

June 13, 2014

Our File: 530-5320

Municipal Government Act Review Team
via email: mga.review@gov.ab.ca

Minister Greg Weadick
via email: lethbridge.west@assembly.ab.ca

RE: Empowering Municipalities for Environmental Management, *Municipal Government Act* Consultations 2014

The Environmental Law Centre (ELC) is an Edmonton-based charitable organization established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy. The ELC's vision is an Alberta where the environment is a priority, guiding society's choices. It is the ELC's mission to ensure that Alberta's laws, policies and legal processes sustain a healthy environment for future generations.

Attached please find our written submissions in the *Municipal Government Act* consultation process (which will also be available for download from our website <<http://elc.ab.ca>>). We wish to highlight the important role of municipalities in environmental protection and management, and the key role of municipalities in implementing regional planning under the *ALSA*. It is the ELC's view that amendments can be made to the *MGA* to provide clarity and guidance to municipalities in fulfilling these important roles.

By way of summary, our recommendations fall into five broad areas:

1. Protection and management of the environment is a valid municipal planning purpose and, as such, should be expressly recognized in the *MGA*.
2. The *MGA* should incorporate by-law purposes specific to protection and management of the environment.
3. The *MGA* should expand the enforcement tools available to municipalities for the purposes of environmental protection and management.
4. The *MGA* should expand the revenue generation options available to municipalities to enable environmental stewardship and, particularly, land conservation.
5. The *MGA* should enhance opportunities for public participation in municipal planning processes.

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We would be pleased to meet with the Minister or relevant staff to further discuss our submissions. Please feel free to contact the undersigned with any questions or comments.

Sincerely,



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**Empowering Municipalities for Environmental Management:
The Environmental Law Centre's Recommendations
2014 *Municipal Government Act* Consultations**

The Environmental Law Centre (ELC) is an Edmonton-based charitable organization established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy. The ELC's vision is an Alberta where the environment is a priority, guiding society's choices. It is the ELC's mission to ensure that Alberta's laws, policies and legal processes sustain a healthy environment for future generations.

It is the ELC's view that municipalities have the potential to play a pivotal role in environmental management and protection in Alberta. Municipalities have the authority to control and regulate many private land uses. As well, municipalities have the responsibility for engaging in local land use planning through the use of statutory plans (for example municipal development plans and area structure plans) and land use by-laws. The ELC would like to see environmental management and protection as a priority in the activities of municipalities.

Issues

While the *Municipal Government Act* ("MGA")¹ requires municipalities to engage in local land use planning and to create statutory plans that are consistent with applicable regional plans under the *Alberta Land Stewardship Act* ("ALSA")², there is no imperative to consider environmental matters within the municipality.

It is our view that expressly granting municipalities clear legislative guidance and authority for dealing with environmental matters will enhance the provincial approach to regional land use planning under the *ALSA*. As well, legislative changes can be implemented to solidify the municipal role in stewarding Alberta's natural assets and the delivery of ecosystem services. Ecosystem services can be defined as the "wide range of conditions and processes through natural ecosystems, and the species that are part of them, [that] help sustain and fulfill human life".³ As an example, ecosystem services include natural processes such as water purification and flood control provided by wetlands.

Along with clarification of the role of municipalities in environmental protection and management in the *MGA*, municipalities must be empowered to actively manage and protect

¹ *Municipal Government Act*, RSA 2000, c. M-26.

² *Alberta Land Stewardship Act*, S.A. c. A-26.8.

³ Keith H. Hirokawa, "Sustaining Ecosystem Services through Local Environmental Law" (2011) 28 *Pace Env'tl L. Re.* 760 at 760.

Alberta's environment on a local scale. This includes expansion of municipal tools for enforcement and revenue generation.

Overview of Recommendations

As mentioned in our letter dated April 1, 2014, it is our view that municipalities play an important role in environmental protection and management.

The Supreme Court of Canada, in the *Spraytech*⁴ decision, has recognized that local governments may be best positioned to respond to local concerns. In that particular case, the Supreme Court upheld a municipal bylaw restricting the cosmetic use of pesticides in order to protect the health of its residents. The bylaw was found to be authorized under a general bylaw power to "secure [municipal] peace, order, good government, health and general welfare" contained within the municipal enabling legislation. This decision by the Supreme Court of Canada affirms the authority of municipalities to regulate environmental matters.

It is the ELC's view that, in light of this decision, the *MGA* ought to be amended to provide greater clarity and guidance to municipalities on environmental matters. In order to accomplish this, the following changes to the interpretation and purpose provisions of the *MGA* are recommended:

1. To facilitate municipal protection and management of the environment, the *MGA* should include definitions of **environment** and **sustainability** as follows:
 - A. Environment means the components of the Earth and includes:
 - a. air, land and water,
 - b. all layers of the atmosphere,
 - c. all organic and inorganic matter,
 - d. all living organisms,
 - e. the interacting natural systems that include the above components, and
 - f. social, cultural, economic, environmental and interactive features or conditions affecting the lives of individuals or communities
 - B. Sustainability means planning and development that acknowledges the inherent limitations of the environment, that is socially, culturally, economically and environmentally sound, and that meets the needs of the present without compromising the ability of future generations to meet their own needs.

⁴ 114957 *Canada Ltée (Spraytech Société d'Arrosage) v Hudson (Town)*, 2001 SCC 40 decision ("*Spraytech*").

2. Section 3 of the *MGA* sets out municipal purposes and should be expanded to include environmental protection and management, and the promotion of sustainability as valid municipal purposes. As an example, both the British Columbia *Local Government Act*⁵ and *Community Charter*⁶ provide that the purposes of a regional district or municipality include:
 - (a) providing good government for its community,
 - (b) providing the services and other things that the board considers are necessary or desirable for all or part of its community,
 - (c) providing for stewardship of the public assets of its community, and
 - (d) fostering the current and future economic, social and environmental well-being of its community

The ELC recommends that similar provisions be incorporated into the purpose provisions of the *MGA*. In particular, the *MGA* should incorporate protection and management of the current and future environmental well-being as valid municipal purposes.

In addition to these overarching changes, we recommend other improvements be made to the *MGA* to enable and empower municipalities to fulfil the role of local environmental protection and management. Our recommendations fall into five broad areas:

1. Protection and management of the environment is a valid municipal planning purpose and, as such, should be expressly recognized in the *MGA*.
2. The *MGA* should incorporate by-law purposes specific to protection and management of the environment.
3. The *MGA* should expand the enforcement tools available to municipalities for the purposes of environmental protection and management.
4. The *MGA* should expand the revenue generation options available to municipalities to enable environmental stewardship and, particularly, land conservation.
5. The *MGA* should enhance opportunities for public participation in municipal planning processes.

⁵ *Local Government Act*, RSBC 1996, c. 323 (“*Local Government Act*”), s. 2.

⁶ *Community Charter*, SBC 2003, c. 26 (“*Community Charter*”).

ELC Recommendation 1

Protection and management of the environment is a valid municipal planning purpose and, as such, should be expressly recognized in the *MGA*

As part of the consultation process, we note that Alberta Municipal Affairs has identified several “spotlight topics”. The following recommendations deal with the spotlight topic of *Growth and Development*. It is the ELC’s view that, while protection and management of the environment is a valid municipal purpose, this is not currently reflected in the *MGA*.

Provisions regarding municipal planning and development are found in Part 17 of the *MGA*. 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.

The ELC specifically recommends that the following provisions be added to Part 17 of the *MGA*:

1. Require that local environmental matters be considered in statutory plans and land use bylaws developed under the *MGA* with particular reference to local environmentally sensitive areas including, but not limited to, riparian areas and wetlands. As well, there should be a requirement to consider the impacts of land use decisions on groundwater and surface water in statutory planning.
2. Section 664 of the *MGA* enables the designation of environmental reserves in the course of the subdivision process. The current approach to designation of environmental reserves is focused on development purposes rather than environmental purposes for setting aside reserves. While the ELC endorses the current enumerated instances for which an environmental reserve is required by s. 664, we would recommend that the provision be expanded to incorporate other environmental concerns. These should include the existence of environmentally sensitive areas such as riparian areas and wetlands. As well, preservation of ecosystem processes and services should be a consideration in setting aside environmental reserves (for example, establishing corridors of environmental reserves throughout a municipality rather than unconnected, discrete environmental reserves). It is the ELC’s view that the existing approach depends too much on development purposes and does not give sufficient consideration to environmental matters.

3. The establishment of municipal environmental reserves currently occurs under the *MGA* as a byproduct of subdivision. The ELC recommends that mechanisms for establishing environmental reserves be expanded so that environmental reserves can be established for express environmental purposes and not merely as a by-product of subdivision for development purposes. A supplementary and preferred approach would be to develop regulatory overlays (or express bylaw powers) which are designed to provide protection of areas with environmental significance. As an example, in British Columbia, the *Riparian Areas Regulation*⁷ requires municipalities to protect riparian areas during local development by requiring science-based assessment. Regulatory overlays can be used to protect environmentally sensitive areas, such as riparian areas and wetlands, by establishing appropriate setbacks and assessment requirements for development.

4. Currently, under the *Subdivision and Development Regulation* promulgated pursuant to the *MGA*, site suitability factors are considered in making a sub-division decision⁸. For example, factors such as topography; soil characteristics; storm water collection and disposal; potential for flooding; subsidence or erosion; accessibility to a road; availability of water supply; sewage disposal and solid waste disposal; lot sizes in relation to private sewage disposal systems; and adjacent land uses must be considered. The ELC notes that environmental concerns are absent. Although a site might be appropriate for development in light of these factors, development may be inappropriate given environmental and sustainability considerations. It is our recommendation that municipalities be expressly granted the authority to deny sub-division applications on environmental grounds. The ELC notes that, in British Columbia, an application may be denied due to adverse environmental or natural heritage impacts. As well, British Columbia's legislation allows for the preservation of farm land and consideration of agricultural concerns.

The *MGA* currently requires that municipal planning be consistent with regional planning under the *ALSA*. It is our view that expressly granting municipalities clear legislative guidance and authority for dealing with environmental matters will enhance the provincial approach to regional land use planning under the *ALSA*. As well, legislative changes can be implemented to solidify the municipal role in stewarding Alberta's natural assets and the delivery of ecosystem services.

The ELC also recommends the following changes be made to the *MGA*:

⁷ *Riparian Areas Regulation*, B.C. Reg. 376/2004.

⁸ *Subdivision and Development Regulation*, AR 43/2002, s 7.

1. Strengthen the mechanisms for inter-municipal planning as a means to encourage and facilitate planning on a regional basis.
2. It is the ELC's view that the current planning appeal process can raise concerns about the appearance of bias when a municipal councilor is also a member of the subdivision and development appeal board ("SDAB"). The ELC notes that this concern is mentioned in the discussion paper entitled *Managing Growth and Development*.⁹ It is the ELC's recommendation that the *MGA* be amended to establish a subdivision and development appeal process that is separate from administration and political oversight of the municipality. The ELC further recommends that the planning appeals be adjudicated by the Municipal Government Board ("MGB") thereby eliminating the current confusion regarding the appropriate body for appeal (SDAB or MGB). As well, this step will address the perception of bias in the planning appeal process.
3. Currently, under s. 619 of the *MGA*, approvals issued by the AER, NRCB and AUC are given priority over municipal planning. Laux describes the operation of this provision as follows:¹⁰

Where the NRCB, the ERCB or AUC has sanctioned a project that also requires planning approval, the project may not be vetoed or altered in any way by the planning body in respect of considerations and issues that have been addressed by the provincial body. On the other hand, the planning agency's powers remain unfettered in respect of planning considerations and issues that have not been addressed by the provincial body.

It is the ELC's view that this provision requires amendment to ensure that local planning conducted by municipalities, in particular that planning done in support of regional planning under the *ALSA*, be given due consideration by the AER, NRCB or AUC as the case may be. In the situation where a municipality has conducted assessment and planning designed to address local environmental concerns and to support regional planning under the *ALSA*, the operation of s. 619 may undermine these efforts. Rather than granting automatic priority to provincial approvals, the ELC recommends that (1) the AER, NRCB and AUC be required to give due consideration to municipal statutory plans and regional plans under the *ALSA* and (2) municipalities be granted standing to participate in the AER, NRCB and AUC decision-making processes.

⁹ MGA Review Discussion Paper, *Managing Growth and Development* (December 2013) at 6.

¹⁰ Frederick A. Laux, *Planning Law and Practice in Alberta* (Edmonton: Juriliber, 2010) at § 3.9(3)(b).

ELC Recommendation 2

The MGA should incorporate by-law purposes specific to protection and management of the environment

The following recommendations deal with the spotlight topic of *Rules* as described in the *MGA* consultation documents. It is the ELC's view that the bylaw powers granted in the *MGA* ought to be expanded to include environmental protection (rather than depending on less direct, general welfare provisions). Adoption of this recommendation will provide clarity and guidance about the municipal role in environmental protection and management.

The ELC recommends that the bylaw power provisions of the *MGA* be amended to explicitly empower a municipality to pass bylaws for the express purpose of environmental protection and regulation. Currently, s. 7 of the *MGA* grants municipalities the general jurisdiction to enact bylaws for a variety of purposes some of which may have environmental implications (such as, provisions regarding the safety; health and welfare of people; nuisances; public places; transportation; and domestic and wild animals). However, there is currently no express environmental bylaw purpose. Incorporation of such a provision into the *MGA* will bring the legislation into alignment with recent court decisions and provide additional clarity and direction to Alberta's municipalities. The Alberta courts have already found this to be the case with respect to s. 60 of the *MGA*.¹¹

In addition to a broad bylaw power to deal with local environmental matters, amendments should be made to specifically enable a municipality to create bylaws for:

- the protection of the natural environment;
- the protection of riparian areas, wetlands, groundwater and surface water;
- the protection of environmentally sensitive areas;
- the maintenance of biodiversity; and
- the control of pollutants and environmental nuisances, including contaminated sites and pesticides.

The ELC recommends that s. 60 of the *MGA* – which grants municipalities direction, control and management over rivers, streams, watercourses, lakes and other natural bodies of water – remain.

¹¹ *R. v. Latouche*, 2010 ABPC 166 (available on Can. Lii).

The ELC notes that similar bylaw powers have been incorporated into British Columbia's *Community Charter*¹² and include the power to regulate public places; trees; protection of the natural environment; the removal and disposal of soil; and nuisances.

ELC Recommendation 3

The MGA should expand the enforcement tools available to municipalities for the purposes of environmental protection and management

The following recommendations deal with the spotlight topic of *Rules* as described in the *MGA* consultation documents. It is the ELC's view that current enforcement tools available to municipalities are insufficient for achieving environmental protection and management. Two key elements to improve enforcement are establishing enforcement tools similar to those available in the *Environmental Protection and Enhancement Act* ("AEPEA") and aligning available municipal tools with the *ALSA*.

Under the current *MGA*, municipalities have limited enforcement tools. By virtue of section 7 of the *MGA*, municipalities are granted the power to enforce bylaws by creating offences enforceable through fines and imprisonment. Municipalities may also conduct inspections to determine if a bylaw is being contravened and may remedy the contravention of a bylaw.

In addition to these bylaw enforcement powers, under section 8 of the *MGA*, municipalities may establish systems of licences, permits and approvals (which can be enforced through suspension or cancellation for failure to comply with necessary conditions). A municipality may enforce its bylaws or development permits by issuing a stop order under ss. 645 and 646 of the *MGA*.

The ELC recommends that the enforcement "toolbox" available to municipalities be expanded and aligned with those tools available under the *AEPEA* and the *Water Act*:

1. The ELC notes that the discussion paper entitled *Land Dedication (Reserves)*¹³ raises the possibility that Alberta Environment and Sustainable Resource Development ("AESRD") be charged with the enforcement on lands dedicated as environmental reserves.

It is the ELC's view that this approach – in combination with adoption of an environmentally focused approach to designation of environmental reserves - is desirable. The ELC would further recommend that municipalities/municipal bylaw officers be granted delegated inspector status pursuant to section 25 of the *AEPEA*

¹² *Community Charter*, *supra* note 6, s. 8.

¹³ *MGA Review Discussion Paper, Land Dedication (Reserves)* (December 2013).

and section 163 of the *Water Act*.¹⁴ This would enable municipalities to take direct action to enforce environmental violations on a local basis. Effective implementation of this recommendation will necessitate provincial financial support for local enforcement by municipalities.

2. The ELC recommends that, in order to effectively deal with local contaminated lands, municipalities be granted the authority to identify and designate contaminated lands within their boundaries. In addition, municipalities ought to be granted the accompanying power to require clean-up of such contaminated lands (including on a retroactive basis). This recommendation can be implemented via regulations pursuant to s.37(e)(i) of the *AEPEA* which allows the Minister to delegate the powers of the Director to a delegated authority. It is the ELC's view that this includes the Director's powers related to environmental protection orders for substance release (s. 113) and to contaminated sites (Part 5, Division 2).
3. While section 7 of the *MGA* does grant municipalities the power to conduct inspections as a means to enforce their bylaws, the ELC recommends that municipalities be granted clear authority to enter and inspect places in response to suspected bylaw or development permit violations (similar to those powers granted under s. 198 of the *AEPEA*). The ELC recommends that the powers to enter and inspect be included in section 549 of the *MGA*.
4. Given the overlap of provincial and municipal roles in environmental protection and management, the ELC recommends that the *MGA* include a provision clearly outlining areas of mutual jurisdiction. The ELC notes that section 9 of British Columbia's *Community Charter* identifies spheres of concurrent activity.¹⁵ In

¹⁴ *Water Act*, RSA 2000, c. W-3.

¹⁵ For ease of reference, section 9 of British Columbia's *Community Charter* provides as follows:

9. (1) This section applies in relation to the following:
 - (a) bylaws under section 8 (3) (i) [*public health*];
 - (b) bylaws under section 8 (3) (j) [*protection of the natural environment*];
 - (c) bylaws under section 8 (3) (k) [*animals*] in relation to wildlife;
 - (d) bylaws under section 8 (3) (l) [*buildings and other structures*] establishing standards that are or could be dealt with by the Provincial building regulations;
 - (e) bylaws under section 8 (3) (m) [*removal and deposit of soil and other material*] that (i) prohibit soil removal, or (ii) prohibit the deposit of soil or other material, making reference to quality of the soil or material or to contamination.
- (2) For certainty, this section does not apply to
 - (a) a bylaw under section 8 [*fundamental powers*] that is under a provision not referred to in subsection (1) or is in respect of a matter to which subsection (1) does not apply,
 - (b) a bylaw that is authorized under a provision of this Act other than section 8, or

addition, the ELC recommends that section 13 of the *MGA* be amended to clarify that, while a municipal bylaw has no effect to the extent that it is inconsistent with a provincial enactment, there is no inconsistency if a person who complies with the bylaw does not contravene the provincial enactment.

While the ELC recommends strengthening municipal bylaw powers and accompanying enforcement tools to improve environmental protection and management, we also recognize that these are somewhat limited tools. As stated by Justin Duncan,¹⁶

Regulation of activities through by-laws can be a very effective means of achieving environmental management objectives and protecting human health. However, in some circumstances by-law enactment and enforcement may not be possible given legal restrictions on municipal powers and fiscal restraints on program implementation and maintenance. In other circumstances, by-law enactment and enforcement may not be the most effective, or the most cost-efficient means of achieving an objective.

With this in mind, the ELC also recommends that the municipal enforcement “toolbox” be aligned with tools enabled by the *ALSA* in order to move beyond traditional command and control approaches to environmental protection. This will empower municipalities to actively participate in environmental protection. Furthermore, this will better position Alberta’s

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- (c) a bylaw that is authorized under another Act, even if the bylaw could have been made under an authority to which this section does apply.
 - (3) Recognizing the Provincial interest in matters dealt with by bylaws referred to in subsection (1), a council may not adopt a bylaw to which this section applies unless the bylaw is
 - (a) in accordance with a regulation under subsection (4),
 - (b) in accordance with an agreement under subsection (5), or
 - (c) approved by the minister responsible.
 - (4) The minister responsible may, by regulation, do the following:
 - (a) establish matters in relation to which municipalities may exercise authority as contemplated by subsection (3) (a), either (i) by specifying the matters in relation to which they may exercise authority, or (ii) by providing that the restriction under subsection (3) only applies in relation to specified matters;
 - (b) provide that the exercise of that authority is subject to the restrictions and conditions established by the regulation;
 - (c) provide that the exercise of that authority may be made subject to restrictions and conditions specified by the minister responsible or by a person designated by name or title in the regulation.
 - (5) The minister responsible may enter into an agreement with one or more municipalities that has the same effect in relation to the municipalities as a regulation that could be made under subsection (4).
 - (6) If
 - (a) a regulation or agreement under this section is amended or repealed, and
 - (b) the effect of the amendment or repeal is that bylaws that previously did not require authorization under subsection (3) would now require that authorization, those bylaws affected that were validly in force at the time of the amendment or repeal continue in force as if they had been approved by that minister.

¹⁶ Justin Duncan, *The Municipal Powers Report: Municipal By-laws and Best Practices for Community Health and Environmental Protection in Canada* (Toronto: Sierra Legal, 2010) at 16.

municipalities to implement regional planning goals and requirements established by land use planning under the *ALSA*.

While already permitted under the *ALSA*, it is our recommendation that the *MGA* expressly enable municipalities to use the tools of conservation easements, conservation offsets and transfer of development credit schemes.¹⁷ In order for effective use of these tools, the *MGA* must recognize that, in some circumstances, municipalities must be able exercise activities outside their boundaries. For example, effective implementation of conservation offsets may necessitate activity by a municipality outside its boundaries. Further, the ELC notes that there is a need for alignment of municipal planning and conservation directive decisions under *ALSA*. That is, it ought to be recognized that municipalities play a valid role in conservation directive decisions made in the course of regional planning. It is the ELC's view that these changes will provide clarity to municipalities regarding their role in regional planning under the *ALSA*.

ELC Recommendation 4

The *MGA* should expand the revenue generation options available to municipalities to enable environmental stewardship and, particularly, land conservation

The following recommendations deal with the spotlight topic of *Funding* as described in the *MGA* consultation documents. Insufficient funding is impairing the ability of municipalities to fulfill their roles, even where municipal powers are otherwise sufficient.¹⁸ The challenge of inadequate financial resources and limited options for revenue generation applies to large and small municipalities alike.¹⁹ The ELC has heard numerous municipal concerns about “responsibility without capacity”.

A survey of 46 municipalities, urban and rural, identified financial incapacity as the leading barrier to pursuit of environmental objectives at the municipal level.²⁰ Beyond competing demands on limited resources, many funding options available to municipalities preclude

¹⁷ See Arlene Kwasniak, “The Potential for Municipal Transfer of Development Credit Programs in Canada” (2004) 15:2 JELP 47 which outlines the municipal role and authority with respect to transfer of development credit schemes.

¹⁸ *MGA Review Consultation Workshops, What We Heard*, (Alberta Association of Municipal Districts and Counties, November 2013); and Kristen Pue, A “Big City Charter” for Edmonton and Calgary: *Explaining the role of municipalities in Canada’s federal framework*, (University of Alberta: Centre for Constitutional Studies, April 24, 2013), available online: < <http://ualawccsprod.srv.ualberta.ca/ccs/index.php/constitutional-issues/federalism/729-a-big-city-charter-for-edmonton-and-calgary-explaining-the-role-of-municipalities-in-canada-s-federal-framework>>.

¹⁹ *Ibid.*

²⁰ Alberta Land Trust Alliance, Conservation Connections Alberta, *Our Spaces, Our Future: Phase 1 – Survey of Municipalities & Land Trusts* (Edmonton: Alberta Land Trust Alliance, 2012) (the “survey”).

environmental programs.²¹ Inadequate funding options create a misfit with a finding of “substantial levels of support for land conservation within a wide range of municipal governments”, both urban and rural.²² While 68% of municipal respondents rated conservation as a high to medium priority, 80% did not provide financial support to community environmental initiatives.²³ Only a small percentage of municipalities purchase land or conservation easements.²⁴ Most municipalities depend on regulation for land conservation.²⁵ This may fuel perception that conservation impacts property rights. The survey indicated a need for municipalities to use partnerships and that lack of funding impacts land trusts too.²⁶ These provincial trends lag behind growing documentation of the economic benefits and competitive advantages associated with environmental stewardship at the municipal level.²⁷

Impact on provincial objectives: The Land Use Framework²⁸ implies a significant role for municipalities, by promoting “efficient land use” and “smart growth”. The Land Use Framework identifies specific areas of provincial interest that the ELC views as being impacted by municipal development. These gaps include coordinating surface and subsurface uses; preventing agricultural land fragmentation and conversion; managing flood risk; managing recreation; protecting the diversity of Alberta’s ecological regions; and establishing transportation and utilities corridors. Municipalities have further roles in watershed planning; lake management; riparian buffering; and wetland policy. The regional planning consultations have revealed the huge commitment needed to fill these gaps. Fear of implementation burden could undermine support for the provincial approach to stewardship as a shared responsibility.

Municipal services include delivery of ecosystem services: The spotlight on funding invites discussion of municipal services and how the costs of servicing should be recovered. The materials recognize the provision of ‘soft services’ including recreational, cultural, and social services. This invites discussion of amenity migration as a driver of growth in Alberta. Municipalities with high natural amenities are facing extraordinary demand for conventional municipal services and for recreational opportunities.²⁹ Some towns straddling the urban-rural divide are growing over twice as fast as Calgary, while the rate of rural growth is the highest in

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Calvin Sandborn, *Protecting Natural Areas in Our Communities*, in *Maintaining SuperNatural BC for Our Children, selected law reform proposals*, Calvin Sandborn, ed. (University of Victoria: Environmental Law Centre, 2012), p.87-91 (“Reform Proposals”); and survey, *ibid.*

²⁸ *Land-use Framework*, Pub. No. 1/321 (Edmonton: Government of Alberta, 2008).

²⁹ Danah Duke et al., *Spatial Analysis of Rural Residential Expansion in Southwestern Alberta* (University of Calgary: Miistakis Institute, September 2003).

the entire west.³⁰ The resulting need for local stewardship of environmental assets and rewards for doing so transcends the debate over differential taxation based on municipal size.

Reform options: The Land Use Framework is understood as a statement of provincial intention to develop new tools for voluntary conservation and stewardship. This intention is being pursued largely under *ALSA* but the ELC recommends using municipal government legislation to overcome immediate challenges.

ALSA: The *ALSA* conservation and stewardship tools should definitely be developed but this is proving to be a slow process requiring more provincial investment. Creating a conservation easement means lost property value and uncertain funding for ongoing stewardship. Easement donors likely deserve a property tax break but municipalities are not assured revenue options. The *ALSA* tools that could provide compensation and incentives to landowners and municipalities require further development: There is insufficient guidance for transfer of development credits, no regulatory oversight for conservation offsets and no policy for use of conservation directives. Some municipalities are apprehensive of the *ALSA* tools despite recognizing environmental, agricultural and natural scenic values in their own plans and bylaws.³¹ They fear inequitable burdens between municipalities and seek assurance of local benefits.³² Municipalities are requesting training, funding and assistance with use of *ALSA*.³³

The MGA: The *MGA* could fill local revenue gaps and generate support for *ALSA*. The issue is that existing *MGA* provisions do little to enable directed revenue for environmental initiatives:

- The “special tax” that may be used to “pay for a specific service or purpose” omits ecosystem goods and services; land conservation and stewardship; or the environment.³⁴ This incomplete list is inconsistent with the intention of the *MGA* to provide broad powers unless specifically limited, and inconsistent with municipal government legislation elsewhere as discussed below.
- The “Local improvement” tax provision is vague concerning what “benefits” may be.³⁵ Existing case law concerns hard services.³⁶

³⁰ *Ibid.*

³¹ Oldman River Regional Services Commission, *Municipal Perspectives: Position Paper on the South Saskatchewan Regional Plan*, (Oldman River Regional Services Commission, November, 2009).

³² *Ibid.*

³³ *Ibid.*

³⁴ *MGA*, s 382.

³⁵ *MGA*, s.391.

³⁶ *Kane v. Leochko*, 2007 ABPC 190.

- Provisions for revenue other than taxation are even less conducive to funding environmental initiatives. Levies are tied to development; licensing is a regulator charge paid to general revenue; debt financing and investment options are limited; and there are no provisions for conservation bonds or user fees.

A proven alternative: British Columbia is witnessing a “common success story” in which “local citizens have raised impressive sums” for conservation purposes.³⁷ BC municipal government legislation enables local authorities to establish funds to secure land for the provision of ecosystem services.³⁸ As of 2011 there were six programs in operation.³⁹ Three programs were created by regional districts comprised of multiple municipalities.⁴⁰ These regional funds have shown success over ten years.⁴¹ Multiple programs make use of partnerships. An example is the East Kootenay Conservation Partnership which promotes collaborative win-win solutions to ecosystem conservation on private lands.⁴² This program indicates that funding by municipal electors can attract numerous partners including industry, government, and land trusts.

The BC experience offers sample legislative provisions, municipal bylaws, and model funding programs.⁴³ The BC legislation has three features that would improve Alberta’s legislation:

1. Municipal power to deliver services related to the environment: The *Community Charter* provides that municipalities may provide “any service that the council considers necessary or desirable, and may do this directly or through another public authority or another person or organization”.⁴⁴ It specifically provides that municipalities may make bylaws in relation to “municipal services” and “protection of the natural environment”.⁴⁵ The *Local Government Act* empowers regional districts comprised of multiple municipalities to operate “any service” it considers “necessary or desirable” for all or part of the region.⁴⁶ The provision of ecosystem services is akin to delivery of water or waste disposal.⁴⁷

³⁷ Reform Proposals, *supra* note 27.

³⁸ South Okanagan Similkameen Conservation Program, 2011 *Establishing a Regional Conservation Fund in British Columbia: A Guide for Local Governments and Community Organizations* (2011) (“Conservation Funds”).

³⁹ *Ibid.*

⁴⁰ Micah Carmody, *Regional District Conservation Funds in British Columbia: Three Case Studies*, (University of Victoria, Environmental Law Centre, October 23, 2009). [Case Studies].

⁴¹ *Ibid.*

⁴² East Kootenay Conservation Partnership, online: < <http://kootenayconservation.ca/> >.

⁴³ Available from the Environmental Law Centre on request.

⁴⁴ *Community Charter*, s 8(2); and Conservation Funds, *supra* note 38.

⁴⁵ *Community Charter*, s.8(3)(a)(j); and Conservation Funds, *supra* note 38.

⁴⁶ *Local Government Act*, s 796(1).

⁴⁷ Conservation Funds, *supra* note 38.

2. Broader options for directed revenue, including:
 - a. Property tax based on land value that allows for separate rates for revenue to be raised for different purposes.⁴⁸
 - b. Parcel tax, where a flat rate irrespective of land value is applied to all parcels receiving the service.⁴⁹ (Available for service tax under the existing MGA).
 - c. Local area service tax, which may be property value tax or parcel tax.⁵⁰
 - d. Fees for service on a cost recovery basis for all or part of a service.⁵¹ The fee may be collected from households as part of utilities instead of being imposed through the property taxation process.⁵²

3. Accountability for financial requisitions through a combination of provincial oversight and direct democracy. The bylaw creating the service and the means of cost recovery must be approved by the provincial inspector and by the participating area.⁵³ An option for the participating area to grant approval is “assent of the electors” (a majority vote on a referendum).⁵⁴ Referendums may be held for one municipality or for the whole area.

Municipalities with current programs have largely found the dedicated funding options to be more appealing than use of general revenue for conservation funding.⁵⁵

Detailed Recommendations

The MGA should expand the revenue generation options available to municipalities to enable funding for environmental stewardship and particularly land conservation. The ELC recommends that the *MGA* be amended as follows:

- Provide that municipalities may make bylaws on taxation, municipal services and for protection of the environment.
- Make special tax available for “any municipal service or purpose.” Alternatively, ensure that the existing list clearly includes environmental programs. An option for guiding municipalities in advancing the Land Use Framework could be to replicate the purpose

⁴⁸ *Community Charter*, s 197.

⁴⁹ *Community Charter*, s 200; and *Local Government Act*, s 803(1).

⁵⁰ *Community Charter*, s 216.

⁵¹ *Community Charter*, s 194; and *Local Government Act*, s 803(1).

⁵² Conservation Funds, *supra* note 38.

⁵³ Case Studies, *supra* note 40.

⁵⁴ *Local Government Act*, ss 801.2 and 797.5; and Case Studies, *supra* note 40.

⁵⁵ Conservation Funds, *supra* note 38.

of conservation tools under *ALSA*: to protect conserve, manage or enhance the environment, natural-scenic, esthetic, or agricultural values.⁵⁶

- Provide that services may be delivered through another government authority or other person or organization.
- Clarify that local improvement tax is available for environmental enhancements and low-infrastructure improvements to natural amenities. As with the special tax, an option for guiding municipalities would those purposes consistent with conservation tools under *ALSA*: to protect conserve, manage or enhance the environment, natural-scenic, esthetic, or agricultural values.⁵⁷
- Expand the cost-recovery options for allowable environmental programs as follows:
 - Property tax based on property value assessment as currently exists, but with additional power to apply separate rates for revenue for different, specific services.
 - Parcel tax with flat rate paid for each parcel, as exists with special tax⁵⁸
 - Taxation based on unit of frontage or unit of area as exists with special tax.⁵⁹
 - Fees for services on a cost-recovery basis for part or all of the service.
- Provide that a bylaw creating a tax or fee may be created by assent of the municipal electors. Assent should be established in one of two ways:
 - A majority (over 50%) vote on a referendum of electors who would pay the tax and benefit from the service.
 - A petition signed by the majority (over 50%) of electors who would pay for and benefit from the service. The existing right to petition for local improvement tax should apply to special tax.

As well, the *MGA* should provide that the bylaw may last more than one year so as to enable land conservation spending that is more capital than operational in nature.

⁵⁶ *ALSA*, ss 29(1) and 37(1).

⁵⁷ *ALSA*, s.29(1).

⁵⁸ *MGA*, s.384.

⁵⁹ *Ibid.*

- Provide a system of assent for multiple municipalities or regional authorities to establish regional funding for delivery of ecosystem services. Participation of all municipalities should be voluntary.

Advantages of recommendations

These would be simple amendments to existing *MGA* provisions. They would not alter the relationship of municipalities to the province; create differential taxation power between municipalities or involve costs of reform beyond those allocated to the *MGA* review.

These amendments could:

- Increase capacity to pursue local, regional and provincial policy objectives.
- Improve support for stewardship as a shared responsibility by reducing implementation burden.
- Advance the Land Use Framework by empowering municipalities to exercise local autonomy in ways that uphold provincial interests.
- Overcome resistance to *ALSA* tools by assuring local benefits from conservation and stewardship. Provincial legislation that applies to all municipalities equally would allow diverse municipalities to choose the revenue tool that best fits their unique issues. Regional funds could help coordinate conservation and stewardship efforts and allow municipalities with larger roles to benefit from economies of scale.
- Provide compensation and incentives to municipalities and landowners while the *ALSA* tools are under development.
- Make the provincial Land Trust Grant Program and Alberta Land Stewardship Fund go further by enabling matching funds at the municipal level.
- Capitalize on existing municipal understanding of the *MGA* regime. Consistent wording between a reformed *MGA* and *ALSA* could provide clarity as to where municipal actions comply with *ALSA*.
- Increase accountability of municipalities through electoral assent for new taxes.
- Help Alberta catch up to a neighboring province that has demonstrated success in municipal funding for environmental programs.

ELC Recommendation 5

The *MGA* should enhance opportunities for public participation in municipal planning processes

The following recommendations deal with the spotlight topic of *Accountability* as described in the *MGA* consultation documents. Current opportunities for public participation in municipal planning and decision-making are too limited. It is the ELC's view that early, meaningful engagement of the public in decision-making processes leads to better decisions. Accordingly, the *MGA* ought to be amended to improve public participation opportunities.

Currently, the *MGA* provides limited opportunity for public engagement in municipal planning processes. Section 230 of the *MGA* requires public hearings to be held before the second reading of a proposed bylaw or before council votes on a proposed resolution. The council is required to hear from any person who claims to be affected by the proposed bylaw or resolution. While preparing a statutory plan, there are requirements – by s. 636 of the *MGA* – for the municipality to provide public notice and a means for persons affected by a proposed statutory plan to make suggestions and representations. It is noted that these requirements do not apply to amendments to statutory plans. Further, while the *MGA* does provide a mechanism for members of the public to petition for a new bylaw, or amendment or repeal of an existing bylaw, this mechanism does not apply to bylaws relating to planning and development.

It is the view of the ELC that public participation in municipal planning and development processes should be encouraged as an asset. Municipalities should strive to encourage as much public participation as there is interest. This requires that the *MGA* provide support for meaningful and effective public participation in municipal planning and development decision-making processes. This requires, at a minimum:

- a. notice be provided in sufficient form and detail to allow the preparation of public input on the proposed statutory plan or bylaw,
- b. full and convenient access to information,
- c. a reasonable period of time to prepare public input,
- d. an opportunity to present public input,
- e. fair consideration of public input by the municipality, and
- f. explicit consideration of information, comments and evidence provided by the public in the decisions.

Public participation must be encouraged and accommodated at the early stages of municipal planning. The current approach invites public participation at a late stage of decision-making

(i.e. the second reading). The ELC recommends that efforts be made to engage the public at an early stage of development of statutory plans.

Further, the ELC recommends that the right of public participation should be expanded to include those persons with a genuine public interest (as opposed to only those “affected” or on “adjacent property”). The “genuine interest” approach to standing requires that the participant demonstrate a genuine, legitimate, tangible, or bona fide interest or concern in the matter to be decided. The genuine interest test strikes a balance between bringing issues forward and screening out frivolous, unmeritorious challenges. The Supreme Court of Canada holds that:⁶⁰

...the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue.

The legal test for genuine interest comprises of three aspects which are weighed by the courts to determine standing:⁶¹

- a serious issue,
- a genuine or legitimate interest in the decision, and
- it is a reasonable or effective way for the matter to be heard.

Courts do not grant public interest standing on issues that can be more appropriately or effectively addressed by private litigants.

Demonstrating genuine interest generally requires a history of involvement in an issue or an established record of “legitimate concern” for the interest to be represented. An example in the Alberta context is provided by *Western Canada Wilderness Committee v. Alberta*.⁶² A non-governmental organization was found to have a genuine interest in a timber resource agreement between government and a private party because the organization was incorporated for purposes related to wilderness in western Canada, including education, information, conservation, and protective status.

The ELC recommends that genuine interest standing be extended to ss. 678 and 685 in order to provide the opportunity for appeals on subdivision and development permit decisions raising concerns of genuine public interest. In addition, it is recommended that the MGA acknowledge that genuine public interest concerns are valid considerations in municipal planning, including the development of statutory plans.

⁶⁰ *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236.

⁶¹ *Finlay v. Canada*, [1986] 2 S.C.R. 607 and *Canada (AG) v. Downtown Eastside Sex Workers*, [2012] 2 S.C.R. 524.

⁶² *Western Canada Wilderness Committee v. Alberta (Provincial Treasurer)*, [1994] 108 D.L.R. (4th) 495, 2 W.W.R. 378.

Conclusion

We thank you for the opportunity to provide written submissions in the *MGA* consultation process. In the course of providing these submissions, we wish to highlight the important role of municipalities in environmental protection and management, and the key role of municipalities in implementing regional planning under the *ALSA*.

It is the ELC's view that amendments can be made to the *MGA* to provide clarity and guidance to municipalities in fulfilling these important roles. By way of summary, our recommendations fall into five broad areas:

1. Protection and management of the environment is a valid municipal planning purpose and, as such, should be expressly recognized in the *MGA*.
2. The *MGA* should incorporate by-law purposes specific to protection and management of the environment.
3. The *MGA* should expand the enforcement tools available to municipalities for the purposes of environmental protection and management.
4. The *MGA* should expand the revenue generation options available to municipalities to enable environmental stewardship and, particularly, land conservation.
5. The *MGA* should enhance opportunities for public participation in municipal planning processes.

We would be pleased to meet with the Minister or relevant staff to further discuss our submissions. Please feel free to contact the undersigned with any questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'BHP', with a long horizontal line extending to the right.

Brenda Heelan Powell

Staff Counsel
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