to the interests of neighbouring property as well as interests relative to the municipal servicing of the Northland property in relation to other properties in the municipality. The decisions of the Council and of Alberta Environment are therefore able to be harmonized.

The Court's observations reflect a recognition of the respective roles of both levels of government. It also reflects support for the concept of subsidiarity and the notion that local authorities should have the ability to raise the bar for environmental outcomes within their boundaries.

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[49] *Northland* at note 45 at para 43.

Conclusion

Municipal autonomy to make environmental planning and development decisions is influenced not only by municipal law but also the exercise of discretion by provincial regulators in the making of decisions. The provincial paramountcy provisions of the *MGA* make the assumption that higher municipal environmental standards would be inefficient and impeding of provincial objectives (primarily those of an economic nature). Yet accountability for localized impacts on the environment are more likely to be realized at the municipal level.

The present state of affairs can only be changed through law reforms that mandate better harmonization rather than provincial paramountcy or through changes in how regulators consider municipal plans and bylaws. While localized environmental autonomy can pose challenges for certain types of development there is a tradeoff as provincial mandates and regulators may find it most efficient to disregard local aspirations for their quality of environment.