DO RECENT AMENDMENTS TO ALBERTA'S MUNICIPAL GOVERNMENT ACT ENABLE MANAGEMENT OF SURFACE WATER RESOURCES?

Dr. Judy Stewart

BRBC September Forum

September 12, 2018

Short answer:

"SO, THAT'S THREE 'YES' AND TWO 'NO' AND ONE 'MAYBE YES MAYBE NO'."

As a general rule…

Fact patterns, the wording and interpretation of statutory provisions, and legal precedents arising from Canadian court decisions about municipal jurisdiction affect legal opinions on the question of whether municipalities have authority to manage surface water resources at any scale.


and this, son, is where our esteemed colleague should have said “this is not legal advice”…

First! Acknowledge the images and cartoons from the internet.

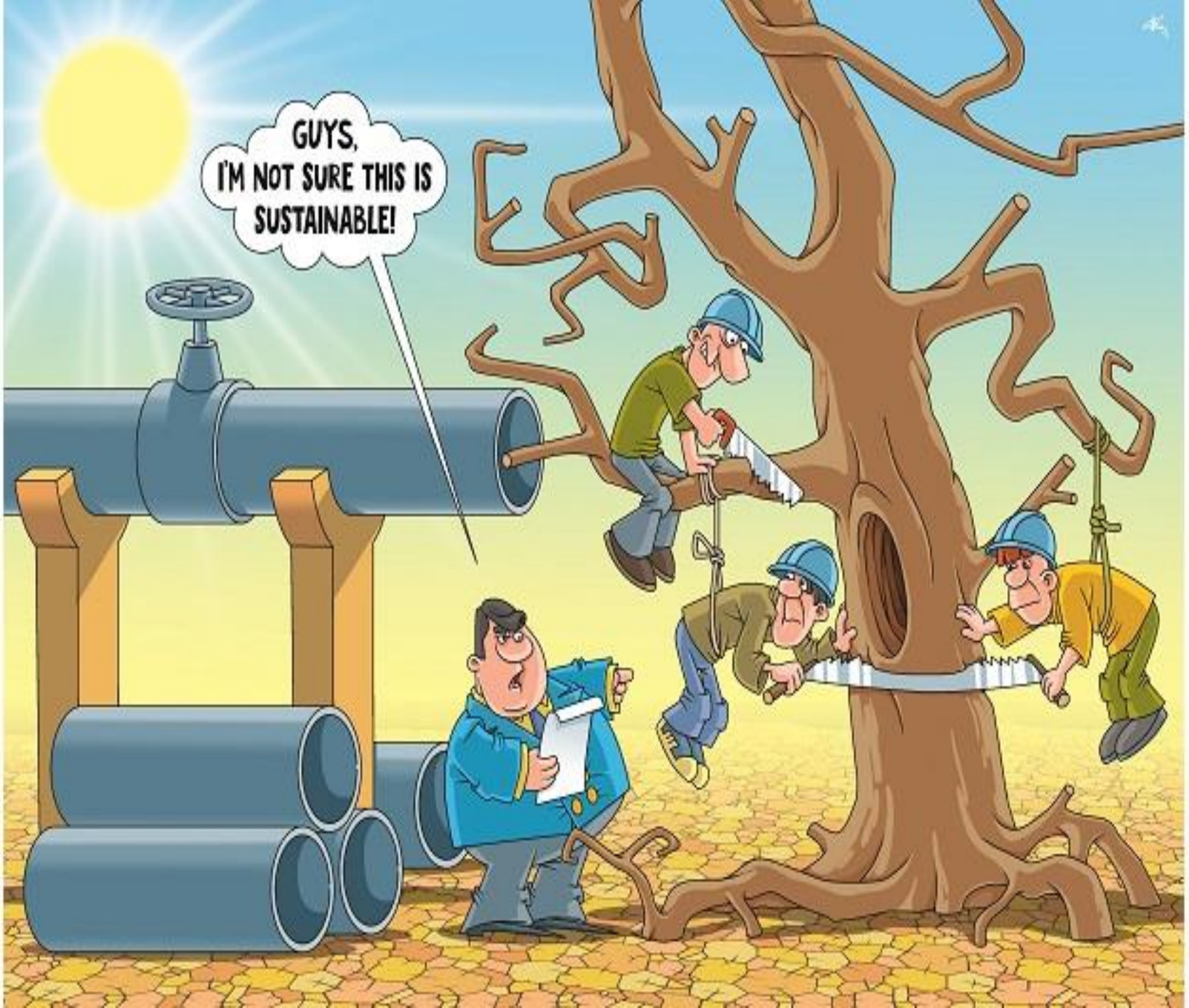
This is a presentation of my recent paper that was published in the Alberta Law Review. The paper is better than this presentation.

I want to thank Dr. Mary Ellen Tyler who inadvertently taught me that our current legal system, in the British commonwealth tradition, does not reflect proper ecological principles necessary for a successful co-existent between humans and everything else on the planet. Our laws must continue to evolve.

Outline of Presentation

1. Introduction
2. A word about consistency of laws
3. The MGA and the environment – some history
4. The Modernized Municipal Government Act and An Act to Strengthen Municipal Government
   - **The Preamble of the MMGA**
   - **New Municipal Purposes in the MMGA and an Act to Strengthen**
   - **Definition of a Body of Water**
   - **Environmental Reserve Provisions**
   - **New 'Conservation Reserves'**
5. Concluding remarks

Introduction


GUYS,
I'M NOT SURE THIS IS
SUSTAINABLE!

Environmental regulation vs. Environmental management

- Environmental regulation and environmental management refer to different social-political processes.
- Environmental regulation by various levels of government in the British common-law tradition is authority-based.
- Governments and government institutions use formal and substantive laws (common law, constitutional, and statutory laws and regulations) to regulate human activities related to the use and management of the natural biophysical environment, specific components of the environment, and ecosystem services.

"They call it 'evolution' — It's some kind of new compliance plan."

Environmental Management

- Environmental management means ***the activities of analysing and monitoring, and developing and implementing measures to keep the state of the components of the environment within desirable bounds*.**
- Through ALSA regional land use plan regulations, and the management frameworks, the GOA has established the so-called 'desirable bounds' within which surface water quality must be sustained to support both human health and well-being and the health and well-being of all other living things.

"Setting a low bar helps us to consistently exceed our expectations."

So what?


Glenn and Gary McCoy/Distributed by Universal Uclick via CartoonStock.com
CARTOONSTOCK .com
Search ID: ggm070623
"BIG DEAL—YOU CREATED FIRE. HAVE YOU THOUGHT ABOUT WHAT YOU'RE DOING TO GLOBAL WARMING?!"

A word about consistency of laws

- Municipalities are not a level of government, but are 'creatures of the provincial government,' exercising the powers granted to them by legislatures in accordance with the *Canadian Constitution Act, 1987*.

- **Alberta municipalities must ensure that there are provisions in the MGA that grant them powers to manage surface water resources before they pass bylaws to achieve management objectives.**

Inconsistency?

The meaning of inconsistency and what constitutes true conflict between a municipal bylaw and a provincial or federal enactment was considered by the Supreme Court of Canada [SCC] in 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),) [Spraytech].

The SCC referred to the Quebec decision of Huot v. St-Jérôme (Ville de), as follows: [Translation]

"A finding that a municipal by-law is inconsistent with a provincial statute (or a provincial statute with a federal statute) requires, first, that they both deal with similar subject matters and, second, that obeying one necessarily means disobeying the other."

The bylaw must be enacted for municipal purposes

If a person is able to comply with the bylaw and the provincial or federal law at the same time, and the bylaw does not frustrate the purpose of the provincial or federal law, then the bylaw will likely be upheld by the court.

Municipal Purposes

Pre-amendment
three municipal purposes

(a) to provide good government;

(b) to provide services, facilities and other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and

(c) to develop and maintain safe and viable communities.

Generally, municipal bylaws to regulate or control human activities and interactions in the environment have been enacted under the third municipal purpose, 'to develop and maintain safe and viable communities.'


THIS LOVELY
ENVIRONMENT
TO BE TORN DOWN
A NEW
EQUALLY LOVELY
ENVIRONMENT
TO BE BUILT ON
THIS SITE
J. Harris
CARTOONSTOCK
.com
Search ID: shr0617

Post-amendments, 2 new municipal purposes added

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. (Emphasis added.)

"Have you got an Environmental Impact Statement for that castle, son?"

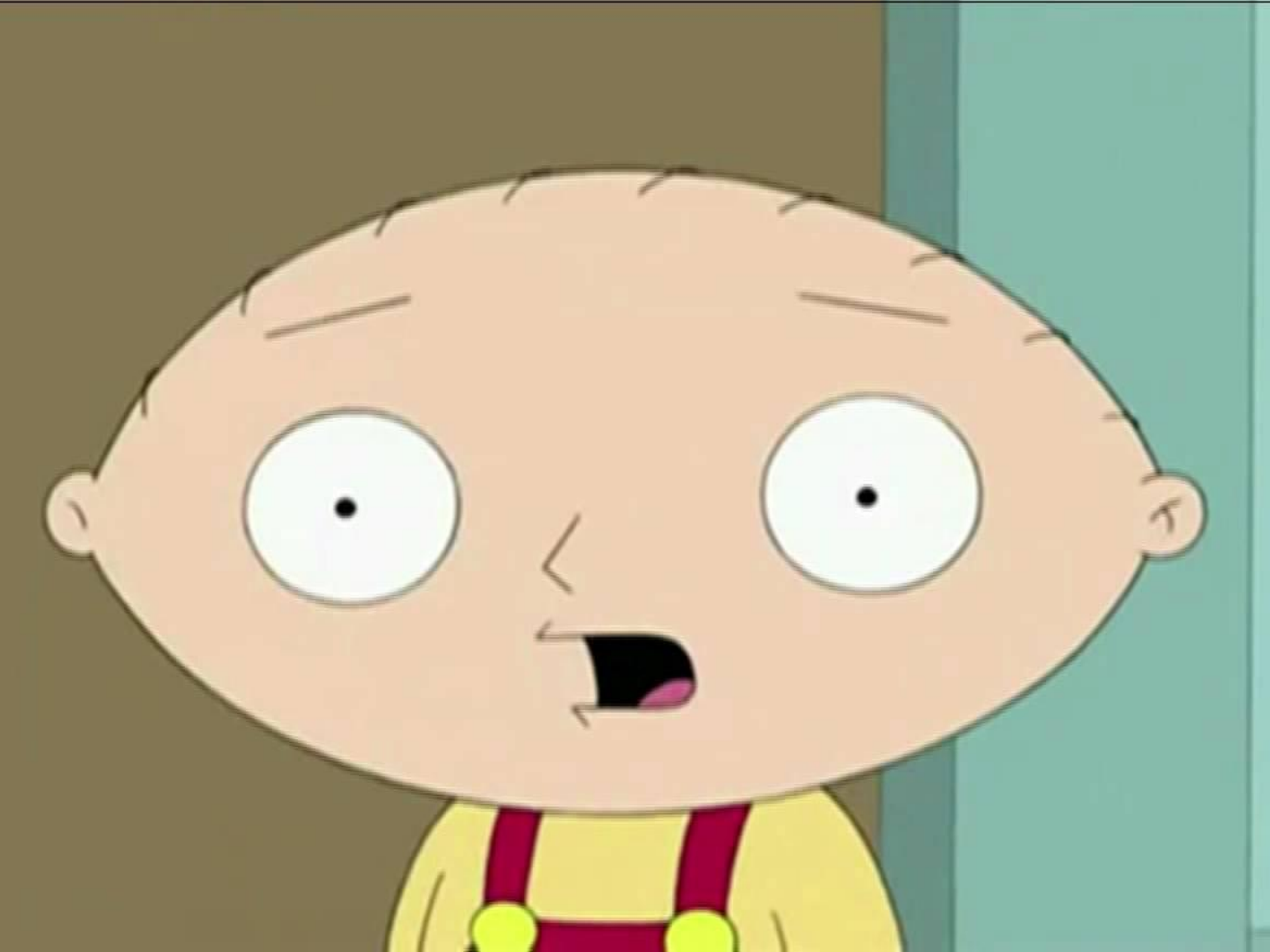
Municipal bylaws that "foster the well-being of the environment"

- Originally, in the discussion documents that were circulated to the public as part of province-wide consultations about *An Act to Strengthen*, the new purpose of a municipality was **'stewardship of the environment,'** which was well-understood and well-received by the majority of stakeholders who responded to the GOA's discussion document.
- While the public may understand what is involved in municipal environmental stewardship, they are not familiar with how a municipality will foster the well-being of the environment: the two phrases are not interchangeable.

Historically speaking

- In 1994 the GOA granted broad bylaw passing powers to municipal councils to address emerging issues of a local nature within their boundaries, or that could take effect in another municipality by agreement.

- Although 'the environment,' is referenced here and there in the MGA, the issue of whether the MGA empowers municipalities to manage the environment was never clearly resolved, although some municipalities did pass bylaws under different parts of the MGA to manage some components of the local environment.



Alberta *Land Use Policies*

- The LUPS were adopted by the Province in 1996, and section 622 of the MGA was enacted, requiring that all municipal land use decision-making be consistent with the LUPS.
- Through the LUPS, the Province 'encouraged' municipalities to minimize and mitigate any local negative impacts on provincially owned 'natural resources' and 'water resources' during subdivision and development of private lands.
- While **the LUPs were not mandatory**, all municipal decision-makers were required to ensure that their planning documents and decisions made under Part 17 were consistent with those provincial policies.

The MGA, Part 17 and the Environment

The only enabling provisions in Part 17 that address the environment are

- **section 664** that enables the dedication of specifically described lands as 'environmental reserve' to the municipality during subdivision processes (under certain circumstances).
- **section 640(4)** that enables a municipal council to determine buildings setbacks from low lying areas, lands subject to flooding, and a number of listed types of water bodies.

Environmental considerations during land use planning

- Environmental considerations during land-use planning are often restricted to determining **whether a parcel of land proposed for subdivision or development is suitable for the intended purpose** because the lands may be subject to flooding, slumping, or subsidence post-development.

- Environmental considerations are, therefore, more concerned with how hazardous lands may impact human development and buildings, than on how the environment may be impacted during and post development.

Municipal Development Plans and the environment

- Part 17 also includes section 632(3)(b)(iii) whereby a municipality is given discretionary authority to “address environmental matters within the municipality” in a municipal development plan [MDP].

- A MDP is a high level planning policy document whereby a municipality addresses future growth and development patterns, and proposes and identifies locations for major infrastructure, transportation systems, and other municipal services and facilities.


You're not going to believe these things I tell you.

Land Use Bylaws

MD of Foothills

Overview of Amendments

Two major amending statutes, with other legislation and regulations in support following in 2017-2018:

- *The Modernized Municipal Government Act*
- *An Act to Strengthen Municipal Government*

Some recent amendments – that support my thesis????

- The Preamble of the MMGA ☑
- New Municipal Purposes ☑
- Definition of a Body of Water ⊘
- Environmental Reserve Provisions ☑
- New ‘Conservation Reserves’ ☑

Beautiful,
yet “meaningless.”

Rife with
“ambiguities.”

What is the purpose of a “Preamble”?

- Section 12 of Alberta’s Interpretation Act provides that the **“preamble of an enactment is a part of the enactment intended to assist in explaining the enactment.”**

- While the Preamble may have an effect on how the MGA is interpreted by the courts in the future, it does create an expectation that municipalities will play an important part with respect to environmental prosperity, or the environmental sustainability of municipalities throughout the province.

"That's a new word legal came up with. They're still working on a definition for it."

A note about the new municipal purpose

The GOA did not provide any interpretative guidance as to what a municipality must do 'to foster the well-being of the environment.'

I submit that when "construed" in context of ALSA, regional land use plan regulations, the new Intermunicipal Development Plan provisions, and the regulations for growth management boards and city charters, a legislative scheme emerges that authorizes municipal management of the environment in order to foster environmental well-being.


WE PREFER "ENVIRONMENTALLY AWARE." NO STUDENT, ON ANY UofM CAMPUS, EVER, EVER WANTS TO BE CALLED "GREEN!"
UM-D
SIERRA CLUB
S.E.A.
10/13
©Samuel Saad 2010
THE PRESS+GUIDE

What **was** the intent of the Legislature?

Alberta Hansard does provide some meaningful context. For example, when debating Bill 8 (The MMGA) and the new municipal purpose in April, 2017, Dr. Robert Turner, MLA for Edmonton-Whitemud constituency had the following comments:

Some stakeholders express concern that municipalities lack explicit authority to incorporate environmental well-being in their operational land-use decision-making processes. This may prevent municipalities from fully embracing a leadership role in environmental stewardship and more actively taking action towards the goal in Alberta's climate leadership plan. Members of the public are supportive of clarifying municipal responsibilities and consideration in the decision-making process that will lead to better planning and development decisions.

Expanding municipal purpose in the MGA to include fostering environmental well-being will give municipalities a clear signal to consider the environment in a multitude of operational and growth decisions, and municipalities will not be able to pass bylaws that conflict with provincial legislation on these environmental measures.

- To give municipalities a clear signal to consider the environment in a multitude of operational and growth decisions

Does not necessarily go with:

- municipalities will not be able to pass bylaws that conflict with provincial legislation on these environmental measures.

- But, what the hay!

Definition of a “Body of Water”

Clarifies that water bodies with “claimable” beds and shores under the *Public Lands Act* are within municipal jurisdiction to govern. What legal entity governs water bodies that are privately owned, for example not permanent, or man-made reservoirs?

(1.2) In this Act, a reference to a <u>body of water</u> is to be interpreted as a reference to

- ***(a) a permanent and naturally occurring water body, or***
- ***(b) a naturally occurring river, stream, watercourse or lake.***


Untitled Map
Cochrane rivers and creeks
Legend
Bow River
Big Hill Creek
Google Earth
900 m
N

Old environmental reserve provisions

664(1) Subject to section 663, a subdivision authority may require the owner of a parcel of land that is the subject of a proposed subdivision to provide part of that parcel of land as environmental reserve if it consists of

(a) a swamp, gully, ravine, coulee or natural drainage course,

(b) land that is subject to flooding or is, in the opinion of the subdivision authority, unstable, or

(c) **a strip of land, not less than 6 metres in width, abutting the bed and shore of any lake, river, stream or other body of water <u>for the purpose of</u>**

  (i) preventing pollution, or

  (ii) providing public access to and beside the bed and shore.

The old ER strip and limited purposes has been amended out.

664(1)(c) now:

664(1) Subject to section 663 and subsection (2), a subdivision authority may require the owner of a parcel of land that is the subject of a proposed subdivision to provide part of that parcel of land as environmental reserve if it consists of

(a) a swamp, gully, ravine, coulee or natural drainage course,

(b) land that is subject to flooding or is, in the opinion of the subdivision authority, unstable, or

(c) a strip of land, not less than 6 metres in width, abutting the bed and shore of any body of water.

“bed and shore”?

In addition, interpretation of what the GOA means by ‘bed and shore’ is added in a new provision, subsection 664(1.2), as follows:

664 (1.2) For the purposes of subsection (1.1)(b) and (c), “bed and shore” means the natural bed and shore as determined under the Surveys Act.

Environmental Reserve Purposes

These purposes apply to all the three types of environmental reserves, and not just 664(1)(c) as in the past!

Definition of body of water has complicated ER provisions

- By way of comparison, previously subsection 664(1)(c) **did not require** that a body of water be permanent or naturally occurring as a condition of requiring the dedication of the minimum 6 meter strip of land from its bed and shore.

- The bed and shore will necessarily need to be determined by a surveyor in order to establish an appropriate reserve setback to achieve one or more of the purposes of ER listed in section 664(1.1) above.

- In the past, to require the dedication of a minimum 6 metre strip of land abutting water bodies as they were previously listed in subsection 664(1)(c) pre-amendment, a municipal development authority had to be able to demonstrate that the requirement was for providing public access or preventing pollution.

- Under the MMGA amendments, 6 metre (or much wider) strips may now be required to be dedicated for two additional purposes, including the broadly stated purpose 'to preserve the natural features of land referred to in subsection (1)(a), (b) or (c) where, in the opinion of the subdivision authority, those features should be preserved.'

What do you think?

The four new purposes will enable a requirement for ER dedication of more environmentally significant areas, and will, arguably, render the conservation reserve provisions redundant.

What about non-permanent and human-made bodies of water?

Given the above discussion about MMGA definition of body of water, how will municipalities know if they have jurisdiction to require the dedication of lands as ER under section 664 that consist of, or are riparian lands that abut bogs, fens, peatlands and ephemeral wetlands?

Old ER addressed all water bodies

The term '**swamp'** in subsection 664(1)(a) reflects terminology that was imported into Canadian law from the British legal system. Swamps traditionally had no discernible beds and shores or legal banks, so, arguably, subsection 664(1)(a) provided enabling legislation to municipalities so that they could require dedication of lands as ER that contained bogs, fens, peatlands and ephemeral wetlands that were not bodies of water with a discernible bed and shore or legal bank. However, these lands were not suitable for residential or commercial development because of inherent risks of flooding and subsidence.

- In subsection 664(1)(b) the phrase ‘land that is subject to flooding’ includes flood risk areas, (both the floodway and the flood fringe as defined in the Alberta’s Flood Hazard Identification Program, and ephemeral wetlands that only flood during spring snowmelt and high precipitation events.

- These lands are highly productive riparian landscapes (surface water resources) that store and release during drought and flood conditions. Subsection 664(1)(b) does not refer to beds and shores of bodies of water but allows a municipality to require the dedication of ephemeral wetlands and lands in the flood fringe of water bodies as ER.

Summary about new ER provisions

These substantive changes to the ER provisions illustrate provincial direction to municipalities to conserve and manage bodies of water as defined, and other surface water resources and environmentally significant areas at the local scale, especially during subdivision approval processes.

New conservation “reserves”

- Too complex to address today.

- Conservation reserves are new institutional arrangements created through section 114 of the MMGA. Unlike ER dedications, a conservation reserve required to be transferred to a municipality during the subdivision process is considered a taking for which the municipal must pay full market value.

- Conservation reserves will, therefore, be recognized as valuable environmentally significant features as part of MDP and Area Structure Plan development processes.

- MGA: 661.1:

"The owner of a parcel of land that is the subject of a proposed subdivision must provide to a municipality land for conservation reserve as required by the subdivision authority pursuant to this Division."

- Municipalities will need to expend general revenues to identify and map these environmentally significant features during statutory planning processes well in advance of a landowner or developer's application for subdivision and development of the parcel. This is because a land developer who purchases lands expecting to be able to use the land for development purposes should not be surprised by a requirement to sell these lands to the municipality as conservation reserves after buying the land to develop. The new section, 664.2 is provided below in its entirety.

Conservation reserves
Legal "Takings" for Market Value

664.2(1) A subdivision authority may require the owner of a parcel of land that is the subject of a proposed subdivision to provide part of that parcel of land to the municipality as conservation reserve if

(a) in the opinion of the subdivision authority, the land has **environmentally significant features**,

(b) the land is **not land that could be required to be provided as environmental reserve**,

(c) the **purpose of taking** the conservation reserve is to enable the municipality to protect and conserve the land, and

(d) the taking of the land as conservation reserve is **consistent with the municipality's municipal development plan and area structure plan**.

Who decides market value?

(2) Within 30 days after the Registrar issues a new certificate of title under section 665(2) for a conservation reserve, the municipality must pay compensation to the landowner in an amount equal to the market value of the land at the time the application for subdivision approval was received by the subdivision authority.

(3) If the municipality and the landowner disagree on the market value of the land, the matter must be determined by the Land Compensation Board.

Summary re: conservation reserves

Conservation reserves reflect the GOA's intent that municipal governments are to protect and conserve environmentally significant features within their boundaries that are not otherwise dedicated as ER pursuant to section 664.

Concluding remarks

- *In conclusion, fact patterns, the wording and interpretation of statutory provisions, and legal precedents arising from Canadian court decisions about municipal jurisdiction will continue to affect legal opinions on the question of whether municipalities have authority to manage surface water resources at any scale.*
- *However, since these amendments, Alberta courts will have more to work with when required to determine whether municipalities have exceeded their jurisdiction in enacting environmental management bylaws to foster the well-being of the environment.*

REST
IN PEACE

REST
IN PEACE


In
loving
memory
of Cochrane's
lost wetlands

Please read the paper.