Alberta's Municipalities & Environmental Assessment

A Primer to the Model Bylaw

Environmental Law Centre

A Community Conserve Project
Building environment and conservation capacity for municipalities

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Municipal Authority over Environmental Matters

Municipalities are "creatures of statute" meaning that a municipality is created and governed by its enabling legislation. A municipality's actions must be within the parameters set in its enabling legislation. Furthermore, since municipal authority is delegated by the province (via legislation), a municipality cannot purport to assert authority over matters that are not within provincial jurisdiction. In order to understand municipal authority over environmental matters, it is necessary to consider both Canada's constitutional framework and Alberta's municipal legislation.

Constitutional Framework

In Canada, the authority of the federal and provincial governments to make laws is governed by the *Constitution Act, 1867*.[1] Sections 91 and 92 of the constitution list the subject matters over which the federal and provincial governments have jurisdictional authority, respectively.

Neither the federal not provincial governments have exclusive legislative authority over the environment. Rather, both levels of government have legislative authority relevant to environmental matters which means that the environment is a matter of overlapping and concurrent legislative authority. In addition to authority to make laws, both the federal and provincial governments have ownership over a variety of natural resources which may confer a measure of control in some environmental matters.

Federal powers over environmental matters

Under s. 91 of the *Constitution*, the federal government has legislative authority to make laws for the "Peace, Order and Good Government" of Canada in relation to all matters that are not exclusively assigned to the provinces (the POGG power). In addition to the residuary POGG power, the constitution explicitly assigns several heads of authority to the federal government. Those heads of authority relevant to environmental matters include:

- regulation of trade and commerce;

[1] *Constitution Act*, 1867 (UK), 30 & 31 Vict., c. 3 (U.K.), reprinted in RSC 1985, App. II, No. 5.

- navigation and shipping;
- seacoast and inland fisheries;
- criminal law; and
- taxation.

Other matters relevant to environmental matters over which the federal government has authority include migratory birds, interprovincial works, atomic energy, aboriginal peoples and lands, and aeronautics. The federal spending power can also have a significant role to play in environmental matters.

In addition to its legislative authority, the federal government has ownership interests which may confer some control over environmental matters.[2] However, generally speaking, proprietary rights do not provide a basis for comprehensive federal efforts within provinces.[3]

Provincial powers over environmental matters

Under s. 92 of the Constitution, provinces have authority to make laws in relation to municipalities, property and civil rights in the province, local works and undertakings, and all matters of a merely local or private nature in the province. Each province also has jurisdiction to regulate with respect to the management and sale of public lands belonging to that province (including the timber and wood thereon). In addition, s. 92A grants jurisdiction to the provinces to legislate regarding conservation and management of non-renewable resources, forestry resources, and facilities for the generation and production of electric energy. The provincial power of direct taxation can also be relevant to environmental matters.[4]

In addition to legislative authority, each province has proprietary rights to certain natural resources within that province.[5] Each province owns the public lands within provincial boundaries including natural resources, beds of navigable water, wildlife, the proprietary

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[2] Judith Hanebury, "The Environment in the Current Constitution", (1992) 18:4 Alternatives 14. The federal government owns canals; public harbours; lighthouses and piers; river and lake improvements; military roads; armories and lands set aside for public purposes; northern territories; territorial seas; national parks; Indian lands; federal crown lands; and lands obtained by federal purchase or expropriation for federal purposes such as interprovincial railways or defence.

[3] Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: UBC Press, 1996).

[4] *Supra* note 1 at Section 92.

[5] *Supra* note 2.

and marketing aspects of fisheries, and wood and timber. These ownership rights, along with legislative authority granted by ss. 92 and 92A of the *Constitution*, mean that provinces have a dual role as legislators and owners of natural resources.[6]

Each province generally has good authority to deal with environmental matters that fall within its boundaries.[7] However, environmental matters that fall expressly into federal jurisdiction (matters that affect fisheries or navigation, and intra-provincial pollution that moves across boundaries by air or water) cannot be regulated by the provinces nor delegated to municipalities.

Municipal powers over environmental matters

As mentioned, municipalities are "creatures of statute" which means that a municipality is created and governed by its enabling legislation. In Alberta, the primary piece of legislation governing municipalities is the *Municipal Government Act* (the "MGA")[8] and its accompanying regulations. In addition to the MGA, municipalities may derive authority from other provincial legislation.[9] From an environmental perspective, key pieces of legislation include the *Environmental Protection and Enhancement Act*, [10] the *Historical Resources Act*,[11] the *Hydro and Electric Energy Act*,[12] and the *Alberta Land Stewardship Act* (ALSA).[13]

Currently, the MGA applies to all municipalities in Alberta including cities, towns, villages, summer villages, municipal districts and specialized municipalities.[14] Recent amendments

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[6] Alastair R. Lucas, "Natural Resource and Environmental Management: A Jurisdictional Primer" in Donna Tingley, ed, Environmental Protection and the Canadian Constitution: Proceedings of the Canadian Symposium on Jurisdiction and Responsibility for the Environment (Edmonton: Environmental Law Centre, 1987) 31.

[7] *Ibid*.

[8] *Municipal Government Act*, RSA 2000, c. M-26 (MGA). It should be noted that the MGA is currently under review by the provincial government. The website providing progress on the review process is http://mgareview.alberta.ca/.

[9] The MGA also contains several consistency provisions - s. 619 (AER, AUC, NRCB permits), 620 (provincial permits), 622 (provincial land use policies) and 693 (international airport vicinity protection area regulations). As well, provincial approval may be required for certain developments: development adjacent to provincial highways (need permit from Alberta Transportation), EPEA may require EA, major projects in NRCB Act, energy and utility projects (AER or AUC).

[10] *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

[11] *Historical Resources Act*, R.S.A. 2000, c. H-9.

[12] *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16.

[13] *Alberta Land Stewardship Act*, R.S.A. 2000, c. A-26.8.

[14] MGA *supra* note 8 at s. 1(1)(s).

to the MGA authorize the creation of City Charters which may provide that specified provisions of the MGA are inapplicable to a particular City and may enable that City to modify or replace provisions of the MGA via bylaw. There are no City Charters as of December 2017.

Part 1 of the MGA sets out the purposes, powers and capacity of municipalities. Among other things, the purposes of a municipality include providing good government and developing and maintaining safe and viable communities.[15] On October 26, 2017 this provision was expanded to include "foster[ing] the well-being of the environment".[16] This change is intended to give municipalities explicit authority to take a leadership role in environmental stewardship and to encourage them to consider the environment in their operational and land-use decisions.[17]

Under s.5 of the MGA, a municipality has the powers, duties and functions as specifically set out in the Act or in other statutes. In addition, a municipality has natural person powers except as limited by the MGA or other statutes.[18]

Another key power of municipalities is the authority, under s. 7 of the MGA, to make bylaws for specified municipal purposes. A municipality has the authority to enforce its bylaws using several mechanisms including the creation of offenses, fines, penalties, imprisonment, inspections and remedying contraventions. Among other things, a bylaw may:[19]

- regulate or prohibit certain activities;
- deal with developments, activities, business or things in different ways; or
- provide a system of licences, permits or approvals.

While there is no express authorization within s. 7 of the MGA to make bylaws for environmental purposes, this does not necessarily preclude a municipality from doing so. Several court decisions have confirmed the authority of municipalities to act on environmental matters using the general welfare bylaw power. For example, in *Croplife*

[15] *Ibid.* at s. 3.
[16] *Ibid.* at s. 3 as amended by Bill 8, *An Act to Strengthen Municipal Government*, 3rd Session, 29th Leg, Alberta, 2017, cl. 3 (proclaimed into force October 26, 2017).
[17] Government of Alberta (2017), online: Building Better Communities Municipal Government Act Review https://mgareview.alberta.ca/whats-changing/empowered-to-govern/#Environmental_Well-Being.
[18] *Supra* note 8 at s. 6.
[19] *Ibid.* at s. 8.

Canada v City of Toronto, the Court found that a municipal pesticide bylaw was legitimate pursuant to its general welfare power.[20]

It should be noted that any bylaw that is inconsistent with provincial law is of no force or effect.[21] Furthermore, since municipal authority is delegated by the province, a municipality cannot purport to assert authority over matters that are not within provincial jurisdiction. That is a municipality cannot purport to regulate expressly federal matters such as navigation, fisheries or intra-provincial pollution.

However, the mere fact of provincial or federal regulation of a subject matter does not necessarily preclude municipal regulation of that same subject matter. With respect to regulation of environmental matters in Alberta, the Alberta Court of Appeal has stated:[22]

> [20] Municipal authorities have the jurisdiction to address environmental facts even though the environment is regulated by the province: see Robertson v. Edmonton (City), [1990] A.J. No. 278(Alta. Q.B.); Hutterian Bretheren Church of Starland v. Starland No. 47 (Municipal District),b[1991] A.J. No. 495 (Alta. C.A.).

In other words, it is possible to have the same subject matter regulated by more than one level of government (this is referred to as concurrent legislation). However, a municipality must be wary to not use its bylaw power in a manner that impinges on the core of existing provincial or federal regulation of a matter.[23]

Further, if a municipal bylaw results in an operational conflict, as a matter of paramountcy the federal or provincial legislation will prevail. This principle is illustrated by recent Burnaby Bylaw Litigation[24] which considered a conflict between a municipal parks bylaw

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[20] *Croplife Canada v City of Toronto*, (2005) 75 O.R. (3d) 357. This decision is consistent with the decision in *114957 Canada Ltee v Hudson*, [2001] 2 SCR 241 wherein the Supreme Court of Canada upheld a municipal bylaw prohibiting the cosmetic use of pesticides under a provision in the enabling legislation which allowed general welfare bylaws.

[21] *Supra* note 8 at s. 13.

[22] *Patricia Hills Landowners Society v Parkland County (Subdivision and Development Appeal Board)*, 2010 ABCA 413 (CanLii) at para. 20.

[23] See also *Peacock v Norfolk (County)*, [2004] OJ Mo. 5835 (ON. S.C.) and *Rogers Communications Inc. v Chateauguay (City)*, 2016 SCC 23. In the *Peacock* case, a municipal bylaw attempted to change siting provisions set by a comprehensive provincial code and, as such, was found to be repugnant to provincial legislation. In the *Rogers* case, the court found that a municipal reserve notice was intended to affect the siting of a telecommunications tower and was therefore *ultra vires* the municipality because it impaired the core of federal power by compromising orderly development of telecommunications.

[24] This consisted of several applications before the NEB, the BC Courts and the Federal Courts. For a good summary, see Nigel Bankes, "Pipelines, the National Energy Board and the Federal Court" (2015) 3(2) Energy Reg. Q. 59 at pp. 68-72. Effectively, the NEB (in Ruling 40) decided the constitutional question in this matter.

and a National Energy Board (NEB) order allowing a pipeline company's activities pursuant to s. 73(a) of the *National Energy Board Act*. In this case, the municipality attempted to stop the pipeline company's activities (drilling bore holes) as a violation of its *Parks Bylaw*. Ultimately, it was held that the bylaw was inoperative to the extent it conflicted with the NEB order.[25] In this case there was clear operational conflict making dual compliance with both the bylaw and the NEB order impossible thereby triggering the application of the paramountcy principle.

Further, while municipalities do have authority to act in environmental matters, that authority is subject to a territorial limitation and cannot be used to attempt to affect matters outside its boundaries.[26] There is a presumption that a municipal bylaw is valid unless it is demonstrated that the bylaw falls outside the municipality's jurisdiction, such as not being made for a municipal purpose or regulating a matter not within provincial jurisdiction (which means it cannot be delegated to the municipality). [27]

Other recent amendments to the MGA recognize the need for adjoining municipalities to plan on a coordinated and integrated fashion, including when considering environmental matters. These plans must address environmental matters in the relevant area.[28]

Since municipalities derive their authority via delegation from the province, there are restrictions on municipal actions associated with the principle of delegation.[29] Being a delegate, a municipality may not re-delegate to others unless the enabling legislation allows such a re-delegation or the matter is a purely administrative matter. This rule against re-delegation includes re-delegation to itself of regulatory authority. In other words, a bylaw cannot merely repeat the statutory language that grants the authority in the first place but must provide additional guidance as to permissible conduct. In addition, any materials incorporated by reference must be as of the date of the bylaw (as opposed as "amended from time to time").

The BC Supreme Court declined to take jurisdiction to resolve this matter and the Federal Court of Appeal denied leave to review the NEB's decision.

[25] Effectively, the NEB (in Ruling 40) decided the constitutional question in this matter. The BC Supreme Court declined to take jurisdiction to resolve this matter and the Federal Court of Appeal denied leave to review the NEB's decision.

[26] *Shell Canada Products Ltd. v Vancouver*, [1994] 1 S.C.R. 231.

[27] *Eng v Toronto*, 2012 ONSC 6818 (CanLii) at para. 16 to 17.

[28] *Supra* note 8 at s.631.

[29] Lanarc Consultants Ltd., Stewardship Bylaws: A Guide for Local Government (Revised June 1999), Government of Canada as represented by the Minister of Fisheries and Oceans, and Government of British Columbia Ministry of Environment, Lands and Parks.

Thus, in designing a municipal EA bylaw, a municipality must take care to remain within its jurisdiction by ensuring the bylaw is made for a municipal purpose within the parameters of the MGA. A municipal EA bylaw also must not attempt to regulate a matter not within provincial jurisdiction. As well, a municipal EA bylaw must not impinge the core of existing provincial or federal regulation but rather be complementary in nature.

Municipalities and Environmental Assessment

Environmental assessment is a means to improve decision-making and to enable the selection and design of undertakings with minimized negative environmental impacts. This paper provides a brief overview of the purpose and objectives of EA. As well, an overview of the existing provincial EA regime is provided in this paper. This background information is useful in designing an effective municipal EA bylaw.

What is Environmental Assessment?

The Supreme Court of Canada has described environmental assessment as follows:[30]

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., Environmental Rights in Canada (1981), 245, at p. 247:
>
> The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.
>
> As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development [citations omitted]. In short, environmental assessment is simply descriptive of a process of decision-making.

[30] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 71.

The International Association for Impact Assessment (IAIA) defines environmental impact assessment as "the process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of development proposals prior to major decisions being taken and commitments made."[31] Several objectives for environmental impact assessment have been identified by the IAIA.[32] These are to:

- ensure that environmental considerations are explicitly addressed and incorporated into the development decision making process;
- anticipate and avoid, minimize or offset the adverse significant biophysical, social and other relevant effects of development proposals;
- protect the productivity and capacity of natural systems and the ecological processes which maintain their functions; and
- promote development that is sustainable and optimizes resource use and management opportunities.

In addition, the IAIA has set out several best practice principles for environmental impact assessment.[33] These consist of basic principles that should be applied through all stages of environmental impact assessment and operating principles that describe how the basic principles should be applied in various environmental impact assessment processes.

The basic principles adopted by the IAIA are that environmental impact assessment be purposive, rigorous, practical, relevant, cost-effective, efficient, focused, adaptive, participative, interdisciplinary, credible, integrated, transparent and systemic. The operating principles identified by the IAIA are that environmental impact assessment should be applied:

- as early as possible in decision making and throughout the life cycle of the proposed activity;
- to all development proposals that may cause potentially significant effects;
- to biophysical impacts and relevant socio-economic factors, including health, culture, gender, lifestyle, age, and cumulative effects consistent with the concept and principles of sustainable development; and
- in accordance with internationally agreed measures and activities.

[31] International Association for Impact Assessment, in cooperation with Institute of Environmental Assessment, UK, Principles of Environmental Impact Assessment Best Practice (January 1999).
[32] *Ibid*.
[33] *Ibid*.

An additional operating principle is that environmental impact assessment should provide for the involvement and input of communities and industries affected by a proposal, as well as the interested public.[34]

Environmental Assessment in Alberta[35]

The environmental assessment process in Alberta is governed by Part 2 of the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12 ("*EPEA*"). Relevant regulations under *EPEA* are the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93 (the "*EA List*") and *Environmental Assessment Regulation*, Alta. Reg. 112/93 (the "*EA Regulation*"). In addition to the environmental assessment legislation, the government has issued numerous guidance documents which are available at http://esrd.alberta.ca/lands-forests/land-industrial/programs-and-services/environmental-assessment/default.aspx.

In Alberta, the stated purpose of environmental assessment is as follows:

> Section 44 The purpose of the environmental assessment process is
>
> (a) to support the goals of environmental protection and sustainable development,
> (b) to integrate environmental protection and economic decisions at the earliest stages of planning an activity,
> (c) to predict the environmental, social, economic and cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the proposed activity, and
> (d) to provide for the involvement of the public, proponents, the Government and Government agencies in the review of proposed activities.

Key definitions, including the meaning of **environment**, are found in s.1 of *EPEA*.

Only those activities designated in the *EPEA* Schedule of Activities are subject to the act. If an activity is not included in the Schedule of Activities, this means *EPEA* does not apply and

[34] *Ibid*.

[35] For an additional review and critique of Alberta's environmental assessment regime see Roger Creasey and Kevin S. Hanna, "Chapter 14: Alberta's Impact Assessment System" in Kevin S. Hanna, ed., Environmental Impact Assessment: Practice and Participation (Don Mills, ON: Oxford University Press, 2005).

it will not be subject to a provincial environmental assessment. Further, the *EA List* indicates which designated activities must undergo an environmental assessment and which designated activities are excluded from environmental assessment. Any activities which appear on the Schedule of Activities but are not referenced in the *EA List* may undergo an environmental assessment at the discretion of the Director. The Director determines whether such an activity should undergo an environmental assessment by considering factors such as size and location of the activity, complexity and technology required for the activity, and other criteria specified in section 44 of the act.

The environmental assessment process consists of five stages: submission of terms of reference by the project proponent, public and Director review of the terms of reference, proponent submission of the environmental assessment report, review of the environmental assessment report by the Director, and review of the environmental assessment report by the Minister or appropriate regulatory body (Alberta Energy Regulator, Natural Resources Conservation Board or Alberta Utilities Commission). The assessment is prepared by the project proponent, in accordance with terms of reference approved by the Director, and must include components enumerated in section 49 of the Act.

There are limited opportunities for public participation in Alberta's environmental assessment process. Under s. 44(6), once a decision to require further assessment of a non-mandatory activity has been made, a directly affected person may submit a written statement of concern which sets out the person's concerns with the proposed project. The Director is required to consider all statements of concern when deciding whether or not an environmental impact assessment report is required. As well, under s. 48, members of the public have an opportunity to provide comments on proposed terms of reference for a project's environmental impact assessment report. Finally, under s. 49, an environmental impact assessment report must include information about the proponent's proposed public consultation process and the results of that process.

Municipal Planning Law[36]

A municipal EA bylaw will inevitably be tied to the municipality's role in local planning and development. Part 17 of the MGA governs municipal planning and development, and establishes a variety of planning tools for municipalities. These planning tools include land use bylaws, municipal development plans, area structure plans, neighbourhood structure

[36] It should be noted that numerous amendments to the MGA are pending. These amendments can be found in the *Modernized Municipal Government Act*, SA 2016, c. 24 which has been passed but is not yet in force.

plans, neighbourhood area structure plans, and area redevelopment plans. These **statutory plans** may be supplemented with non-statutory planning tools such as long-range policies and may include transportation plans, recreation plans, community plans, business development plans, and corridor and other land use studies.[37]

A municipal development plan (MDP) is required if a municipality has a population of 3,500 or greater (s.632). The MDP encompasses the entire municipality, and sets out the general priorities and objectives for municipal growth.[38] The MDP does not set out requirements rather it contains a series of proposals and long-range planning goals. Typically, a MDP will identify general land use categories and include policies for infrastructure development and maintenance. A MDP must set out policies for the protection of agricultural lands and land use adjacent to sour gas facilities.

An Area Structure Plan (ASP) provides a general land use framework for land slated for development. Typically, an ASP will plan land use, transportation and municipal services for a large parcel of raw land. It is usually prepared at the prompting and expense of a developer.[39] Closely related is a Neighbourhood Area Structure Plan (NASP) which is prepared to meet the requirements of an ASP but on a smaller scale (1 or 2 neighbourhoods).

Once an ASP has been prepared, a Neighbourhood Structure Plan (NSP) is prepared for areas within the ASP that support 4,000 to 7,000 people (i.e. one neighbourhood).[40] The NSP shows the size and location the neighbourhood's land use types, public facilities, transportation network (excluding local roads), and planned development stages. Usually, a NSP is approved as an amendment to an ASP.

Another type of statutory plan is the Area Redevelopment Plan (ARP) which functions like an ASP but applies primarily to already developed areas. Typically, an ARP describes the characteristics of an area, the objectives of the redevelopment strategy, and proposals for future land uses and development standards.

Division 5 sets the municipal requirement to pass a land use bylaw and specifies the matters to be addressed in a land use bylaw. Essentially, a land use bylaw is the blueprint for future municipal growth and is the regulatory tool for implementing the statutory plans

[37] James S. Mallet, Municipal Powers, Land Use Planning, and the Environment: Understanding the Public's Role (Edmonton, AB: 2005, Environmental Law Centre).
[38] *Ibid.*
[39] *Ibid*.
[40] *Ibid*.

developed by the municipality.[41] Pursuant to s. 640, a land use bylaw "may prohibit or regulate and control the use and development of land and buildings in a municipality." A land use bylaw divides the municipality into zones with prescribed uses. These zones may be modified via **overlays** adopted by municipal council that impose special regulations on specific areas. The land use bylaw must be consistent with municipal statutory plans, provincial land use policies, and applicable regional plans developed pursuant to the *Alberta Land Stewardship Act*.

As well, the land use bylaw establishes the process for accepting, considering and issuing development permits. This includes designation of the development authority and establishment of administrative procedures for deciding development applications. It is noteworthy that a municipality may attach conditions to development permits.

Under recent amendments the MGA now mandates the use of intermunicipal development plans (IDPs) (unless an exemption is obtained or where the municipalities are not part of a "growth region").[42] IDPs must address future land use, the manner of proposals for future development, and any other matters relating to the physical, social or economic development of the areas of land and environmental matters (either generally or specifically) within the area.[43] As well, the amendments enable the establishment of growth management boards "to provide for integrated and strategic planning for future growth in municipalities".[44]

While s. 632 permits consideration of local environmental matters in a municipal development plan, it is not a mandatory requirement. There is no mention of local environmental matters in the provisions dealing with area structure plans (s. 633), and area redevelopment plans (ss. 634 and 635). Similarly, the provisions dealing with land use bylaws (ss. 639 – 646) permit, but do not require, consideration of certain environmental matters.

It should also be noted that s.619 of the MGA provides that an authorization issued by the NRCB, ERCB, AER, AEUB or AUC prevails over any statutory plan, land use bylaw, subdivision decision or development decision issued by a municipality. Further, municipal governments are bound by applicable regional plans developed under ALSA.[45]

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[41] *Ibid.*
[42] MGA s.631.
[43] *Ibid*.
[44] *Ibid*. at 708.011.
[45] ALSA, s. 15.

Alberta Case Studies: Calgary

The City of Calgary does not currently have a municipal EA bylaw. The current Land Use Bylaw[46] does not impose any EA requirements. The Municipal Development Plan (MDP)[47] - being a statutory planning document – does not impose any EA requirements. However, the MDP does express a commitment to considering environmental, social and economic matters as they relate to the growth and development of the City. Some environmental priorities are identified in the MDP including greater emphasis on sustainable modes of transportation, the dedication of environmental reserves, protection of the natural environment, and the creation of ecological networks.

The *Environmental Development Review Policy, UEP003, 2005-61 (Effective January 6, 2006)* does impose EA requirements. A purpose of this policy is to establish a process to determine site suitability for proposed use with respect to environmental conditions as part of the planning approval processes. An additional purpose is to ensure that environmental conditions are considered as an integral part of planning approval process to promote public health and safety, responsible and sustainable development.

The policy applies to all applications reviewed by the City's Environmental & Safety Management department. An application is considered to be any application for a planning related approval. This includes area structure plans, area redevelopment plans, community plans, land use amendment/outline plan/road closure application, subdivision applications, development permit applications and special circulation applications.

The policy sets out a procedure for environmental review of applications. The procedure requires:

1. Review of existing and available environmental investigation information;
2. Request environmental investigation information that is relevant to the application under review, as required.
3. Based on the available information, determine if the site is suitable for the intended use.
4. Apply appropriate conditions to the application, as required.

[46] City of Calgary Land Use Bylaw 1P2007.
[47] Municipal Development Plan (Office Consolidation, December 2015).

The policy indicates that environmental criteria are set out in the Environmental & Safety Management standard operating procedures manual. The policy provides definitions of **environmental conditions** and **environmental investigation information**.

Alberta Case Studies: Edmonton

The City of Edmonton maintains a multitude of planning and environmental documents.[48] Edmonton's Municipal Development Plan (MDP) - *The Way We Grow: Municipal Development Plan, Bylaw 15100*[49] - provides the physical growth strategy for the city. Portions of the MDP deal with natural areas, wetlands, parks and open spaces, and water. The MDP identifies certain areas of the city for which area structure plans are required. In some cases, the area structure plans must consider agricultural value of the land. The MDP also indicates an intention to support regional planning initiatives for the protection of the environment.

Edmonton's *Environmental Policy*[50] is designed to promote an environmentally sustainable community that functions in harmony with the natural environment through planning and decision-making. The *Environmental Policy* outlines several guiding principles including a requirement that environmental considerations will be factored into business decisions made by the City.

In another policy – *Natural Area Systems*[51] - the City indicates an intention to balance ecological and environmental considerations with economic and social consideration in its decision-making. Under this policy, the City Manager and general managers are required to ensure that projects are undertaken in their departments consider the existence of natural area systems and protection of Edmonton's ecological network, identify and mitigate impacts on identified natural area systems, provide support for the development of management plans for conserved natural area systems, and monitor ecological impacts of operational activities in the natural area systems. Additional requirements are imposed on the General Manager of Planning and Development and include ensuring that long range and strategic planning supports conservation activities, incorporating policy requirements into the terms of reference for statutory plans and land use bylaws, and

[48] As examples, see Alberta Environmental Network, *Conserving Edmonton's Natural Areas: A Framework for Conservation Planning in an Urban Landscape, Technical Report* (Community Services, City of Edmonton, February 2001) and City of Edmonton, *Natural Connections: Local Biodiversity Strategy & Action Plan 2008-2018* (City of Edmonton, Office of Natural Areas) DRAFT.
[49] City of Edmonton, The Way We Grow: Municipal Development Plan, Bylaw 15100.
[50] City of Edmonton, City Policy Number C512: Environmental Policy (1 May 2006).
[51] City of Edmonton, Policy Number C531: Natural Area Systems (5 June 2007).

assisting development proponents in voluntary conservation of natural sites. This policy includes the information requirements for development proposals and strategies (including identification of affected natural systems) and guidelines for determining environmental reserve dedications for water bodies.

Finally, the *Environmental Site Assessment Guidebook*[52] sets out the municipality's requirements for environmental site assessments accompanying land development applications. Land development applications include structure plans, rezoning, subdivision, road closure and development permit applications.

Alberta Case Studies: Canmore

The Canmore Municipal Development Plan (MDP)[53] is primarily concerned with orderly and economic distribution of land uses, form of future development, and protection of key natural areas that are critical to the ecological preservation of wildlife movements and habitats within the community, throughout Bow corridor, and beyond.

The MDP sets out specific requirements for environmental assessment within the municipality. The information that is required for an initial screening Environmental Impact Statement (EIS) is set out in Part 4, Section 8.5 and includes a description of the existing environmental condition, the proposed development and the significance of potential environmental impacts; identification of mitigative measures; and assessment of whether more environmental assessment work is required. Based upon review of the EIS by relevant provincial authorities and an independent specialist selected by the Town of Canmore, a fuller Environmental Impact Assessment (EIA) may be required. If an EIA is required, then the terms of reference must be prepared for the EIA which are ultimately approved by council and the proponent prepares EIA in accordance with approved terms of reference.

In addition to the EA process, the MDP sets out other environmental review processes. All new large-scale multi-unit developments, large subdivisions and recreational developments in or adjacent to environmentally sensitive areas are required to file a site-specific Construction Management Plan which outlines environmental protection measures including erosion control, vegetation protection and pesticide and herbicide control; environmental mitigation and monitoring measures to be undertaken by the developer; and reclamation and revegetation plans. As well, where there is reason to believe that there is a possibility of site contamination, the Town requires an applicant for a land use

[52] City of Edmonton, Environmental Site Assessment Guidebook (March 2016).
[53] Municipal Development Plan (September 22, 1998), Bylaw 30-98.

redesignation or a discretionary development permit which involves significant change of use or construction to provide an Environmental Site Assessment.

In Part 6, Section 4.0 of the MDP, there is a requirement that Area Structure Plans and conceptual schemes be subject to either an EIS or and EIA and a sustainability screening report process (among other things). Area Redevelopment Plans require completion of a sustainability screening report.

Further requirements for environmental assessment are set out in the Land Use Bylaw (LUB).[54] All development permit applications for buildings 500m^2 or greater require preparation of a sustainability screening report. In addition, in accordance with the MDP, an EIS may be required for such applications. Section 14 requires that, where required by the MDP, an application for subdivision provide an EIA.

The Sustainability Screening Process (SSP) is outlined in a separate policy document[55] and is intended to achieve a triple bottom line of economy, environment and community. With respect to the environment, the goal is to achieve decisions and practices that respect the environment, define development boundaries, limit water usage and GHG emissions, minimize waste creation, limit the extraction from or introduction of substances to the earth, and protect wildlife and riparian habitats and natural spaces. Any statutory plan (MDP, ASP, Area Redevelopment Plan, or LUB) or an amendment thereto is subject to the SSP. In addition, any development permit that includes gross floor area of 500m^2 or bigger is subject to the SSP.

The Town's Environmental Advisory Review Committee (EARC) reports to council and oversees environmental initiatives that involve the community in environmental stewardship. As part of this role, the EARC reviews all EIS and EIA in order to provide a report to Council.

Alberta Case Study: Pincher Creek

The Municipal Development Plan[56] aims to implement a sustainable approach for "vibrant and progressive community", "controlled growth with a sense of stability" and "small town atmosphere". Tourism and wind energy are identified as two industries with greatest potential for development within the municipality.

[54] Land Use Bylaw 22-2010.
[55] Sustainability Screening Process (January 23, 2013). See also Public Guide to the Sustainability Screening Process.
[56] Municipal Development Plan, Bylaw 1518 (September 2001).

Some requirements for environmental assessment are set out in the Picher Creek Land Use Bylaw (LUB).[57] For instance, an environmental assessment may be required for proposed developments in:

- Highway/Drive-In Commercial (C2) zone,
- General Industrial and Warehousing (I1) zone,
- Light Industrial (I2) zone

The LUB sets land use districts (Schedule 2) and identifies those developments that do not require a development permit (Schedule 3). There are some land use districts with environmental purposes: parks and open space districts and transitional/urban reserve districts.

Elements of a Municipal EA Bylaw

The following process for creating an environmental bylaw has been suggested by Deborah Curran:[58]

1. develop the policy which will be implemented with the bylaw;
2. assemble relevant enabling municipal legislation and regulations;
3. identify the bylaw purposes and context;
4. determine the structure of the bylaw;
5. write a detailed rationale for the bylaw;
6. write the key clauses of the bylaw in draft form (key provisions are prohibitions, regulations, enforcement);
7. write the filter and exception clauses for the bylaw;
8. write definitions for the bylaw;
9. review draft bylaw with staff, committees, stakeholders and legal counsel;
10. review the draft bylaw with the municipal council/board and refine it further; and
11. start the formal process of approving the bylaw.

[57] Land Use Bylaw 1547, July 2005 (consolidated to Bylaw 1547-Z).

[58] Deborah Curran, *The Stewardship Series: Green Bylaws Toolkit for Conserving Sensitive Ecosystems and Green Infrastructure* (Environmental Law Clinic, University of Victoria: November 2007). See also Lanarc Consultants Ltd., Stewardship Bylaws: A Guide for Local Government (Revised June 1999), Government of Canada as represented by the Minister of Fisheries and Oceans, and Government of British Columbia Ministry of Environment, Lands and Parks.

In developing a bylaw, an essential starting point is a clear understanding of what the bylaw is to accomplish and how it relates to other regulations (municipal, provincial and federal).[59] Furthermore, having a policy framework in place expedites the production of the bylaw, its coordination with other bylaws and its acceptance.[60]

It is also noteworthy that research in British Columbia found that:[61]

> The consensus from environmental protection staff around the province is that local governments should incorporate new regulations into existing bylaws and permitting processes as much as possible. Adding new values or standards to existing processes will result in greater staff commitment and less confusion on the part of development applicants than creating new processes or steps in the development permit process.

It is recommended that, in order to develop effective environmental bylaws, a municipality have good understanding of the location and quality of environmentally sensitive areas within its land base.[62] Mapping of environmentally sensitive areas can include information about sensitive ecosystems, locations of species at risk, special features and rare landscape elements.[63]

According to Curran,[64] EA bylaw provisions ought to aim to:

- prompt an impact assessment when a rezoning, development permit, or temporary commercial or industrial use permit related to an environmentally sensitive area arises;
- create a flexible process that requires varying levels of assessment depending on a project's level of impact;
- allow local government to set the terms of reference;
- require a biophysical inventory and analysis, an assessment, and mitigation measures; and
- give the applicant and local government a process.

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[59] Lanarc Consultants Ltd., Stewardship Bylaws: A Guide for Local Government (Revised June 1999), Government of Canada as represented by the Minister of Fisheries and Oceans, and Government of British Columbia Ministry of Environment, Lands and Parks.
[60] *Ibid.*
[61] Curran, *supra* note 58 at p. 27.
[62] *Ibid.*
[63] *Ibid.*
[64] Deborah Curran and Ethan Krindle, *Green Bylaws Toolkit for Conserving Sensitive Ecosystems and Green Infrastructure* (Revised and Updated April 2016) available at www.greenbylaws.ca at p.112.

Ensuring early, purposive and relevant EA

One of the key operating principles espoused by the IAIA is that EA processes be applied "as early as possible in decision making and throughout the life cycle of the proposed activity".[65] The goal of engaging EA early dictates the planning and decision making stage at which municipal EA will be triggered. Municipal EA could be triggered in two distinct instances:

(a) Strategic level (municipal and statutory plans),
(b) Projects level (development permit applications),

Curran suggests that the EA process be applied to applications for permits; to amend community plans, rezone lands and subdivide lands; zoning, development permits, and temporary commercial and industrial use permits.[66] Curran notes, at the project level, some municipalities apply EA requirements based on the size of the development whereas others use geographic location as a trigger. In each case, the application is initially screened to determine if an Environmental Impact Assessment (EIA) is required.

Strategic EA

We recommend that EA be required for all statutory planning activities (initial or significant amendments):

- *Municipal Development Plans*
- *Area Structure Plans*
- *Neighbourhood Structure Plans*
- *Area Redevelopment Plans*

and the development or amendment of a Land Use Bylaw.

Using EA at strategic levels (i.e. conducting an EA at the stage of statutory planning) will allow for identification of environmentally significant areas (such as water bodies, wildlife corridors, natural areas etc.) and appropriate land use planning. In addition, this can guide the decision-making for future land development proposals including requirements for EA of such proposals.

[65] International Association for Impact Assessment, *Principles of Environmental Impact Assessment Best Practice* (January 1999) available on-line at http://www.iaia.org/uploads/pdf/principlesEA_1.pdf.
[66] Deborah Curran and Ethan Krindle, *supra* note 64 pp.211 to 215.

Project Level EA

We recommend that EA be required for:

- *Developments within select municipal areas (designated in an appendix to the bylaw), areas adjacent to water bodies and in environmentally sensitive areas*
- *Developments 500 m2 or larger*

In order to be an effective tool for municipal planning and decision making, EA must also be utilized early in a purposive and relevant manner. As described by the IAIA, purposive EA means that the process "informs[s] decision making and result[s] in appropriate levels of environmental protection and community well-being". [67] Relevant EA means that the process provides "sufficient, reliable and usable information for development planning and decision making". [68] These principles speak to the appropriate subject matter and criteria for EA. These raise questions of the types of environmental effects to considered, the criteria to be used for assessing the project, the appropriate party for conducting the assessment, and the reliance on third party information (such as watershed plans from Watershed Planning and Advisory Councils). The opportunity for public participation and contribution by ENGOs also play a role in EA purposiveness and relevance.

Purposive and Relevant EA

- *Define environment and environmental effects*
- *Consider process issues such as who prepares the EA report, who contributes to the process*
- *Consider the role of information prepared by third parties such as watershed plans, environmental sensitive area inventories*

Mechanisms for cost-effective and efficient EA while maintaining rigor and credibility

When designing an EA bylaw, it must be borne in mind that the benefits of conducting EA must be balanced against the costs of EA. As stated by Curran, "[b]ecause impact

[67] *Supra* note 65.
[68] *Ibid*.

assessments are an additional cost it may be unreasonable to require them for small projects".[69]

In order to balance the benefits and costs of EA, the process needs to be designed to be scalable. That is, the level of information and public involvement may vary with the type of assessment (strategic level versus project level) and, in the case of specific development projects, the scale or potential impact of the project. This can be achieved via a combination of trigger points and a multi-stage process involving screening.

Trigger points could be proximity to a water body or environmentally significant area, or could be project size. For example, the Canmore LUB states that all development permit applications for buildings 500m^2 or greater require preparation of a sustainability screening report. The Pincher Creek LUB provides that and environmental impact statement may be required in specific identified areas of the municipality.

In the British Columbia context, Curran recommends that applications be screened to determine whether an EIS should be required. [70] The recommended factors to be considered in screening projects are (1) within 50m of a natural park, the agricultural land reserve, watercourse or a floodplain (2) within 60m of marine shoreline (3) outside the urbane containment boundary and involves a rezoning for more uses or density (4) deemed to be environmentally sensitive. It is also recommended that screening consider the complexity (are there numerous environmental issues raised) and time & resources (do staff have time and resources to assess project without an EIA).

Cost-Effective & Efficient EA

We recommend a combination of trigger points and a multi-stage process involving screening.

Mechanisms to address legacy projects and cumulative effects within the municipality

As mentioned above, EA may be utilized at a strategic or project level. Strategic level EA may provide a mechanism to address both legacy projects and cumulative effects within the municipality.

[69] *Supra* note 64 at p.110.
[70] *Ibid.* at pp. 111 to 112 and 211 to 215.

As stated by Omura, brownfields impact on municipal long-term planning.[71] Municipal planning tools – such as community revitalization plans and area redevelopment plans – can be used to address brownfields within a municipality. According to the Federation of Canadian Municipalities, brownfield redevelopment should be a priority in municipal plans.[72]

In the context of municipal strategic EA (and consistent with the Federation of Canadian Municipalities' approach)[73], brownfields can be addressed in municipal plans. This requires:[74]

- compiling a brownfield inventory including site location and characteristics; land ownership; land use; redevelopment potential; relevant municipal policies, plans or strategies; municipal contact person; and
- identifying priority sites for redevelopment.

As well, a municipal plan can outline a standard and streamlined approval process for brownfield proposals.[75] The Alberta Urban Municipalities Association has suggested mechanisms such as reducing or forgiving fees for rezoning applications, development permits or building permits to offset the additional costs of developing brownfields.[76]

In addition to addressing legacy projects in a comprehensive manner, municipal strategic EA is also well suited to consider cumulative effects. The Federal Court of Appeal has provided the following definition of cumulative effects:[77]

> "Cumulative effects" are not defined in the [Canadian Environmental Assessment] Act. The Agency has defined cumulative environmental effects as "the effects on the

[71] Robert K. Omura, *Strategies for Cleaning Up Contaminated Sites in Alberta*, May 2013, CIRL Occ. Paper #41.
[72] Federation of Canadian Municipalities, *Green Municipal Fund: Leadership in Brownfield Renewal Program: Best Practices Framework* (www.fcm.ca/brownfields) and Federation of Canadian Municipalities, *Green Municipal Fund: Brownfield Roadmaps 2016: Alberta (2016)* (www.fcm.ca/gmf).
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*
[76] See Alberta Urban Municipalities Association recommendations re: brownfields at https://auma.ca/advocacy-services/programs-initiatives/brownfields/what-auma-doing-address-brownfields. It should be noted that amendments enabling tax incentives for the development of brownfields are pending in *Modernized Municipal Government Act*, SA 2016, c. 24 at s. 58. Once in force, this *Modernized Municipal Government Act* will make amendments to the MGA.
[77] *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 FC 461 (FCA) at paragraphs 40 to 42.

> environment, over a certain period of time and distance, resulting from effects of a project when combined with those of other past, existing, and imminent projects and activities.

In another case, the Federal Court of Appeal stated that a finding that a project has insignificant environmental effects does not preclude the need for considering cumulative effects because "[i]t is not illogical to think that the accumulation of a series of insignificant effects might at some point result in significant effects".[78]

Given its intention to look at the sum total of many activities, the concept of cumulative effects assessment is not well suited for project level EIA.[79] Duinker and Greig suggest that, conceptually, it would be best to eliminate project level cumulative effects assessment to be replaced at the regional level.[80] However, given the practical barriers to doing so, there is need for a long-term shift from cumulative effects assessment within project EA to regional assessment processes.[81]

Given that municipalities have practical and legal requirements for planning, the development of such plans is a natural conduit for cumulative effects assessment. High level plans can assess existing activities and plan for future activities within a municipality. The plan, once completed, can provide guidance and set thresholds for future activities.

Legacy Projects & Cumulative Effects

Strategic EA can be used in conjunction with the statutory and other planning processes carried out by municipalities. This provides a mechanism to address legacy projects (brownfields) and to consider cumulative impacts with municipalities.

Administrative and enforcement considerations

From an administrative perspective, a key consideration is achieving an EA process that balances the benefits and costs of EA. The process must allow the level of information and

[78] *Friends of West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 FC 263 (FCA) at paragraph 39.
[79] Peter N. Duinker and Lorne A. Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redployment" (2006) 37(2) Environmental Management 153 at 155.
[80] *Ibid*. at 158.
[81] *Ibid*.

public involvement to vary with the type of assessment (strategic level versus project level) and, in the case of specific development projects, the scale or potential impact of the project. As discussed above, this can be achieved via a combination of trigger points and a multi-stage EA process.

Following completion of an EA (and subsequent approval of a proposed plan or project), enforcement is essential. As stated by Duinker and Greig,[82] "the very best analysis of cumulative effects will be useless if it is not followed up with a vigorous monitoring program and subsequent mitigative action as warranted." The same can be said of other matters considered in an EA process.

Recent work by the Canadian Environmental Network sets out several components in effective enforcement of EA (albeit at the federal level):[83]

- need assurance that obligations and commitments made during the hearing process yield expected results after the EA decision is made;
- tracking and reporting of results of EA must be open and transparent;
- future performance to minimize environmental impacts must be tracked, and be transparent and accountable – where necessary, should result in change to management and regulatory responses; and
- if development not started within prescribed time, then need new EA (although can reference findings from the first EA).

In designing a municipal EA bylaw, mechanisms to ensure enforcement should be adopted.

Enforcement of EA

In order to enable effective implementation and enforcement of matters raised during the EA process, we recommend that the municipal EA bylaw:

- *require preparation of a management plan to mitigate negative impacts identified in the EA; and*
- *allow development permits to be issued subject to legally enforceable conditions.*

[82] *Ibid*. at 159.

[83] Achieving a Next Generation of Environmental Assessment, Environmental Planning and Assessment Caucus of the Canadian Environmental Network (December 14, 2016), see *Theme 4: Post Assessment Decision Tracking, Reporting, and Compliance Assurance*, pp. 22 to 26.