Environmental Law Centre

Legal Foundations for Municipal Riparian Management

Prepared for the

North Saskatchewan Watershed Alliance

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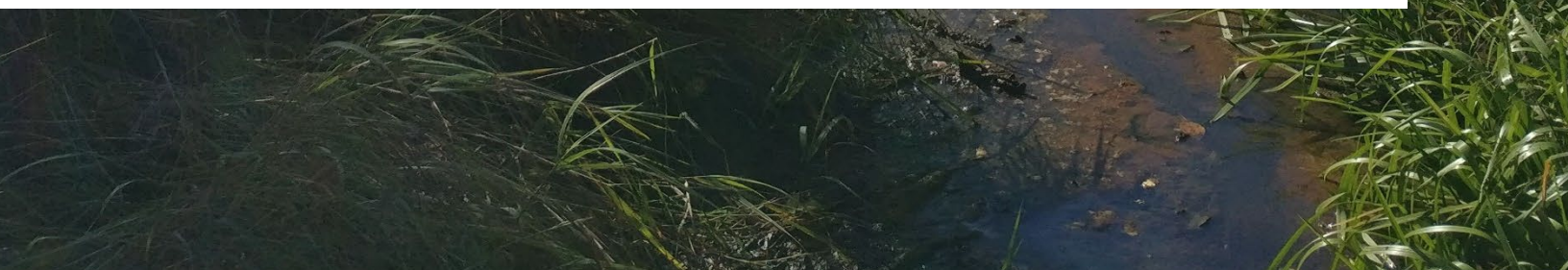

EXECUTIVE SUMMARY

Riparian lands provide essential ecosystem services. As noted in the North Saskatchewan River Watershed Riparian Conservation and Restoration Strategy, riparian areas are "critical for protecting our source waters and for maintaining the water quality, quantity and aquatic health of the North Saskatchewan River and its tributaries, as well as other water bodies (e.g., lakes, wetlands) in the Watershed."[1]

The critical role of healthy riparian lands makes their conservation and restoration a regulatory and policy concern for all levels of government: federal, provincial, and municipal. As the primary land use planner, municipalities have a central and important role to play in the conservation and restoration of riparian lands. This report looks at the fundamentals of municipal planning and decision making around riparian lands. The objective of this report is to ensure municipal decision makers understand the legal foundations for riparian regulation and decision making, and to understand any legal risks associated with riparian-focused municipal policy and regulation.

The legal foundations of action are found in the broad enabling powers of the *Municipal Government Act*. This includes setting planning priorities in statutory plans and regulating the physical environment through the use of land use bylaws for the well-being of the environment while balancing private property rights.

Effective riparian land conservation and restoration requires a comprehensive and coherent policy approach by a municipality that ensures riparian conservation and restoration targets are described in statutory plans, bylaws, and in supporting policies. As a municipality's riparian policy evolves, it is necessary to ensure alignment across all municipal planning and decision-making documents.

Conservation of lands can be achieved through a clear and prescribed riparian management approach. The stage for conservation is set by municipal development plans, and further elaborated in area structure plans. Subdivision decision-making should be clearly guided by both the statutory plans as well as policy to ensure effective and substantive use of environmental reserves or environmental reserve easements (as they are defined by the *Municipal Government Act*). Finally, relevant approaches to conservation of riparian lands in land use bylaws and development permitting processes is essential. Setbacks and conditions on development permits remain essential components of ensuring riparian integrity.

To manage the impacts of historic impairment of riparian lands, municipal regulation of land use is not the first line of management, rather policies and programs focused on

[1] North Saskatchewan Watershed Alliance (September 2021) at 3, online: http://www.nswa.ab.ca/wp-content/uploads/2022/05/Riparian-Health-Strategy-May-4-2022.pdf.

restoration efforts are required. Existing (and potentially non-conforming) land uses and structures will require education and voluntary program participation to be restored.

Achieving targets for a healthy riparian landscape will be facilitated by ensuring that municipal plans, environmental reserves, bylaws, and development conditions are working together with restoration programs and outreach, in a unified and coherent approach.

ACRONYMS

ALPRT- Alberta Land and Property Rights Tribunal

ALSA – *Alberta Land Stewardship Act*

ASP – Area Structure Plan

EPEA – *Environmental Protection and Enhancement Act*

IDP – Intermunicipal Development Plan

MDP – Municipal Development plan

MGA – *Municipal Government Act*

NSWA – North Saskatchewan Watershed Alliance

SDAB –Subdivision and Development Appeal Board

SSRB – South Saskatchewan River Basin

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Introduction

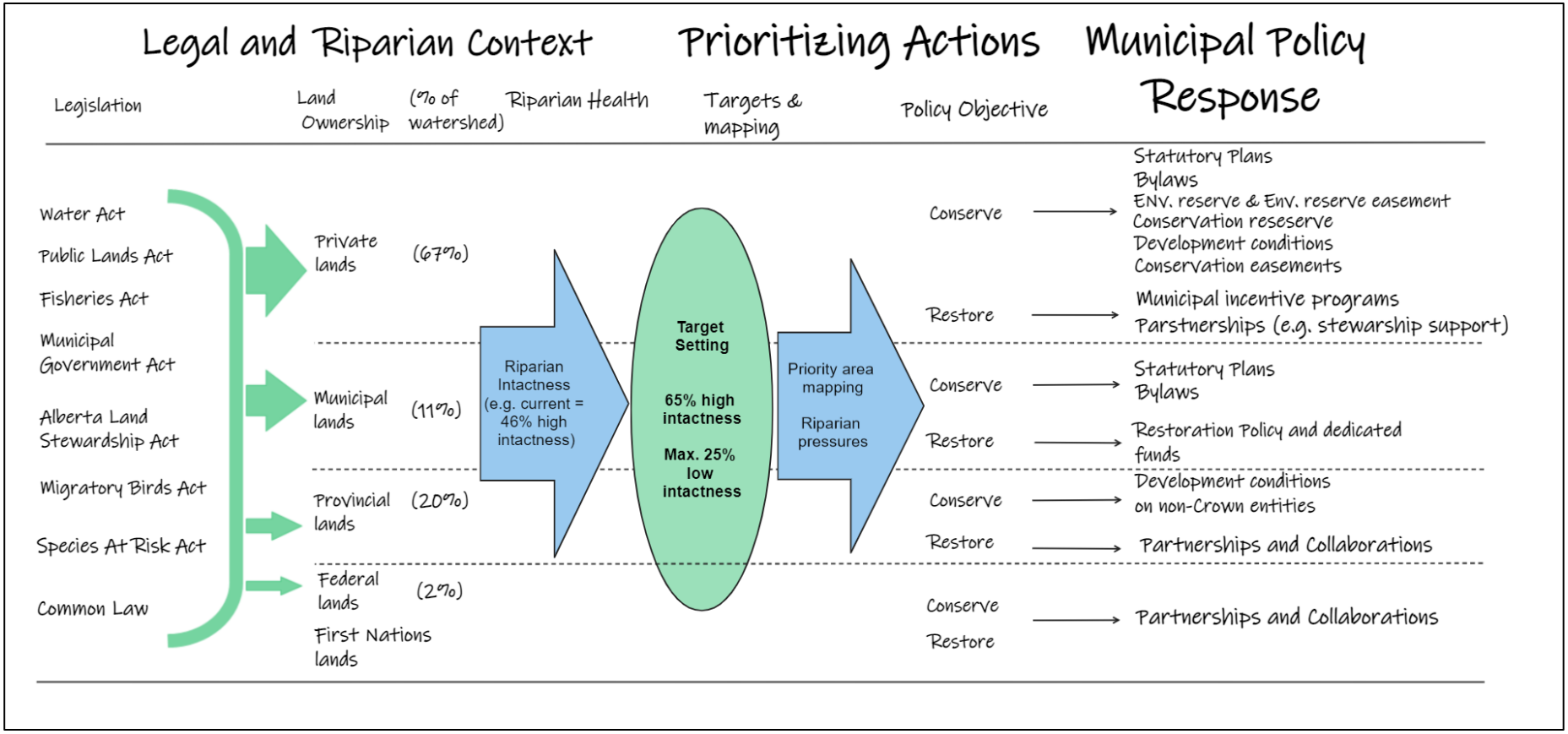
Riparian areas sit at the interface of land and water and provide a variety of ecological functions; they are also subject to a diverse set of laws and policies. Municipalities, with their primary role in land use planning, are key players in riparian area regulation and management.

This report is aimed at providing the legal context around riparian management and can be used to support municipal regulatory and policy actions for effective conservation and restoration of these ecologically significant areas. Of course, meeting riparian targets is much more than municipal regulation and policy; it requires a coordinated effort among landowners, civil society organizations and regulators. It requires monitoring and data collection to understand and manage impacts.

The report is presented as follows: first, the report discusses legal and environmental risks and the interplay between them. Second, the report identifies the foundations for riparian regulation by a municipality and how the municipality can integrate regulatory approaches across plans and bylaws. Finally, the report identifies some of the core issues surrounding how riparian decisions might be subject to appeals or review.

The purpose of this report is to provide the foundations of how municipalities can regulate and conserve riparian lands within their borders. This information regarding the legal framework for municipal riparian action can be married with the data, analysis and resources provided by the North Saskatchewan Watershed Alliance (NSWA) on the intactness of and pressures on riparian lands to create coherent riparian planning, bylaw, and policy framework. Figure 1 below highlights some of the relevant consideration in approaching riparian management.

Figure 1: Riparian area management and municipal policy responses



The rationale for municipal based riparian management and regulation

There are various levels of government that have interests in the health of land and water. It is sensible to ask the question: why should municipalities take on a significant role in riparian management?

The provincial government owns the bed and shore of water bodies and the water within the province; however, the federal government has jurisdiction over fisheries, which may be impacted by riparian management. In light of this crowded regulatory space, why should municipalities be concerned with riparian management? The answer to this question has both legal and practical aspects.

From a legal perspective it is important to clearly understand the role of municipality in land use planning and development under the *Municipal Government Act*. Activities on the land can impact the quality of environment. Management of land, particularly in riparian areas, has direct effects on provincial water resources. This in turn may carry legal liability for municipalities and land owners who reside within their boundaries.

The implications of that legal liability may include the payment of fines where prosecuted under the legislation, the payment of administrative penalties, and the costs associated with restoring the environment. These costs to address and remedy the harm to the environment can be the most significant cost of ineffective environmental management and may arise as a result of government issued orders, a court orders, or simply a need to avoid ongoing legal violations and prosecutions.

On the more practical front, it is typically a municipality that has the closest connection to its constituents with a more intimate understanding of their concerns and their environmental aspirations. Practically speaking, environmental quality is a place-based concern. Municipal government is, in this regard, the level of government most closely connected to this sense of place.

Further, municipalities are also responsible for ensuring effective and efficient delivery of services. These services may often be intricately linked to riparian areas and their ecological functions in terms of water quality and flood risks. Costly infrastructure such as roads, stormwater infrastructure, and considerations around the safety of private and municipal infrastructure are highly relevant to municipal development. The cost associated with this infrastructure is significant and to the extent that this cost can be offset by natural infrastructure, the taxpayers of the municipality will benefit. Riparian areas also provide natural and recreational spaces for their constituents.

In this way, the clear linkage of regulatory jurisdiction of municipalities to riparian areas and the services they provide elevates the importance of conserving and restoring riparian areas at the municipal level. Setting municipal targets to drive this work will

ensure that environmental and legal risks associated with municipal governance are minimized.

Of course, legal risks are only a part of the picture for municipal action in relation to riparian areas as other roles of riparian areas contribute to the overall quality of the environment and thereby contribute to the quality of life in a municipality.

A. Understanding legal and environmental risks and risk responses

Understanding the legal context in which a municipality operates is foundational to municipal riparian action. Just as knowledge of the functions and importance of riparian areas has evolved, so too has the expectation around municipal environmental management and decision making. By understanding environmental and legal risks, a municipality is well placed to implement and administer a robust and sound riparian management system.

Functions of a riparian area, and related environmental risks

Riparian areas play an important function in maintaining water quality by mitigating the potential impacts pollutants and sedimentation in surface waters; providing habitat for aquatic and riparian reliance species and providing corridors for terrestrial species; and attenuating flooding and mitigating flood risk.[2]

It is important to note that these environmental risks result in legal risks. In this way, municipalities can, through riparian area conservation and restoration, mitigate its risks of legal liability but also mitigate conflicts between landowners and other levels of government.

The legal considerations of a municipality can be categorized into three general areas. Two of these areas of law involve risks of liability; civil liability, and regulatory liability. Civil liability arises between two private parties where the actions of one harms the other. In those instances, issues of compensation or court orders stopping an activity may result. Regulatory liability arises where a private party (including a municipality) violates a regulatory law or regulation. A government enforcing the environmental regulatory laws may result in fines, court orders, or administrative orders (which can be used to order a party to stop an activity or to take actions to remedy the environment).

Finally, the area of administrative law deals with the legality of municipal decisions. Unlike regulatory liability, this area of law is relevant to how municipal decisions are

[2] Riis, T., Kelly-Quinn, M., Aguiar, F.C., Manolaki, P., Bruno, D., Bejarano, M.D., Clerici, N., Fernandes, M.R., Franco, J.C., Pettit, N. and Portela, A.P., 2020. Global overview of ecosystem services provided by riparian vegetation. BioScience, 70(6), pp.501-514.

made, both in terms of procedures that are followed but also the reasoning and rationale on which decisions are made. Unlike civil or regulatory liability, there is very limited risk of compensation being payable by the municipality; rather decisions can be overturned, requiring a rehearing or reconsideration of a decision. In very limited circumstances, a court can impose a decision.

Environmental risks as they relate to legal risks

Environmental risks bring legal risks to a municipality. These legal risks may be associated with statutes and regulations (i.e., regulatory risk) or in relation to risks related to civil claims around harms resulting from specific municipal decisions or actions (i.e., tort risks such as negligence, trespass, and nuisance). These risks can give rise to fines and court orders in a given instance, which bring significant costs to a municipality.

Healthy and functioning riparian areas can act to mitigate legal risks that arise where activities may impact water quality and aquatic habitat. These legal risks are particularly relevant to management of municipal lands (including environmental, municipal, or conservation reserve lands), although it may extend to liability around private lands where municipal decisions are found to have legally contributed to harm suffered by a landowner. In this regard, municipalities can view the integrity of riparian areas as a safeguard against liability.

Provincial and federal laws of relevance

A key characteristic of riparian areas from a legal perspective is that it is an area of interface between jurisdictions: municipal, provincial, and federal. There are many statutory provisions that are relevant to municipal management of land but here we focus on highlighting the legal context of riparian management arising from four main pieces of legislation and the common law: the *Water Act*, the *Environmental Protection and Enhancement Act*, the *Public Lands Act*, and the Federal *Fisheries Act*.

In addition, there are a suite of laws and regulations in place that regulate specific activities that could affect surface water bodies, including in regulations under the *Agricultural Operations Practices Act* and the *Oil and Gas Conservation Act*, and forestry rules under the *Forests Act*. This report does not canvas these rules but note that municipal riparian buffers may be overlapping specific regulated activities. We discuss below how this overlapping regulation might play out where there are provincial and federal laws also at play.

Alberta's Water Act

The provincial *Water Act* sets out a regulatory approach to a broad suite of activities, which are prohibited by the Act unless a proper authorization is obtained.[3] Certain activities are exempt from the general prohibition, while other activities, such as diverting water for use or operating works (like a dam) may be issued a licence under the Act.

The scope of "activities" under the Act is directly relevant to riparian areas and their function. "Activity" means

> (i) placing, constructing, operating, maintaining, removing or disturbing works, **maintaining, removing or disturbing ground, vegetation or other material**, or carrying out any undertaking, including but not limited to groundwater exploration, **in or on any land, water or water body**, that
>
> (A) **alters, may alter or may become capable of altering the flow** or level of water, whether temporarily or permanently, including but not limited to water in a water body, by any means, including drainage,
>
> (B) **changes, may change or may become capable of changing the location of water or the direction of flow of wat**er, including water in a water body, by drainage or otherwise,
>
> (C) **causes, may cause or may become capable of causing the siltation of water or the erosion of any bed or shore of a water body**, or
>
> (D) **causes, may cause or may become capable of causing an effect on the aquatic environmen**t;
>
> [Emphasis added]

As can be seen, many if not most activities that have a significant impact on riparian areas may trigger application for an approval (or licence) of the *Water Act*.

Certain activities are exempt from this broad requirement for approval, either where the activity is licensed under the Act or otherwise exempt by way of regulation.[4] Some examples of exemptions include 1) the installing, replacing or constructing a fence in or adjacent to a water body, water crossings in limited circumstances (where there are not fish, limited flood risk, sizing, among others), and 2) landscaping "except where it is in or adjacent to a watercourse frequented by fish or in a lake or a wetland, or it changes the

[3] *Water Act*, RSA 2000, c. W-3 at s 36.
[4] See *Water (Ministerial) Regulation*, Alta Reg 205/1998, https://canlii.ca/t/554hz.

flow or volume of water on an adjacent parcel of land or adversely affects an aquatic environment".[5]

Alberta's *Environmental Protection and Enhancement Act*

The *Environmental Protection and Enhancement Act* (EPEA) regulates pollution, waste, wastewater, storm water, pesticides, and potable water (as well as other matters).[6] Many of these activities have direct linkages with riparian areas, either by virtue of the infrastructure often impacting riparian areas and by virtue of the fact that effective riparian management can offset the scope of some of these activities. The Act has authority over "activities" as enumerated in the schedule to the Act including "the release of substances that may cause an adverse effect" as well as wastewater, stormwater and potable water systems.[7] Further, a variety of requirements and prohibitions related to these systems are set out in the Wastewater and Storm Drainage Regulation.[8]

Under the regulatory mandates of both the EPEA and the *Water Act* it is evident that the scope of planning and development concerns are quite broad. From protecting surface water quality to minimizing water treatment challenges for municipal potable water systems to stormwater management, riparian areas and related "natural infrastructure" can assist in mitigating risk and conserving municipal resources. As can be seen within the context of the Stormwater Management Guidelines for the Province of Alberta, an understanding of the hydrology of development decisions will be relevant to municipal management of stormwater.[9] Issues arising from the topography of the landscape, development patterns and resulting overland flow are of central concern. How riparian areas and wetlands can mitigate stormwater management concerns is also highly relevant.[10]

Alberta's *Public Lands Act*

The *Public Lands Act* is relevant to riparian areas as the bed and shore of **permanent and naturally occurring bodies** of water and the beds and shores of all **naturally occurring rivers**, streams, watercourse and lakes are declared to be owned by the

[5] *Water (Ministerial) Regulation*, Alta Reg 205/1998, https://canlii.ca/t/554hz at Schedule 1 s2 (d).
[6] R.S.A. 2000, c. E-12.
[7] *Ibid*. at Schedule of Activities.
[8] Alta Reg 119/1993, https://canlii.ca/t/51x8n.
[9] Edmonton: Government of Alberta, 1999) https://open.alberta.ca/dataset/75b4611e-d962-4411-ac56-935ec2f8dcd1/resource/c6ccd70c-1a1e-4f2a-ae23-58e287ed5ada/download/stormwatermanagementguidelines-1999.pdf.
[10] Functions will vary. See Lind, Lovisa, Eliza Maher Hasselquist, and Hjalmar Laudon. "Towards ecologically functional riparian zones: A meta-analysis to develop guidelines for protecting ecosystem functions and biodiversity in agricultural landscapes." Journal of environmental management 249 (2019): 109391.

Crown under section 3.[11] It is notable that "rivers, streams and watercourses" may be subject to a Crown claim regardless of the seasonal permanence of the waterbody.

Prohibitions that may be relevant to riparian areas include:

- the unauthorized occupation of public land,
- causing or permitting "loss or damage to public land",
- action on public land that "may injuriously affect watershed capacity",
- "the disturbance of any public land in any manner that results or is likely to result in injury to the bed or shore of any river, stream, watercourse, lake or other body of water or land in the vicinity of that public land", and
- "the creation of any condition on public land which is likely to result in soil erosion".[12]

Unfortunately, many aspects of these prohibitions are not defined and are open to interpretation. For instance, while impacts to a "shore" are clearly within these prohibitions, there may also be liability that arises in the context of an activity on land beside the shore that results in harm to the shore itself. For instance, if activities on upland habitat result in the erosion of public lands, enforcement actions may follow.

The language of the prohibitions implies a greater breadth of activities with the inclusion of the term "permits". This latter term infers that where you have management and control of lands and allow harm to occur, even if you have not directly caused its occurrence, you may be in violation of the Act.

Canada's *Fisheries Act*

The federal *Fisheries Act* takes a broad regulatory approach to protecting fish from harmful substances and protecting fish habitat. The Act's prohibitions are relevant to riparian areas, particularly if there are risks associated with erosion and sedimentation arising from activities in the riparian area.

In relation to habitat management section 35 (1) states that "No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat."

Section 36 (3) states that "no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions

[11] *Public Lands Act*, RSA 2000, c P-40, https://canlii.ca/t/55csn.
[12] *Ibid* at ss.47 & 54.

where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water."

Sediment can be harmful to fish.[13] Similarly, destruction of riparian vegetation has been found to constitute a harmful alteration of fish habitat.[14]

Other Applicable Legislation

There are a wide variety of other statutory rules and regulations that may be relevant to riparian management. This includes:

- Nests and habitat of migratory birds under the *Migratory Birds Convention Act*, 1994;
- Habitat of species at risk under the federal *Species at Risk Act*, particularly listed fish species (e.g., Bull Trout);
- Facilitating compliance on private lands in relation to nutrient/manure application under the *Agricultural Operations Practices Act*;
- Pesticide use under EPEA and the federal *Pest Control Products Act*;[15]
- *Weeds Control Act* obligations; and
- Compliance with regional plans under the *Alberta Land Stewardship Act*.

Provincial Land Use Policies and Regional Plans

Decisions of subdivision and development authorities are guided by provincial land use policies. The current policy of the government was originally issued in by Cabinet Order in 1996 (see Land Use Policies).[16] Municipalities are "expected to incorporate the Policies into …planning documents and planning practices".[17] The Policies are supportive of environmental management, setting out goals and policies for "the natural environment". Municipal plans and planning support the goal of contributing "to the

[13] *R. v. Goodman et al*. - Excerpt Reasons for Judgment, 2005 BCPC 83 (CanLII), https://canlii.ca/t/1jzsn.
[14] *R. v. Larsen and Mission Western Developments Ltd.*2013 BCPC 92 (CanLII), https://canlii.ca/t/fx6hz the finding was confirmed on appeal R. v. Larsen, 2014 BCSC 2084 (CanLII), https://canlii.ca/t/gf6qg See also *R. v. Gwaii Wood Products Ltd. et al*, 2015 BCPC 292 (CanLII), https://canlii.ca/t/glpbf *R. v. Gwaii Wood Products Ltd., et al,* 2017 BCPC 6 (CanLII), https://canlii.ca/t/gx1ns. In an earlier case removal of vegetation from the banks and beds of a creek were found to be a harmful alteration of fish habitat (see *R v. Rhodes et al,* 2007 BCPC 1 (CanLII), https://canlii.ca/t/1q8t6).
[15] *Pest Control Products Act*, S.C. 2002, c. 28.
[16] Alberta Municipal Affairs, Land Use Policies, Established by the Lieutenant Governor in Council Pursuant to Section 622 of the Municipal Government Act, Order in Council 522/96), online: https://open.alberta.ca/dataset/7a02d9d4-be82-4019-b05e-4205df30cefe/resource/b2993476-6864-4903-8a77-917300f760fa/download/1996-landusepoliciesmga.pdf.
[17] *Ibid*. at section 1.1.

maintenance and enhancement of a healthy natural environment".[18] Policies relevant to the goal include:[19]

1. Municipalities are encouraged to identify, in consultation with Alberta Environmental Protection, significant ravines, valleys, stream corridors, lakeshores, wetlands and any other unique landscape area, and establish land use patterns in the vicinity of these features, having regard to their value to the municipality and the Province.

2. If subdivision and development is to be approved in the areas identified in accordance with policy #1, municipalities are encouraged to, within the scope of their jurisdiction, utilize mitigation measures designed to minimize possible negative impacts.

3. Municipalities are encouraged to identify, in consultation with Alberta Environmental Protection, areas which are prone to flooding, erosion, landslides, subsidence, or wildlife, and to establish appropriate land use patterns within and adjacent to these areas.

4. If subdivision and development is to be approved in the areas identified in accordance with policy #3, municipalities are encouraged to, within the scope of their jurisdiction, utilize mitigation measures to minimize the risk to health, to safety and to loss due to property damage.

5. Municipalities are encouraged to identify, in consultation with Alberta Environmental Protection, areas of significant fish, wildlife and plan habitat and to establish appropriate land use patterns designed to minimize the loss of valued habitat within and adjacent to these areas.

6. If subdivision and development is to be approved in the areas identified in accordance with policy #3, municipalities are encouraged to, within the scope of their jurisdiction, utilize mitigation measures to minimize the loss of habitat.

In relation to planning process, policy #3 is of particular interest, as it states:[20]

> When considering a planning application, municipalities are expected to have regard to both site specific and immediate implications and to long term and cumulative benefits and impacts.

[18] Municipal Affairs Alberta, Land Use Policies, Order in Council 5222/96, November 6, 1990, online: https://open.alberta.ca/dataset/7a02d9d4-be82-4019-b05e-4205df30cefe/resource/b2993476-6864-4903-8a77-917300f760fa/download/1996-landusepoliciesmga.pdf.
[19] *Ibid*. at s.5 (p.7-8).
[20] *Ibid* at 4.

These sections of the land use policies of the government can be mirrored in statutory plans, bylaws, and policies to ensure clear direction is given to municipal decision makers.

There may also be relevant regional plans that must be complied with under the *Alberta Land Stewardship Act*, although there is no current regional plan approved for the North Saskatchewan River Basin.[21] The purpose of the Act and regional plans includes to provide leadership and direction regarding "economic, environmental and social objectives", meeting the "reasonably foreseeable needs of current and future generations", "coordination of decisions…concerning land, species, human settlement, natural resources and the environment" and to "enable sustainable development" taking into account cumulative effects."[22] Where regional plans are in place, a municipality must file a "statutory declaration" that the municipality is in compliance with the regional plans.[23]

Common law torts – trespass, nuisance, negligence and strict liability

Effective management of riparian areas can mitigate the risk of civil harms. From a municipal perspective, the most relevant example of this is the safety risks associated with developments in areas that may be subject to erosion. Municipalities have been found liable in situations where they permitted developments which were then subjected to harms that flowed from natural forces.[24] For instance, the City of Edmonton was found 35% liable in relation to approving the development of a residence that ended up falling into a ravine.[25] It was found in that case that the city was negligent by virtue of "failing to use properly the statutory and procedural controls it had in place to protect citizens against damage from landslides, and by failing to directly advise the [plaintiff] of the danger of irrigating their property, although it had unique and comprehensive information in that regard which was not otherwise available to these property owners."[26]

Buffers for development around water bodies have a direct link with this potential liability. While those developing lands want to maximize the developable area of the land, a municipality is best placed to ensure that liability related to approving development in these areas is avoided (not only to avoid the cost of litigation but to account for municipal taxpayers' dollars). It is clearly in the municipal interest ensuring

[21] See section 618.3 MGA.
[22] *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 at section 1.
[23] Section 20 of the *Alberta Land Stewardship Act*, SA 2009, c. A-26.8.
[24] See *Papadopoulos v. Edmonton* (City of), 2000 ABQB 171 (CanLII), https://canlii.ca/t/5nfk. Also see Bowes v. Edmonton (City of), 2007 ABCA 347 (CanLII), https://canlii.ca/t/1vjxw although in this case the claim was barred due to time limitations.
[25] *Papadopoulos v. Edmonton* (City of), 2000 ABQB 171 (CanLII), https://canlii.ca/t/5nfk.
[26] *Ibid*. at para 103.

development does not undermine the functions of riparian areas and the related potential for lawsuits.

A summary of legislative provisions that have relevance federal and provincial legislation is set out in Table 1 below.

Table 1: Federal and provincial law and riparian area connections.

Legislation	Riparian relevant provision/prohibition	Riparian set back requirement
Fisheries Act (Federal)	Alteration, disruption, destruction of fish habitat	Variable and circumstances/species specific
	Deleterious substances	Variable to prevent/mitigate risk of pollution to fish bearing waters
Migratory Bird Convention Act (Federal)	Harmful substances	Variable to prevent/mitigate risk of pollution to waters or areas frequented by migratory birds
	Destruction of nests	Dependent on species, time, and time of year
Species at Risk Act (Federal)	Destruction of residence	Variable
	Destruction of critical habitat (if identified)	Variable
Pest Control Products Act (and related regulations) (Federal)	Application of pesticide products dictated by labelling	Variable dependent on product
Water Act	Activities that impact aquatic environment, siltation, erosion (unless otherwise authorized)	Variable May be governed by a conditional authorization
Public Lands Act & Master Schedule of Standards and Conditions	Impairment of "watershed capacity" Destruction of public land (i.e., bed and shore) Conditioned dispositions on public land	"shore" as defined under the *Survey's Act* Variable dependent on risks of impacting bed and shore or watershed capacity
Alberta Land Stewardship Act	Binding regional plans and decision-making direction	Variable Regional plans may have prescriptive or directional provisions around management of riparian areas

Legislation	Riparian relevant provision/prohibition	Riparian set back requirement
Environmental Protection and Enhancement Act	Pollution releases	Variable Impact of aquatic environmental must be avoided (unless releases are authorized)
Municipal Government Act	Environmental reserve	Minimum of 6 metres (when taken) or as required by flood risk and geography
	Environmental well-being as a municipal purpose	Variable
Agricultural Operations Practices Act (and Standards and Administration Regulation, Alta Reg 267/2001)	Application of manure	10 – 90 metres for application of manure (depending on slope, incorporation in soil, and land use/condition) prohibited in some conditions where slope is 12% or greater
	Storage of manure	30 -90 metres for holding (also has lining requirements)
Oil and Gas Conservation Act (and rules & regulations)	Drill a well, construct a pit.	100 metres (or as the Regulator directs)
Forests Act (and regulations)	Alberta Timber Harvest Planning and Operating Ground Rules (Table 6)	Water body and permit dependent (10-100 metres)
	Avoidance of pollution of waterways	Variable

Barriers and challenges in municipal riparian management

Municipalities are often revenue constrained limiting their financial, technical and legal capacity to undertake municipal wide environmental management. Further, senior levels of government may not appear to support municipal action in this area. Indeed, other levels of government may make regulatory decisions that undermine municipal approaches to riparian area and water management. For example, a municipality may have as a goal to retain a certain number of wetlands to provide specific ecosystem function only to have the provincial government authorize the drainage of the wetlands.

There is also a high level of communication and education needed to ensure municipal constituents understand the value of healthy riparian areas and the regulatory systems

that apply to them. Compliance and enforcement is challenging as historic impairment of riparian areas are typically not subject to an effective regulatory response. Enforcement of recent riparian impairments are challenging given the burden of proof required to enforce the law. Avoidance of harms to riparian areas is far more cost effective than enforcement and restoration actions. For these reasons, the predevelopment planning, policy and regulation set out in this report is of the utmost importance.

B. The *Municipal Government Act* and municipal approaches to riparian area management

The municipal role around environmental management has evolved through time, as has municipal legislation in Alberta. The *Municipal Government Act* (MGA) defines the roles of municipalities and recently (2017) expanded a purpose to include "fostering the well-being of the environment"[27] This addition acknowledges the central role that land use planning has in environmental well-being and on associated community issues such as protecting potable water supplies, ensuring safety, and enabling a quality of life that are fostered by environmental quality. It builds on the recognition that local environments are essential to the health of communities, and the recognition that local governments play an important role in this regard.

To fulfill these purposes, the municipality is provided the power to pass bylaws under section 8 of the Act and under Part 17 (land use bylaws).[28] For the purposes of riparian management the land use bylaws will be of particular interest. The general bylaw power of municipalities, however, is to be interpreted broadly.[29]

Part 17 recognizes that the purpose of land use planning is to "maintain and improve the quality of the physical environment within which patterns of human settlement are

[27] *MGA* at s.3.
[28] Powers under bylaws 8(1) Subject to section 7.1, without restricting section 7, a council may in a bylaw passed under this Division (a) regulate or prohibit; (b) deal with any development, activity, industry, business or thing in different ways, divide each of them into classes and deal with each class in different ways;(c) provide for a system of licences, permits or approvals, including any or all of the following: (i) establishing fees for licences, permits and approvals, including fees for licences, permits and approvals that may be in the nature of a reasonable tax for the activity authorized or for the purpose of raising revenue; (ii) establishing fees for licences, permits and approvals that are higher for persons or businesses who do not reside or maintain a place of business in the municipality; (iii) prohibiting any development, activity, industry, business or thing until a licence, permit or approval has been granted; (iv) providing that terms and conditions may be imposed on any licence, permit or approval, the nature of the terms and conditions and who may impose them; (v) setting out the conditions that must be met before a licence, permit or approval is granted or renewed, the nature of the conditions and who may impose them; (vi) providing for the duration of licences, permits and approvals and their suspension or cancellation for failure to comply with a term or condition or the bylaw or for any other reason specified in the bylaw.
[29] See *Kozak v Lacombe* (County), 2017 ABCA 351 (CanLII), https://canlii.ca/t/hmr4z.

situated in Alberta without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest."[30]

The Alberta Court of Queen's Bench (as it was then) notes, "at all stages of its planning function, a municipal council continues to exercise discretion and to be bound by its overarching obligation to balance private rights and the long-term public interest within the municipality".[31]

In this way, municipalities are put in a position of balancing the public interest in environmental outcomes, individual interests in the environment, and individual rights related to property ownership and use. Riparian management, regulation and protection fits squarely in this context as it has direct links to various public interest outcomes, including maintaining water quality, flood mitigation and biodiversity protection. It can also function to protect downstream property rights through the various functions of an intact riparian area. In this regard, the public versus private balance becomes aligned. Past court decisions have supported municipal autonomy in relation to environmental protection, particularly in relation to putting in place measures that are more highly protective of the environment than provincial laws.[32]

It is important to note that the breadth of legal basis for municipalities to broadly regulate riparian lands is not clearly delineated in the *Municipal Government Act*, and this gives rise to risks of litigation around riparian area restrictions, particularly where the municipal approach is not rationally connected to municipal purposes or where aspects of land management are not rationally connected to broader land use planning goals, objectives and jurisdiction.[33] Nevertheless, the new objective of municipalities for environmental well-being, general control and management over bodies of water (under section 60 of the MGA), and jurisdiction to regulate land use all bolster a municipality's mandate in relation to riparian area management.

Municipal Planning Process

This section of the report highlights the importance of the process of municipal decision making, regulation and policy that will want to be considered in an effort to reach municipal riparian targets.

[30] MGA at s.617. The Court of Appeal has recently highlighted the role of municipalities, *Koebisch v Rocky View* (County), 2021 ABCA 265 (CanLII), https://canlii.ca/t/jh2c2 at paragraph 25.
[31] At para 28, citing *Hosford v. Strathcona County*, 2019 ABQB 871, para 121, 95 MPLR (5th) 194.
[32] 14957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40 (CanLII), [2001] 2 SCR 241, https://canlii.ca/t/51zx see also Catalyst Paper Corp v North Cowichan (District), [2012] 1 SCR.
[33] Judy Stewart observes there is limited delegation of responsibility in relation to riparian area management and reliance on new provisions such as the "well being of the environment" and older provisions around management and control of water bodies, have yet to be clearly articulated by the courts. Judy Stewart, Alberta's Riparian Land Governance System, Canadian Institute of Resources Law, 2021 CanLIIDocs 1568, https://canlii.ca/t/t999, retrieved on 2022-09-26.

Planning and policy coherence

Overall policy coherence in treatment of riparian areas in statutory plans is an important ingredient to ensure effective and broad reaching riparian management. Statutory plans under the MGA are hierarchical in nature so it is important to ensure that riparian provisions across Intermunicipal Development Plans (IMDPs), Municipal Development Plans (MDPs), and Area Structure Plans (ASPs) are either consistent or otherwise clear and not conflicting with other aspects of other plans. These plans in turn will drive decision making under the land use bylaw. This hierarchy is such that, for the lands to which they both apply, the MDP must be consistent with the IMDP. An ASP must be consistent with an IMDP (for the relevant lands) and the MDP. And respectively, the IMDP and MDP prevail in the case of any inconsistency.[34]

It should be noted that regulatory alignment can be a challenge when the creation or change of statutory plans, bylaws and policies are often not conducted in concert or are going through periodic reviews.

Publication of riparian-relevant policies

Riparian policies need to be maintained and published to ensure that decision making is factual, rational and follow proper and fair procedures. Since 2019, municipalities have been required to publish relevant policies, plans, or similar sub-plans that are considered in decisions.[35] These policies must be published on a municipality's website.[36] The MGA prohibits the subdivision and development authorities, subdivision and development appeal boards (SDAB) and the Alberta Land and Property Rights Tribunal (ALPRT) from considering policies that are not published in accordance with the Act.[37]

i. Municipal Development Plans

The *Municipal Government Act* states that every municipality must adopt, by bylaw, a municipal development plan (MDP).[38] There are several mandatory aspects of a MDP including "the future land use within the municipality" and the "manner of and the proposals for future development in the municipality".[39] In addition the MDP may address, among other items, "environmental matters within the municipality,… statements regarding the municipality's development constraints, including the results of any development studies and impact analysis, and goals, objectives, targets, planning

[34] MGA at 638.
[35] MGA at s.638.2.
[36] MGA at s.638.2(2).
[37] MGA at s.638.2(3).
[38] Section 632.
[39] Section. 632 (3).

policies and corporate strategies" and "policies respecting the provision of conservation reserve in accordance with section 664.2(1)(a) to (d)."[40]

Legal relevance and limitations of MDPs

Municipal development plans are directional and strategic in nature. An MDP is not typically prescriptive or regulatory in its framing, although, as will be discussed, it can be. Further the MGA provides mechanisms by which decision makers may deviate from the wording of the MDP.

There are instances where prescriptive language and processes in the MDP will be found to be more or less binding on municipal decision making. As such it is incumbent on a municipality to recognize that these planning documents will drive a general planning direction and that this may be augmented by other mandatory language.[41] For instance, if a MDP states that a specific process must be undertaken, that part of the plan may be binding.

As noted above, the MGA states that a subdivision or development authority must have regard for statutory plans. In terms of whether a municipality's subdivision and development authority or its appeal body (SDAB or ALPRT) will be bound by a municipal development plan, the courts have found that it is a balance between the discretion for decision makers and the need to ensure that the work of municipalities in their planning documents isn't "ineffectualized".[42] In this regard, whether a given decision complies with a given provision of the MDP may turn on the language and approach taken to a matter in the MDP.

Essentially the courts have found that municipal plans and related supporting documents can be binding where the language is mandatory in nature (e.g., shall or must).[43]

Content, clarity and definitions in an MDP

As can be seen in recent court cases, the language in municipal development plans (and the bylaws perpetuated under them) matters, particularly where there is

[40] *Ibid*.
[41] *Ibid*. This was the situation in the case of *Koebisch v Rocky View* (County) *supra* note 62, which found that the mandatory language in a development plan requiring a Master Site Development Plan for aggregate extraction was binding on the municipality. In making this finding the court considered the language of the MDP and observed that the purposes of a site plan and a broader assessment of impacts. In finding that the municipality exercised their discretion reasonably in that case overturning the chambers judge and the contention that the bylaws were patently unreasonable for failure to consider cumulative effects. The Court also observes that "It is not the role of this Court to weigh the policy choices or social, economic, or political factors that were before council." In this case the county had placed mandatory language in a non-statutory county plan that the Court of Appeal found to be binding.
[42] *Koebisch v Rocky View* (County) *supra* note 62.
[43] *Koebisch v Rocky View* (County) supra note 62. Also see *Mohr v Strathcona* (County), 2020 ABCA 187 (CanLII), https://canlii.ca/t/j6xd2 and in particular see paragraphs 13-19.

prescriptive language used. The content and description of how a municipality will approach the identification, characterization and management of riparian areas will be relevant to how development authorities, appeal bodies (and potentially courts), interpret and apply those provisions and will, in the end, drive the effectiveness of the municipality's riparian objectives.[44] It is also clear that any discrepancy or conflict between a development approval and the MDP must be supported by sufficient reasons to discern the logic of departing from the goals and intents of the MDP.

It will be important to articulate the value of riparian areas to the municipality and the municipal objectives for these areas in the MDP. This may take the approach of environmental assessment and integration of assessment results into development permitting or it may be more directive in how environmental outcomes will be obtained.

For example, Parkland County's municipal development plan inclusion of "high valued landscapes" was considered as part of an appeal of subdivision in the county, in which the county required a survey of wetlands on a remaining parcel.[45] In deciding that the conditions on subdivision were appropriate, the Alberta Land and Property Rights Tribunal (ALPRT) found that the conditions were in compliance with provincial Land Use Policies(outlined above), highlighting two parts of the provincial policy of interest:[46]

> Policy #3 in s. 2.0 requires the following: When considering a planning application, municipalities are expected to have regard to both site specific and immediate implications and to long term and cumulative benefits and impacts.
>
> Policy #1 in s. 5.0 encourages municipalities to identify unique landscape areas and utilize measures designed to minimize possible negative effects of development in an effort to maintain and enhance a healthy natural environment.

Further the ALPRT found that surveying the waterbodies was supported by the County Environmental Conservation Master Plan that incorporated Environmental Significant Area into the MDP. Further the parcel was identified as a "high priority landscape" in the MDP.[47] As highlighted by the Tribunal, the MDP states:[48]

> a. High Priority Landscapes are environmentally significant areas that require a careful approach to development. High Priority Landscapes are identified on Figure 14: High Priority Landscapes. Developments in these areas should address the following to the satisfaction of the County:
>
> i. integration with large natural ecosystem complexes and critical wildlife corridor linkages as identified in the County's Environmental Conservation Master Plan. Development

[44] *Cormie v Parkland County*, 2021 ABLPRT 484 (CanLII), https://canlii.ca/t/jjn32.
[45] *Ibid*.
[46] *Ibid*. at para 28.
[47] *Ibid*.
[48] *Ibid*. at para 33.

proposals that may impact these systems should consider and integrate these landscape features as part of development projects;

ii. preservation of surface and ground water interactions and connectivity; and

iii. cumulative effects at the watershed and broader landscape scale.

b. A Desktop or Comprehensive Biophysical Assessment process, as outlined in Appendix 2: Requirements for Technical Reports & Studies, shall be undertaken when multi-parcel developments are proposed within High Priority Landscapes as identified in Figure 14: High Priority Landscapes.

This decision stands as an example of how the provincial land use policies and MDPs, read together, support environmental processes at the municipal level. This can be contrasted with another tribunal decision where a provincial authorization was found to be sufficient to enable subdivision to proceed in the absence of the information that was requested as part of the process by the subdivision authority (see *Verville v Athabasca County (Subdivision Authority)* (this case is discussed further below).[49]

Other examples of MDP provisions

Thorhild County MDP 50

Policy 3.2.2.9 Unless unique site requirements determine otherwise, development proposals should conform to the Alberta Environment Land Conservation Guidelines so far as they pertain to setback requirements from valley breaks, ravines and watercourses.

Summer Village of Seba Beach MDP[51]

Under Section 5.E General Regulations

[49] 2022 ABLPRT 1066 (CanLII), https://canlii.ca/t/jr485.
[50] *Municipal Development Plan Bylaw* 1195/2015, online: https://www.thorhildcounty.com/Portals/0/Documents/Planning-Development/Land-Use-Bylaws/Municipal-Development-Plan-Bylaw-1195-2015.pdf?ver=2021-04-07-111907-303.
[51] Summer Village of Seba Beach, Bylaw No. 8-2019, Municipal Development Plan, online: https://www.sebabeach.ca/file.php?file=04bdcf10452e97e4cebbd8455ffcc572.

9. All applications for subdivision within areas identified as containing environmentally significant areas may be required to provide:

a. A biophysical assessment; and/or

b. A hydrological assessment which indicates potential impacts on the aquifer, riparian areas, recharge areas and how these impacts will be mitigated; and/or

c. A wetland assessment which delineates and classifies wetlands within the development area; and/or

d. Site plan which identifies how the development has been sited to avoid riparian areas and contributing areas.

10. Should Summer Village Council/the Approving Authority deem that new development and/or redevelopment may jeopardize the Lake's water quality and natural ecosystems or seriously impact the quality of life of existing residents, or decide that other factors would recommend against further development, they may do one or all of the following:

a. Impose additional controls over further development;

b. Restrict further development; and/or

c. Refuse to permit any further development.

ii. Intermunicipal development plans

Intermunicipal development plans are relevant to fostering riparian function between neighboring municipalities. Riparian functions on intermunicipal bodies of water are best served by a harmonized approach to conservation of riparian areas.

The content of the IMDP is set out in section 631(8) of the MGA which states,

An intermunicipal development plan

(a) must address

(i) the future land use within the area,

(ii) the manner of and the proposals for future development in the area,

(iii) the provision of transportation systems for the area, either generally or specifically,

(iv) the co-ordination of intermunicipal programs relating to the physical, social and economic development of the area,

(v) environmental matters within the area, either generally or specifically, and

(vi) any other matter related to the physical, social or economic development of the area that the councils consider necessary.

The legal force of IMDPs is similar to that of MDPs and are, in fact, paramount to MDPs in instances where there is a conflict or inconsistency.[52] In this regard, IMDPs, if framed prescriptively will be binding on the municipalities similar to MDPs (as discussed above).

IMDPs therefore give neighboring communities the venue to discuss and decide on a unified approach to riparian management and protection. This can include:

- A unified approach to setbacks/buffers;
- Policy direction on subdivision;
- An establishment and acknowledgement of regional riparian targets; and
- Infrastructure siting and planning with riparian health in mind.

Example of Sturgeon County & City of St. Albert Intermunicipal Development Plan[53]

Objectives related to environmental management include:

- cooperate where feasible in the protection and integration of natural areas into future development.

[52] MGA at s 638(3).
[53] SCHEDULE "A" TO BYLAW 7/2001 (14) Sturgeon County Bylaw # 906/01 City of St. Albert Bylaw # 7/2001 As Approved May 30 and 31, 2001 (https://stalbert.ca/site/assets/files/3268/intermunicipal-development-plan.pdf).

- cooperate where possible in integrating Carrot Creek and Sturgeon River as greenways that can be used for passive recreation purposes, wildlife corridors, and stormwater management.

- mitigate against impacts resulting from resource development.

…

2.2.2 Natural Areas Assessment

As part of the preparation of area structure plan(s) protect natural areas, where feasible, by:

a) Undertaking a review of environmentally significant areas (ESAs) and sensitive natural areas (SNAs) for identification of significance, sensitivity, intrinsic value and the value to future urban development;

b) Protecting provincially and regionally significant natural areas and locally significant, sustainable areas in accordance with policies in the St. Albert Municipal Development Plan Bylaw 4/2000; and

c) Undertaking a habitat/landscape assessment to determine the value and significance of wetland areas. Developing a strategy to conserve and manage wetland areas. Identifying opportunities for the integration of wetlands into the stormwater management system as part of the area structure plan process as soon as possible.

2.2.3 Environmental Reserves

Require subdivision applicants to dedicate, as environmental reserve, all lands in an area to be subdivided that can be defined as environmental reserve in accordance with the provisions of the *Municipal Government Act*. These lands are to be identified at the area structure plan stage. In some instances, the approving authority may consider conservation easements in place of environmental reserves.

2.2.4 Hazard Lands

Not allow development in areas that are prone to flooding, erosion, landslides, subsidence, or any natural or human induced hazards. Development on or in proximity to steep escarpments, steep or unstable slopes may be considered only if recommended by a geotechnical study prepared by a qualified professional and if adequate setbacks are provided to the satisfaction of the approving authorities.

2.2.5 Setbacks from Carrot Creek Shoreland

Require a 50 metre wide lot setback from the Carrot Creek shoreland (i.e. flood plain plus adjacent riverbank) to protect the riparian area and provide adequate space for trail development.

2.2.6 Environmental Policies for Development Along the Sturgeon River

Require plans of subdivision and development along the Sturgeon River within the Sturgeon Valley Area Structure Plan area to comply with policies contained in the Sturgeon Valley Area Structure Plan Bylaw #882/99.

iii. Area Structure Plans

Area structure plans (ASP) are a voluntary mechanism that provide a greater level of detail than an MDP and sets out "the land uses proposed for the area, either generally or with respect to specific parts of the area, general locations of infrastructure" and any other matters a council deems necessary (including reserves).[54] ASPs are an important place to embed riparian consideration, including the siting of infrastructure such as roads and storm water structures. Specific land uses can also be articulated in the ASP, providing an opportunity to ensure location of infrastructure aligns with MDP riparian objectives and values.

The legal nature of ASP is similar to that of MDPs, insofar as both are statutory plans. As a venue for signaling and clarifying future development and infrastructure siting, ASPs will provide certainty in how riparian areas may be managed moving forward, guiding future subdivisions and development decisions within the municipality. Additionally, the Alberta Court of Appeal has found that ASP may put in place binding obligations on the developer and landowners in respect of the subdivision conditions that demand adherence to certain positive commitments in an ASP bylaw.[55]

ASPs will direct both the subdivision and development process and as such riparian management should be directly and clearly articulated into an ASP. This includes clear setbacks, any biophysical or impact assessment required and methodology of any variations from setback calculations that have been prescribed.

A sample of riparian related conditions in two ASPs are provided below.

Example: Long Lake ASP Thorhild County[56]

Policies

[54] s. 633(2).
[55] See *Kneehill (County) v Harvest Agriculture Ltd*, 2019 ABCA 506 (CanLII), https://canlii.ca/t/j45f2 where it notes that s.633(1) and s. 655(1)(a) of the MGA empowers such conditions. This decision involved the SDAB overturning the County's stop order in relation to a project that was not in compliance with the conditions of a subdivision approval that required adherence to the ASP bylaw.
[56] Thorhild County, Long Lake Area Structure Plan, Bylaw: 39-2018, online: https://www.thorhildcounty.com/Portals/0/Documents/Planning-Development/Long-Lake-Area-Structure-Plan.pdf?ver=2021-03-17-140831-073.

65 As part of subdivision approval, a minimum 30m environmental reserve shall be required from the top of the bank of Long Lake, and a 15m environmental reserve will be required from the 1 and 100-year flood line of all wetlands and permanent streams.

66 Environmental Reserves may be increased due to steep slopes, erosion, shallow ground water, or particularly sensitive contamination concerns at the discretion of the Subdivision Authority.

67 A minimum 30m development setback shall be required from the top of the bank of Long Lake, and a 15m development setback will be required from the 1 and 100 year flood line of all wetlands and permanent streams for all new development within the Plan Area.

68 Development setbacks may be increased due to steep slopes, erosion, shallow ground water, or particularly sensitive contamination concerns at the discretion of the Development Authority.

69 Thorhild County may require subdivision and/or development proponents to provide groundwater studies and/or a hydrological assessment designed to identify areas with shallow groundwater susceptible to contamination.

70 Individual landowners and/or development proponents with lands adjacent to the shoreline of Long Lake shall not be permitted to create an artificial beach or plant grass or non-native plant species within any 30m environmental reserve setback.

Example Sturgeon Valley Core ASP (Sturgeon County)[57]

POLICIES

5.6.1 The County shall designate environmentally sensitive and natural areas for environmental protection, restrict public access if necessary, and allow only passive recreation uses for lands designated as Environmental Protection in Figure 5: Development Concept Map.

5.6.2 The County shall require subdivision applicants to dedicate all lands that can be defined as environmental reserve, as described in Section 664(1) of the MGA, to the County. In some circumstances, the County may consider conservation easements in place of environmental reserve dedication.

5.6.3 The County should encourage owners of environmentally sensitive lands to participate in establishing environmental conservation easements as described in the MGA.

5.6.4 The County shall not allow development in areas that are prone to flooding, erosion, landslides, subsidence, or any other natural or human-induced hazards.

5.6.5 The County shall only consider development on or in proximity to escarpments, steep, or unstable slopes if supported by a geotechnical study prepared by a qualified professional and if adequate setbacks are provided. In such a case, Sturgeon County may require restrictive covenants or caveats registered on the title.

[57] At pages 21-23 Bylaw-1557-21-Sturgeon-Valley-CORE-Area-Structure-Plan.pdf (sturgeoncounty.ca).

5.6.6 The County should work proactively and cooperatively with existing landowners to discourage inappropriate use of environmentally sensitive lands and to foster appropriate conservation, habitat enhancement, and public access to and environmental education about such lands.

5.6.7 The County shall require development setbacks from water bodies as per the Riparian Matrix Setback Model as noted within the Municipal Development Plan.

5.6.8 The County shall not permit any permanent structures within the 1:100 year flood plain of the Sturgeon River, as identified in Figure 9: Natural Features Map.

5.6.9 The County may require an environmental impact assessment prepared by a qualified professional for any proposed development within or adjacent to lands designated as Environmental Protection in Figure 5: Development Concept Map. An environmental impact assessment must include, but is not limited to:

- a description of the proposed development, including its purpose, alternative, and staging requirements;
- a description of the biophysical environment that would be affected;
- a prediction of the effects (positive or negative) that the proposed undertaking may have on the biophysical environment;
- an indication of the limitations of the study, criteria used in predicting the effects, and interests consulted;
- recommended measures to mitigate any negative effects identified; and
- presentation of the results in a framework that can assist decision makers in determining the final course of action.

iv. Subdivision and Development Decisions

This section focuses on how subdivisions and developments are authorized and conditioned. Whereas statutory plans direct how development proceeds, often, in a more general way, it is the subdivision and development authorizations (and land use bylaws) that are more regulatory, i.e., enforceable, in nature.

The subdivision process and riparian area management

The process of subdividing a parcel of land to facilitate its development is very important for riparian areas as it is the point at which environmental reserves (ER) and environmental reserve easements may be used by a municipality to provide clear riparian management and regulation. The identification of ER can be based on various factors and the area subject to the ER may serve multiple purposes. For instance, circumstances may dictate ER for the purpose of preventing development in unsafe or flood prone areas while also requiring a setback to protect a body of water from pollution. Insofar as ER involves the transfer of land to the municipality, a municipality should ensure that its approach to characterizing areas subject to ER is supported by science and is linked to the purposes of the ER. The province has recognized the importance of the ER in riparian management in Stepping Back from the Water: A

Beneficial Management Practices Guide for New Development Near Water Bodies in Alberta's Settled Region.[58]

Scope and limitations of a subdivision authority

Subdivision authorities exercise their discretion within the scope of the MGA, guided by relevant statutory plans as well as land use bylaws. Importantly, a subdivision authority may approve a subdivision if it does not comply with Section 654(2) of the MGA:

> (2) A subdivision authority may approve an application for subdivision approval even though the proposed subdivision does not comply with the land use bylaw if, in its opinion,
>
> (a) the proposed subdivision would not
>
> (i) unduly interfere with the amenities of the neighbourhood, or
>
> (ii) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land, and
>
> (b) the proposed subdivision conforms with the use prescribed for that land in the land use bylaw.

Compliance and consistency with statutory plans is required, but issues around consistency of decision making with plans and bylaws continues to attract litigation (with various results).

Conditions on subdivision

The scope and nature of conditions that can be placed on subdivisions is prescribed by the MGA and by the subdivision and development regulations.[59] The key portion of this authority is the enabling of "conditions to ensure that…the statutory plans and land use bylaws and the regulations under this part affecting the land proposed to be subdivided are complied with".[60]

The nature of this provision was recently contemplated in the case of *Kneehill (County) v Harvest Agriculture Ltd*.[61] In this case, subdivision of land was conditional on compliance with an ASP which set out that each owner was to be provided with a membership and access to an equestrian area (including an indoor arena). Kneehill

[58] Government of Alberta (Edmonton: Government of Alberta 2012), online: https://open.alberta.ca/dataset/1c70eb43-a211-4e9c-82c3-9ffd07f64932/resource/6e524f7c-0c19-4253-a0f6-62a0e2166b04/download/2012-steppingbackfromwater-guide-2012.pdf.
[59] MGA at s.655(1).
[60] MGA at s.655(1)(a).
[61] 2019 ABCA 506 (CanLII), https://canlii.ca/t/j45f2.

County issued a Stop Order against the development for failure to comply with the condition. The SDAB in that case quashed a Stop Order. The Court of Appeal stated that the SDAB was wrong to conclude that the positive conditions of the area were not binding. The Court found that Stop Order of the county should be reinstated.[62] This decision has attracted some criticism for its upholding of a strong positive obligation on the developer to comply with a municipal ASP and suggestions for law reform.[63] Despite the criticism, this case is notable insofar as it confirms that conditions on subdivision can be far reaching and binding in relation to adherence to statutory plans, such as ASPs.

In the case of *Bergen v Lacombe County (Subdivision Authority),* a subdivision authority submitted that a conservation easement be imposed to cover a riparian area as a conditions of subdivision.[64] The ALPRT stated that the MGA "does not allow a CE to be imposed", however no legal analysis or decision is cited to support this claim.[65] In light of the Court of Appeal decision above, it is not clear that imposing a CE on a portion of the land would be viewed as beyond the bounds of municipal powers. Nevertheless, the imposition of conservation easement as a condition of subdivision does involve the granting of a subset of property rights to the municipality and as such litigation around the issue is likely. The question then becomes whether conditions on subdivision can otherwise limit destruction of riparian area. Conditions at subdivision will generally be used to delineate and assess the impacts of a proposed development, including riparian areas and buffers. For example, the City of Edmonton includes requirements to submit geotechnical, hydraulic and ecological studies subdivision process.[66] These plans can then feed through area structure planning and other aspect of municipal plans and policies.

Environmental reserve and environmental reserve easements

The ability to designate and require the transfer a portion of a parcel of land as environmental reserve is a central regulatory tool for riparian management. As a municipality gains title to ER lands without the need to pay compensation, it is important for municipalities to have sound processes to identify ER.

An environmental reserve can consist of:[67]

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

[62] *Ibid* at para 54. The decision has been criticized by Dick Haldane, QC as not being in line with principles of statutory interpretation, concluding that statutory reforms may be needed to alter this line of jurisprudence. See Dick Haldane, QC, "Stop order runs loose in Kneehill County", online: Dentons https://www.dentons.com/en/insights/articles/2021/september/15/stop-order-runs-loose-in-kneehill-county.
[63] *Ibid*. Dick Haldane QC.
[64] Bergen v Lacombe County (Subdivision Authority), 2021 ABLPRT 606 (CanLII), https://canlii.ca/t/jlcw0,
[65] *Ibid*. at para 27.
[66] See City of Edmonton, Subdivision Application Checklist, online: https://www.edmonton.ca/sites/default/files/public-files/assets/PDF/SubdivisionApplicationChecklist.pdf.
[67] MGA at s664.

> (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 meters in width, abutting the bed and shore of any body of water.

The MGA further states that ER can only be taken for prescribed purposes, namely:[68]

> (a) 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;
>
> (b) to prevent pollution of the land or of the bed and shore of an adjacent body of water;
>
> (c) to ensure public access to and beside the bed and shore of a body of water lying on or adjacent to the land;
>
> (d) to prevent development of the land where, in the opinion of the subdivision authority, the natural features of the land would present a significant risk of personal injury or property damage occurring during development or use of the land.

There is limited guidance as to when and where "preserving the natural features" should be pursued and this raises the relevance of statutory plans and land use bylaws to guide this decision-making process. Further, the function of preventing pollution to land or the bed and shore of an adjacent body of water is not defined (although a "body of water" is defined to be align with the *Public Lands Act*). Specifically, the MGA states "a reference to a body of water 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."[69] At first glance this seems to imply that certain types of water bodies, such as seasonal wetlands, are excluded from the purview of a potential ER designation. However, the term "swamp" may also apply to these areas. Unfortunately, neither the MGA nor case law has provided clarity as to the nature of jurisdiction in relation to seasonal or ephemeral wetlands.

Similarly lacking in definition are "gully, ravine, coulee or natural drainage course" and land that is subject to flooding" or "unstable" lands. The Courts have given us some insight into some of these phrases, but others remain open to some interpretation. For instance, "natural drainage course" has been interpreted to mean at minimum, a defined path or channel formed by the natural flow of water in one direction".[70] Evidence of

[68] MGA at s.664(1.1).
[69] MGA at ss.1(1.2).
[70] Stettler (County No. 6) v. Ruttan, 2005 ABQB 74 (CanLII), https://canlii.ca/t/1jrxm, retrieved on 2022-09-26 at para 27.

general overland flow between adjacent parcels is insufficient to be considered a natural drainage course.[71]

In relation to "land subject to flooding", the question becomes one of the extent and frequency of flooding that would justify the taking of ER. The court has noted that lands that were above the 1:100 year flood level of a lake that "land that is subject to flooding" must not mean land that is subject to any risk of flooding but rather land that is reasonably likely to flood in the normal course of events."[72] The court will look to some level of standard of determination, such that the taking of ER will be viewed as reasonable. Of course, as impacts around flooding and climate change become more salient, one could expect some movement in judicial interpretation.

As an alternative to environmental reserves, the parties to subdivision may agree to enter an **environmental reserve easement**.[73] This easement "must require that land that is subject to the easement remain in a natural state as if it were owned by the municipality, whether or not the municipality has an interest in land that would be benefitted by the easement" and can be enforced by a municipality against the landowner or future landowners.[74]

Agreements can be made with a landowner to clarify how and if an environmental reserve will be required (either before an application for subdivision is made or before an application has been decided).[75]

Environmental reserves and environmental reserve easements are inherently protective insofar as they are limited in their use to being kept in their natural state or, in the case of an ER, providing a public park.[76] Public access will be a key consideration for the use of an ER that a municipality must carefully consider and plan for as they are likely to increase the risks to riparian areas (and related risks of direct and indirect impacts on water quality). An environmental reserve may change purposes or be disposed of in a limited way, following a public hearing and passage of a bylaw.[77]

Enforcement of environmental reserve compared to an environmental reserve easement should also be considered by a municipality in the subdivision process. Environmental reserves are wholly owned and managed by the municipality; hence enforcement can be treated like any other municipal property and bylaw enforcement matter. On the other hand, enforcing an easement requires the municipality to be prepared to enforce the easement with the current and future landowner. This requires either entering a dispute resolution process as set out in the easement agreement or by taking the landowner to the courts. The terms of the easement are therefore of the

[71] *Ibid*.
[72] *Ibid*. at para 28.
[73] S.664(2).
[74] Ss.664(3)-8. The easement is registered on the land title and thereby binds future landowners.
[75] S. 664.1.
[76] S.671.
[77] S.676.

utmost importance. The agreement should set out what activities are allowed and what activities are prohibited and a base line of what the natural state of the easement area is (i.e., a biophysical survey of the area) should be included as part of the agreement. In the absence of this information enforcement becomes challenging.

Limitations and impacts on Environmental Reserves

The *Municipal Government Act* gives municipalities the voluntary option to designate a Municipal Reserve as "environmental reserve"; therefore, it is important to embed this direction in planning documents. Additionally, municipalities must pass bylaws to regulate activities within their ERs. Examples of ER bylaws include restrictions on cutting vegetation or using motorized vehicles without permission. If public access is allowed on the ER lands, then how will riparian areas be conserved? To answer this question, a municipality would need to document the original state of the riparian area and ensure the measures to be taken to ensure public access restrictions are effectively communicated and enforced.

Further, while an ER can be identified and regulated by a municipality, it does not guarantee that all activities will be restricted therein. In particular if provincial regulatory agencies such as the Alberta Energy Regulator or the Alberta Utilities Commission authorize activities within an ER area the proponent of the activity can obtain a right of entry order issued by the ALPRT.[78]

Conservation reserves

Conservation reserves are a recent legislative tool (2016) that can be used for protection of riparian areas. Conservation reserves may have more applicability in cases where natural land features cannot be adequately protected and managed through regulatory setbacks and development conditions. For example, an upland habitat corridor that is connected to riparian lands may be eligible for protection under a conservation reserve.

A conservation reserve can be used by the subdivision authority where the authority finds that:

1. it has "environmentally significant features",
2. and where it is not land that can be designated as an environmental reserve,
3. and the purpose of the land is to protect and conserve the land,
4. and the taking of the land is consistent with the municipality's MDP and ASP.[79]

[78] See s. 12 of the *Surface Rights Act*, R.S.A. 2000, c. S-24.
[79] S.664.2).

Compensation is payable by the municipality to the landowner and will be based on the market value of the land.[80] Disputes about compensation are dealt with by the Alberta Land and Property Rights Tribunal (ALPRT). It is unclear how the assessment will be made however, particularly where there are aspects of the land that may overlap with other regulatory restrictions such as the federal *Species at Risk Act,* for instance if there is an emergency order protecting habitat of an area.[81]

Conservation Easements

Conservation tools are not limited to the MGA, as municipalities are also qualified under the *Alberta Land Stewardship Act* (*ASLA*) to hold conservation easements.[82] A conservation easement (CE) is an agreement between a landowner and a qualified organization that can be registered on title and bind future landowners. Municipalities are authorized to hold these easements under *ALSA*.

Like environmental reserves easements (ERE), conservation easements are voluntary and can be entered into by the municipality and a willing landowner. Unlike ERE, conservation easements have no direct linkages with planning and subdivision under the MGA.

The content of the conservation easement is generally quite flexible and will be negotiated as part of the easement process. Conservation easement agreements grant certain development rights to the easement holder (e.g., the municipality), thereby helping protect specific ecological or watershed values.

Like EREs, the landowner retains the title to the land, but the municipality gains an interest in land that can be enforced by the municipality against current and future landowners.

Conservation easements are distinct from ERE in several ways. First, a CE can be donated (with a tax benefit accruing to the party donating the easement) or it may be purchased by the party seeking the easement. The CE can apply to an entire parcel or a portion of the parcel of land that is of interest to the municipality. This distinguishes it from an ERE which can only apply to lands that would otherwise be considered ER.[83]

Further, changes to a CE agreement can be made by mutual agreement between the landowner and the municipality. This is in contrast to ERE where an easement may only be “removed” if a plan of subdivision is cancelled.[84] The scope of a municipality to terminate or cancel an ERE is therefore limited. Changes in use of ERE lands are also

[80] S.664.2(2).
[81] There has yet to be clear guidance on this front.
[82] S.A. 2009, c. A-26.8 at s 28.
[83] Section 664(2) states that where a land owner and municipal agree that “any or all of the land that is to be taken as environmental reserve is instead to be subject of an environmental reserve easement”.
[84] MGA at s.658(3.1) and s 664(6).

limited by the MGA requirement to keep the easement lands in their "natural state as if they were owned by the municipality" (reflecting the intention to replace the taking of ER).[85]

Some practical aspects of CE or ERE is that the property, being still the title of the landowner, remains taxable. This is in contrast to ER which is exempt from taxation under the MGA (as municipally owned land).[86] Easements entail budgetary expenditures for monitoring, compliance and enforcement, which should be considered by both parties when comparing the cost and benefits of choosing an easement or reserve option.

Finally, there are liability differences between easements and reserves. In the case of easements, land title is maintained by the landowner who will be responsible for potential harms; this compares to reserves, where land title and liability are the responsibility of the municipality.

[85] MGA at s. 664(3)(b).
[86] MGA at s.361.

Table 1: Reserves and Easements Compared

Tool	Legislation	Voluntary or Mandatory	Type of Interest in Land	Restrictions on Land Use	Termination or Changes	Limitations
Environmental Reserve (ER)	*MGA*	May be mandated without compensation (at subdivision)	Title is transferred to municipality	As per municipal policy and bylaws	Passage of bylaw (s.676 MGA)	Apply to lands (and purpose as set out in MGA)
Environmental Reserve Easement (ERE)	*MGA*	Voluntary and negotiated with limitations without compensation (at subdivision)	Interest in land is registered on land title (binding on future land owners)	Determined by easement and "natural state"	Bylaw for change in boundaries of ERE Agreement of the parties but must be "natural state"	Apply to lands and purpose as set out in the MGA.
Conservation Reserve (CR)	*MGA*	May be mandated with compensation (at subdivision)	Title is transferred to municipality	As per municipal bylaw and policy With purpose to "protect and conserve" land	Where no remaining purpose to protect due to events outside of municipal control (s.674.1)	Can only apply to non ER lands.
Conservation Easement (CE)	*Alberta Land Stewardship Act*	Voluntary and negotiated (anytime)	Interest in land is registered on land title (binding on future landowners).	Determined by easement	By agreement	

v. Land Use Bylaws: District/zoning approaches

Land use bylaws are a key regulatory tool for managing land use and impacts in riparian areas. The foundation of enabling provisions for this are found in section 640 that mandates that "Every municipality must pass a land use bylaw" and that these bylaws "may prohibit or regulate and control the use and development of land and buildings, including, without limitation, by… regulating the development of buildings… and... providing for any other matter council considers necessary to regulate land use within the municipality." Insofar as the well-being of the environment is a stated purpose of a municipality, it is logical that municipal council may focus their regulatory making powers on riparian areas.

In developing a land use bylaw, there is a requirement to divide the municipality into districts and to set out permitted and discretionary uses in those districts, with or without conditions (i.e., commonly referred to as zoning). The land use bylaw further sets out the development permit process, including the nature of "discretion that the development authority may exercise with respect to development permits".[87]The focus of the land use bylaws was recently amended (in 2020) to shorten the section and provide more high level direction of dealing with "any other matter council considers necessary".

The scope of prohibitions allowed by bylaw

The language of bylaw powers, the MGA's municipal purposes and Alberta jurisprudence taken together are enabling of proactive municipal regulation of riparian areas. That said, the nature of riparian regulation is balanced against property rights which means that plans, policies and bylaws should be clear and logically connected to riparian functions and environmental well-being.[88]

Case law has noted that section 640(1) of the MGA (pre-2020) and its language (similar to the current 640(1.1), grants a municipality broad powers to regulate land use.[89] This power to regulate land has been the subject of numerous court cases, often arising from allegations that restrictive zoning (e.g., not amending zoning to allow urban development) amounts to a de facto or implied expropriation of private property. The jurisprudence in this regard notes that regulatory actions on land may constitute a "de facto" expropriation where there is both a beneficial interest acquired in the property and

[87] *Ibid*. at section 640(2).
[88] While in the context of BC and its Local Government Act, the case of *Wilson v Cowichan Valley (Regional District)*, 2021 BCSC 1735 (CanLII), https://canlii.ca/t/jhx5l is illustrative of some courts viewing the breadth of power more narrowly and using this view to interpret a legislative provision narrowly, and in this author's respectful opinion, wrongly.
[89] See *698114 Alberta Ltd. v. Banff (Town of)*, 2000 ABCA 237 (CanLII), https://canlii.ca/t/5rpz. The former section 640(1) stated "A land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality."

all reasonable uses of the property are removed.[90] For a brief overview of cases, see *Alberta (Minister of Infrastructure) v. Nilsson*, where the ability to regulate land uses (without compensation) are generally reviewed.[91]

Other case law is also instructive, particularly when looking at bylaws around floodways and flood fringe. The importance of acting on relevant information is highlighted in the case of *Simonelli v Rocky View (Municipal District No. 44),* where a council decision was overturned because it was found to be based on inaccurate information and that certain information provided by the municipal staff in that case regarding flood risk was "misleading and not relevant".[92] The case did confirm that ecological and environmental considerations (along with those of safety) were valid planning concerns.[93] In the recent Supreme Court of Canada case of *Annapolis Group Inc. v. Halifax Regional Municipality* has noted that a beneficial interest can include a general "advantage" to the state (and should not be restricted to acquiring a specific legal interest in land).[94] The matter of whether there was a de facto expropriation in that case was sent back to the lower court to be determined through a trial.

Further, if land use bylaw provisions attempt to reserve lands for solely public purposes, i.e., a park, they may be overturned or the court may require the municipality to seek ownership of the lands (through the expropriation process).[95] In other instances, land freezes to reflect future planning intent to have a park was not been found to be forced or de facto expropriation (see *Hartel Holdings Co. Ltd. v. City of Calgary*).[96]

If one extends the principles of de facto expropriation set out by the courts to areas of riparian management, there would seem to be very strong argument to support riparian area restrictions unless such restrictions limit the use of the entirety of the land by removing all reasonable use of property.[97] However, there remains potential for litigation around whether a bylaw can apply a significant buffer around surface water without

[90] See *Canadian Pacific Railway v. Vancouver* (City), 2006 SCC 5 at para 30.
[91] 2002 ABCA 283 (CanLII), https://canlii.ca/t/5ftf, citing *Steer Holdings Ltd. v. Manitoba* (1992), 1992 CanLII 2773 (MB CA) *Mariner Real Estate Ltd. v. Nova Scotia* (1999), 1999 NSCA 98 (CanLII), *Trelenberg v. Alber*ta (1980), 1980 CanLII 1087 (AB KB).
[92] *Simonelli v Rocky View* (Municipal District No. 44), 2004 ABQB 45, Also see *Gruman v Canmore* (Town), 2018 ABQB 507 (CanLII), where the court confirms the valid planning role of municipalities around floodways and environmentally significant areas (but overturned the decision on procedural grounds).
[93] *Ibid*. at paras 79-80.
[94] See *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19534/index.do.
[95] See *Three Sisters Mountain Village Properties Ltd v Canmore* (Town), 2022 ABQB 511 (CanLII), (Note that this case may be under appeal). Other cases have found that de facto expropriation did not occur with a heritage designation (see *KMK Properties Inc. v. St. John's* (City), 2021 NLSC 122 (CanLII), https://canlii.ca/t/jjchm. One case did find that requiring an entire parcel to be left in its natural state (notwithstanding an open question of possible uses) was de facto expropriation (see *Lynch v St. John's* (City), 2016 NLCA 35 (CanLII), https://canlii.ca/t/gscl0(leave to the Supreme Court of Canada was denied),). In this case there were discretionary uses however the court felt that due the city administrator's discretion was operating in such a way as to nullify those uses.
[96] *Hartel Holdings Co. Ltd. v. City of Calgary*, 1984 CanLII 137 (SCC), [1984] 1 SCR 337, https://canlii.ca/t/1xv20,
[97] See *Canadian Pacific Railway v. Vancouver* (City), 2006 SCC 5.

crossing the line into de facto expropriation. This makes the designations of ERs at the time of subdivision of significant importance.

Development authority and appeal board discretion to depart from bylaw requirements

In certain instances, a development authority is not bound by a land use bylaw. Specifically, section 640(6) states a development authority may depart from the land use bylaw where "in the opinion of the development authority…the proposed development would not… unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land, and … the proposed development conforms with the use prescribed for that land or building in the land use bylaw".

Similar language in section 654 guides the discretion of the subdivision authority, and on appeals, under section 687 (3)(d).

This provision has been considered recently in the context of a decision by appeal boards under the Act.[98] The basic premise is that the development authority has relatively broad leeway to determine instances where a non-conforming activity can proceed. Notwithstanding this leeway, it is questionable whether avoidance of bylaw provisions in relation to riparian areas could so easily be avoided.

Specifically, since a development authority must find that "the proposed development conforms with the use prescribed for that land…in the land use bylaw" it seems like any alternative use of the riparian lands would be contrary to the bylaw "use". In cases where a variance is allowed, it is often a question of scale (either density or distance) rather than the use itself. Admittedly, a counter argument may be that the overall use of the district (i.e., zone) is maintained even if developments occur in the riparian area and that the general land use is permissible.

See an example of riparian relevant provisions in the Strathcona County bylaw below.

Strathcona County Land Use Bylaw, Part 3: General Regulations [99]

3.6 ENVIRONMENTAL FEATURES

3.6.1 A minimum setback of 50.0 m is required from the top of bank of the North Saskatchewan River for any development, unless the Development Officer is provided with an environmental and

[98] See *White v. Okotoks* (Subdivision and Development Appeal Board), 2018 ABCA 86 (CanLII), https://canlii.ca/t/hqrsc and Edmonton (City of) Library Board v Edmonton (City of), 2021 ABCA 355 (CanLII), https://canlii.ca/t/jk3qt.

[99] https://strathconacablob.blob.core.windows.net/files/files/pds-lub-part3-generalregulations-nov2021.pdf.

geotechnical assessment, prepared by a qualified professional in accordance with County requirements, which verifies that a lesser setback is warranted. The Development Officer shall require a setback greater than 50.0 m where determined by the assessment.

3.6.2 A minimum setback of 36.0 m is required from the top of bank of Pointe-aux-Pins Creek within the plan area of the North of Yellowhead Area Concept Plan for any development, unless the Development Officer is provided with an environmental and geotechnical assessment, prepared by a qualified professional in accordance with County requirements, which verifies that a lesser setback is warranted. The Development Officer shall require a setback greater than 36.0 m where determined by the assessment.

3.6.3 A minimum setback of 30.0 m is required from the top of bank of any other watercourse or water body, unless the Development Officer is provided with an environmental and geotechnical assessment prepared by a qualified professional that verifies that a lesser setback is warranted. The Development Officer shall require a setback greater than 30.0 m where determined by the assessment.

3.6.4 The minimum setback and the requirements for an environmental and geotechnical assessment indicated in Sections 3.6.1, 3.6.2, and 3.6.3 above may be reduced or eliminated where the Development Officer determines that the proposed structure or building is incidental to the operation of a utility service (i.e. a pump shack) and the Development Authority is satisfied that there is no risk or adverse effect on development or the riparian area.

3.6.5 No trees shall be cleared or removed from any land which lies within the minimum setback from the top of bank to a watercourse or water body, unless the Development Officer receives written confirmation from a qualified professional indicating: a) that the removal is necessary in order to provide access to the watercourse or water body; and b) the area where trees or vegetation may be removed.

3.6.6 A Development Officer shall not approve an application for a building within a floodway.

3.6.7 When an application for a building is made for an existing lot which is, or may be, affected by a watercourse, a water body or flood fringe area, the Development Officer shall require the applicant to submit a geotechnical report or a flood plain/ flood hazard mapping study or both, prepared by a qualified professional in accordance with County requirements. The geotechnical report shall confirm that there is a minimum contiguous developable area of 0.4 ha on the subject lot and that study shall contain flood proofing provisions to mitigate potential damage from a flood event.

3.6.8 Despite any other regulation in this Bylaw, the Development Authority may increase any required setback for any use in any Zoning District where written confirmation from a qualified professional is received that a proposed development: a) may be detrimental to the conservation of environmentally sensitive lands; or b) may be affected by being in a floodplain or in proximity to steep or unstable slopes; or c) may increase the degree of hazard presented by an existing environmental feature. If the increased setback cannot be met, the Development Officer shall require that the applicant submit a report, prepared by a qualified professional in accordance with County requirements, identifying preventive engineering and construction measures that shall deem the lot suitable for the proposed development.

vi. Conditions on Development permits

The scope and nature of conditions that may be placed on development permits will be set out in the land use bylaw. Land use and developments may be either permitted (permitted uses), permitted through the discretionary exercise of delegated development authority (discretionary uses), or not permitted by virtue of not being a permitted or discretionary use. [100] Both permitted uses and discretionary uses may be accompanied by conditions.[101] The method of issuing permits is also to be set out in the bylaw. The nature of discretion and the types of conditions that may be imposed on a permit may also be prescribed by bylaw.[102]

Permitted uses and conditions on development

Where a land use zone (i.e., referred to in the MGA as a "district") within a land use bylaw permits a specific use of land, then the development permit must issue with or without conditions.[103] As such, the nature of riparian related conditions, if not prohibited otherwise, should be clearly articulated in the conditions of a development permit and enabled in the land use bylaw as part of a permitted use.[104] Further, when considering the nature of permitted uses in drafting a land use bylaw, one should consider the nature of potential impact that those uses may have on a riparian area and its function and whether sufficient clarity of conditions to mitigate those risks can be drafted.

Discretionary uses and conditions on development

For discretionary uses within a district, there are few restrictions on the types of conditions that may attach to the development permit.[105] So long as the conditions are logically connected to planning outcomes (which are ideally articulated in related statutory plans), there can be a variety of requirements put in place as conditions. In this regard, requirements to restore riparian lands, with conditions clearly directing on how that is to be done, will likely withstand scrutiny from reviewing boards, tribunals, and courts.

Can a municipality create a riparian restoration bank? A municipality may be interested in creating a system whereby payments for riparian harms are held by the municipality to repair and restore other high value riparian areas. This occurs provincially under the

[100] MGA at s.640 (2)(a).
[101] MGA at s.640 (2)(a).
[102] Ibid at s.640(2)(c).
[103] See *Liquor Stores Limited Partnership v. Edmonton* (City), 2017 ABCA 435 (CanLII), https://canlii.ca/t/hpdqh.
[104] See MGA at s. 642.
[105] See *Baron Real Estate Investments Ltd. v. Edmonton* (Subdivision and Development Appeal Board), 2018 ABCA 67 (CanLII), https://canlii.ca/t/hqjp6, where the Court of Appeal states (citing professor Laux) " Development authorities and subdivision and development appeal boards have a broad discretion to determine whether to approve discretionary uses" at para 16.

wetland policy and could, theoretically, be extended to riparian areas. The question then arises whether a municipality can set up such a "riparian" restoration bank in its borders.

Generally, powers to raise revenue within a municipality are limited to the instances prescribed by the Act. At the same time, innovative tools such as tradable development credits systems (TDCs) have been upheld as being within the jurisdiction of a municipality to be implemented, although such programs must now be approved under the *Alberta Land Stewardship Act*.[106] A system is similar to a "bank" insofar as credits in one area can be sold and a corresponding high value environmental area can be protected. The court in *Keller v. Municipal District of Bighorn No. 8* highlighted the breadth of powers conveyed by s.632 and s.640 of the Act noting that a tradable development credit program "clearly falls within the broad powers of regulation and control provided to the municipality".[107] TDCs can be said to be analogous to a conservation offset, or in this case, a riparian offset program. The question therefore becomes whether such an offset program would be interpreted as a TDC style program, and hence require approval under ALSA. To overcome this uncertainty, one could seek to pursue a riparian focused TDC program under ALSA. Unfortunately, there remains a lack of regulatory detail under ALSA to support such offset programs. Overall, at this time, the option to proceed with in lieu payments carries some litigation risk, as arguments may arise over whether the municipality has authority to require such a payment. The argument in this regard would turn on whether of having in lieu payments for riparian impairment is a regulatory charge or user fee that is enabled by the MGA or a system of additional taxation, which is not enabled by the MGA.[108]

vii. Compliance and Enforcement

Compliance and enforcement actions for municipal riparian regulations are essential components of meeting targets for healthy riparian areas. The enforcement will typically be focused on prohibitions within the municipal land use bylaw and in relation to conditions of development permits.

Under the MGA there are a variety of compliance and enforcement tools that may be used including the issuance of a remedial order, injunctions for an ongoing contravention, or a stop work order. Further, compliance opportunities may extend where there is failure to comply with a remedial order.

Compliance and enforcement on riparian areas can be a challenge as there are practical challenges in cataloguing the state of riparian areas (to understand any damage that may have been caused) and garnering proof that a specific party

[106] 2010 ABQB 362 (CanLII), https://canlii.ca/t/29zpb.
[107] *Ibid*. at para 26.
[108] For a discussion of the issue of municipal jurisdiction over taxes, user fees, and regulatory charges see Lindsay M. Tedds and Kelly I.E. Farish User Fee Design by Canadian Municipalities: Considerations Arising from Case Law (Sept. 2014) MPRA Paper No. 96914, posted 14 Nov 2019 16:56 UTC.

undertook a prohibited activity. Due to these enforcement challenges, education and communication around municipal regulations is of paramount importance.

Compliance powers described

Under section 545 of the MGA, where a "designated officer" finds that a person in contravention of the Act or any enactment of the municipality, may, by written order, direct the person to stop an activity or change the manner in which it is being done, to "take any action" necessary to remedy the contravention. A compliance order must include details about the timeframe within which the order must be fulfilled, and a statement about the consequences for not complying to the order. Where a municipality seeks to remedy a contravention, there are a variety of procedural requirements that must be met (under section 549).

Consideration of stop orders in the context of riparian setbacks has seen some appeals heard in relation to developments in floodways (with related riparian impacts). For instance, an order to remove a retaining wall built within a setback to a floodway was upheld by the Calgary Subdivision and Development Appeal Board decision (SDAB2009-0236 (Re)).[109] Both the land use bylaw and a condition of the development permit prohibited developments with the floodway and Calgary's stop order was upheld. This decision also illustrates the need to gather and track evidence of the condition of land, as in this case there were competing claims as to when work on the lands had taken place. So long as riparian setbacks are clearly articulated and integrated into development permit conditions or the land use bylaw, stop orders should stand up under scrutiny.

Compliance of development limitations on riparian areas can be challenging to enforce. This is primarily because there needs to be evidence of before and after an activity to justify the issuance of an order. Depending on the nature of the prohibitions and the nature of the land the difficulty this poses will vary.

C. The Legal Ecosystem of Municipal Decision Making

Municipalities have various powers provided to them by the *Municipal Government Act* and these powers are exercised within the context of legal principles and rules. These legal rules around government decisions making are part of "administrative law" and have evolved through time. This section looks at these powers in a more detailed way and looks at the underlying decision-making approach that can mitigate litigation risk around municipal riparian management. Part of understanding the legal risks at play is

[109] 2009 CGYSDAB 236 (CanLII), https://canlii.ca/t/glp6z.

understanding how appellant tribunals, including the courts, will review and consider the decisions made by the municipality.

The approach taken for different types of lands will be markedly different as the municipality may have differing planning and regulatory options or limitations that are at play. In this regard, prioritization of actions for given areas of impaired and degraded riparian areas will be important.

Federal lands

Federal lands are governed by federal laws. Activities on federal lands may sometimes also be regulated by provincial law, although this will vary. First Nation reserves are considered federal lands under our laws and as such they are governed by both federal law and by laws passed by the First Nation community.

There is a limited regulatory role for municipalities in this regard. Where issues arise on federal lands, collaboration with the relevant government, whether the First Nation or the Government of Canada, will be the first step in reaching riparian targets.

As owners of the land, First Nations and the Government of Canada will have a direct regulatory (and property owner) function in relation to riparian management, including where leasehold or occupation agreements are put in place.

Provincial lands

The scope of municipals power over public land varies by the party that is regulated. A municipality is not able to regulate Crown ministries or Crown corporations on provincial lands but may regulate some aspects of other people on Crown lands. This means that the municipal role in relation to Crown activities is one of collaborator, partner, and/or advocate, rather than regulator. Municipalities can play an important role in working with provincial government departments and staff to foster effective riparian management in their municipality.

Regulation of third-party actors (for example, individuals or private corporations) on public land is possible, although there may be limits to the extent of the municipal jurisdiction where provincial laws authorize the activities. Legal academics and court decisions do acknowledge that the municipal land use powers under MGA applies to public lands. The MGA does state that some public lands are exempt from this power (and these public lands are to be listed in a Ministerial Regulation). [110]

[110] For a discussion of this see Laux, Planning Law and Practice in Alberta, (Carswell, 2nd edition, looseleaf), at chapter 4. While a different jurisdiction, British Columbia has more definitively established that municipal bylaws apply to private parties on Crown lands. (see Squamish (District) v. Great Pacific Pumice Inc., 2000 BCCA 328 (CanLII), https://canlii.ca/t/5308 and MGA at ss.618(2) & (3).

Activities that may be subject to municipal regulation includes areas of municipal approval over aggregate extraction and aspects of development that are not regulated provincially. The scope and scale of municipal regulation of public land has not been subjected to court review, which is perhaps not surprising as few municipalities have the resources to take on additional regulatory areas where the province is seen to be the one responsible, as landowner.

Advocacy before regulatory agencies and tribunals to integrate municipal riparian targets

Though municipalities do not have power over federal and provincial lands, they are not prevented from presenting and advocating their interests before the relevant regulators for consideration. We can see clarification of municipal power over public land by recent amendment to the MGA. Specifically, the MGA was amended to indicate that appeals for activities “in Green Areas” (i.e., forested public land areas) of the province are to be heard by the Alberta Land and Property Rights Tribunal.[111] Inherent in this provision is the clear assumption that a municipality has control over land use developments in Green Areas, which are owned by the Crown.

Municipal lands

Clearly management of municipal lands to meet riparian objectives should be an area of focus, as the lands are fully under the control and management of the municipality. In the case of environmental reserve (ER) lands, this is a more straightforward proposition as the MGA specifically mandates that the municipality maintain an ER in its “natural state” or as public park.

Whether ER, environmental reserve easements, conservation reserves or ownership of lands, it is important to have policies and, where needed (i.e., ER lands), bylaws to regulate both municipal and public use of municipal lands.

Regulating private land

The extent of regulatory control over privately owned riparian lands may be of central importance in meeting municipal riparian targets. The scope of municipal jurisdiction to regulate privately held riparian lands is dealt with further below, but a recurring theme of this document is that municipal management of riparian lands, wherever they occur, is ensuring “riparian policy coherence”. This policy coherence is of particularly relevance to private land use planning and management.

[111] MGA at 678 & 685.

In this regard, the management tool may vary depending on the nature and intention of land use. Environmental reserves will be a favoured tool for areas that are subjected to a proposed subdivision. In relation to ER there will be important components to be addressed in ER related policies and ER bylaws.

Where the land is not subject to a proposed subdivision, the land use bylaw related regulations and the development permitting will be of increased relevance.

The approach may also depend on the current state of the riparian lands: Are they in a natural state with the aim of conserving them, or are the lands in need of restoration to regain some of the function that has been lost? This question is dealt with in greater detail below.

Practical matters may also arise in terms of how municipalities seek to regulate riparian lands. For instance, lands used for the purpose of agriculture may have impaired riparian areas that need restoration and ongoing monitoring and conservation. In these instances, working to promote voluntary legal options like conservation easements that can be held by the municipality is a preferable approach but, outside of subdivision, a municipality may have to rely on voluntary measures being taken by the landowner. This requires ongoing municipal programs, education, and incentivizing of landowner behaviors that favour effective riparian management.

i. Pathways of legal challenges to municipal decision making

The roles of municipal staff, subdivision authorities and councils are enabled by the MGA, but also constrained by it. In this regard, if challenged, different types of decisions will be reviewed through different legal procedures.

Appeals of subdivision and development authority decisions

Where a subdivision or development authority has made a decision within their jurisdiction, appeals may occur on prescribed grounds to various appellant bodies under the MGA. For the purposes of this report, the likely appellant bodies will be the Tribunal ALPRT or a SDAB. Effective riparian decision making means that a municipality will want to ensure that, to the extent feasible, these subdivision and development authorities and the appellant boards are not making appeal decisions that undermine a municipality's targets for its riparian areas. To avoid this, it is important to have clear riparian objectives and, where appropriate, prescriptive language in statutory plans. It is similarly important to ensure that decisions are backed by published municipal policy and logically and rationally connected to stated riparian objectives.

The ALPRT has jurisdiction to hear various appeals under section 488 of the MGA. This includes appeals of both subdivision decisions and development permits adjacent to

bodies of water or where the land is subject to an authorization of Alberta Environment and Parks.[112] The Subdivision and Development Appeals Board (set up by a municipal bylaw) will deal with other relevant riparian focused subdivision and development permit appeals (i.e., those decisions not listed in section 488).

Where a subdivision or development decision is appealed the reviewing tribunal (whether it is the ALPRT or the SDAB) will be focused on reviewing the interpretation of the development or subdivision authority and whether that decision is consistent and conforms to relevant statutory plans, the land use bylaw, and is consistent with land use policies.

Judicial review of municipal council bylaw decisions

A review of a decision of a municipal council proceeds through a different process, specifically municipal council decisions to pass or amend bylaws involve a party seeking judicial review of a bylaw's validity by way of an application to the Court of King's Bench. The Court will look to determine whether the bylaw decision was "reasonable" in accordance with principles set out in past administrative law cases.[113] This "reasonable" standard is discussed further below.

ii. Bolstering municipal riparian decisions through policy coherence

Whether the decision maker is a subdivision authority, a development authority or council itself, the effectiveness of decisions will be bolstered by having policy coherence around riparian management. This means statutory plans, i.e., IMDPs, MDPs, and ASPs, are aligned in their approach to riparian management, that Land Use bylaws are similarly reflective of statutory plans in their prescriptive limiting language, and that policies that guide these decisions are coherent and targeted toward a unified decision-making framework when it comes to riparian areas.

This policy and regulator coherence will not only assist in making initial decisions but will give clear guidance to appellant bodies around riparian management. This requires diligence in how statutory plans, land use bylaws and policies evolve to ensure ongoing alignment with municipal riparian targets.

What is reasonable will be circumstance specific, depending on the nature of the decision-making body and on the nature of evidence on which the decision was

[112] MGA at sections 678 & 685.
[113] See *Terrigno v Calgary* (City), 2021 ABQB 41 (CanLII), https://canlii.ca/t/jcnz6 and *Young v Red Deer County*, 2022 ABQB 13 (CanLII), https://canlii.ca/t/jlnnn. The earlier standard of review for bylaw decisions was whether the decision was "patently unreasonable". For details of this evolution see Paul Daly, Patent Unreasonableness after Vavilov, [Source not specified], 2021 CanLIIDocs 654, https://canlii.ca/t/t2hc.

based.[114] To be reasonable the courts have noted that decisions should be justified, be "internally coherent" with a foundation in a rational chain of analysis.[115]

Logic, reasoning, and justification in the riparian management context can be captured by clearly linking scientific knowledge with municipal outcomes, as reflected in statutory plans, and in municipal action and decision making. In terms of riparian management, a decision may be viewed as both logical and justified where a given management or administrative action is logically connected to a municipal outcome. Such a decision will be supported by a clear statement of riparian policy and should be readily supported, either generally or specifically with some readily available scientific understanding or knowledge. Specific circumstances may further be used to justify specific decisions.

This can be further bolstered by having principles that guide policy and planning within the municipality, such as the principles of pollution prevention and precaution.

When might a municipal decision be challenged or overruled? It is important to note that nothing insulates a municipality from either a statutory appeal or judicial review. These processes exist, in part, to ensure decisions administered by government bodies are fairly undertaken and are within the legal powers granted to them. It is important therefore to understand the basis for decision making and to be confident in being able to justify a specific decision. Transparency in scientific rationale and reasoning is important.

In the context of municipal action, there will be a balance between private property rights and the public interest (as reflected in the MGA s.617). Decisions that appear to be arbitrarily limiting property use may be particularly open to challenge.

iii. Limitations on municipal riparian regulation: Alberta tribunal authorizations

Decisions made by provincial tribunals can supersede regulatory instruments and decisions made by the municipality.[116] This hierarchy of regulatory decision making is found in section 619 of the MGA and the courts have made it clear that the decisions of these bodies cannot be blocked or altered by a municipality. These regulatory bodies include the Alberta Energy Regulator (AER), the Alberta Utilities Commission (AUC),

[114] Allison Boutilier notes that the Court should be attentive to specialized knowledge used in making an administrative decision. The Court should also be attentive to the evidence and submissions that were before the decision-maker, as well as the history of the proceedings. However, the Court may not substitute its own reasons for the reasons of the administrative decision-maker or supplement the decision with reasons that were not given or implied by the context of the decision.
[115] See From *Morris v Law Society of Alberta* (Trust Safety Committee), 2020 ABQB 137 (CanLII), https://canlii.ca/t/j5d8l, at para 59-60.
[116] See Borgel v Paintearth (Subdivision and Development Appeal Board), 2020 ABCA 192 (CanLII), https://canlii.ca/t/j7c5d.

and the Natural Resources Conservation Board (or decisions of their predecessor regulators).[117]

Section 619 states "A licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC prevails, in accordance with this section, over any statutory plan, land use bylaw, subdivision decision or development decision by a subdivision authority, development authority, subdivision and development appeal board, or the Land and Property Rights Tribunal or any other authorization under this Part." The MGA goes on to set out a process to determine the consistency of municipal regulations with the provincial regulatory authorization and notes that a hearing may be held but only to deal with matters not already decided by a specific provincial tribunal.[118]

A municipality's regulatory and land use regulation may still be relevant if they deal with "matters not included" in the provincial authorization.[119] An appeal of the municipal decision regarding the "consistency" with the provincial authorization is now heard by the ALPRT. An example how a municipality may fill gaps in a provincial authorization can be seen in the recent decision of Fitzpatrick v Starland County.[120] This decision dealt with whether the municipal development permit should be upheld in the face of an AUC authorization. The ALPRT found that the municipal development permit dealt with certain matters regarding traffic and dust, that were not dealt with the AUC authorization. The development permit was therefore found to be consistent with the AUC authorization and the development permit could act as a standalone regulatory requirement of the municipality.[121]

Another example around development setbacks from water bodies and how provincial regulatory bodies will consider (or adopt) them can be seen in the *Hines Creek Farms* decision of the Natural Resources Conservation Board. [122] The NRCB in that case rejected municipal setbacks in lieu of provincial regulatory setbacks from water bodies The municipality had greater setbacks in their MDP. The NRCB concluded:[123]

> The Board is satisfied that the AOPA setbacks to water bodies and wetlands provide province-wide environmental protection to both surface and ground water. The Board can find no specific MDP land use objective related to Hines Creek Farms' proposed CFO that would warrant a setback to water bodies or wetlands greater than that provided by AOPA.

Of note in that case, several aspects of *Agricultural Operations Practices Act* have setbacks of only 30 meters from a body of water. This case illustrates that justifying a

[117] MGA at s.619.
[118] *Ibid*. at s.619(4).
[119] *Ibid*. at s.619(3).
[120] 2021 ABLPRT 789 (CanLII), https://canlii.ca/t/jlcwb.
[121] *Ibid*.
[122] Decision 2020-03 / FA19003 1577912 Alberta Ltd. (Hines Creek Farms) April 23, 2020.
[123] *Ibid*.

greater riparian setback past provincial regulatory body policy and regulation may be a challenge.

Nevertheless, the fundamental principle is that municipal planning and regulations will be augmented to accommodate the provincially authorized activity, regardless of how this may impair or impact the riparian area. This can be an important reason for municipalities, if feasible, to participate in provincial authorization decisions and to discuss matters with an activity proponent, such that activity siting and construction might accommodate municipal goals.

The importance of participation in regulatory processes is illustrated by the decision of the NRCB in the case of G & S Cattle, where an approval officer denied an expansion of a CFO in the Pigeon Lake Watershed due, in part, to the "materially negative and long-lasting effects on the community".[124] In that decision, considerable public concern around the project as well as concerns from summer villages located around the lake appeared to be an important determining factor. A review of the officer's decision was sought by G & S Cattle based, in part, that the application was consistent with the local MDP and therefore should proceed. A review was denied by the NRCB, upholding the finding that the development effects "on the environment, the economy and the community" were not acceptable.[125] This decision illustrates the broad power of constituents to advocate for specific environmental objectives while also illustrating that statutory plans should attempt to reflect the expectations of the municipality's constituents.

iv. Potential conflicts between bylaws, permits and provincial authorizations

Riparian regulations and policies pursued by municipalities should be aware of potential conflicts with provincial laws, although in much of the riparian area above the bank of water body there is a regulatory and management void that a municipality can and should fill. Specifically, section 13 of the MGA states that if there "a conflict or inconsistency between a bylaw and this or another enactment, the bylaw is of no effect to the extent of the conflict or inconsistency."[126] This is further reflected in section 620 of the MGA in relation to development permits where it states:

> A condition of a licence, permit, approval or other authorization granted pursuant to an enactment by the Lieutenant Governor in Council, a Minister, a Provincial agency or Crown-controlled… prevails over any condition of a development permit that conflicts with it.

[124]NRCB Decision Summary RA21045, at page 30 online: https://www.nrcb.ca/download_document/1/453/11438/ra21045-ds-31-aug-22.
[125] 20221021 NRCB Decision RFR 2022-11 - G&S Cattle Ltd. RA21045 online: https://www.nrcb.ca/download_document/1/453/11514/20221021-nrcb-decision-rfr-2022-11-g-s-cattle-ltd-ra21045.
[126] MGA at section 13.

What is deemed to be consistent or conflicting has been the subject of numerous court cases across the country. In some cases, bylaws have been held to stand so long as dual compliance is feasible, whereas in other cases, courts have found that municipal bylaws were inoperable where the municipal decision did not allow an activity to proceed, even though the activity was authorized by the province.[127]

By way of example, a decision has found that an aggregate extraction authorization granted by the province did not prevail over municipal development decisions and that there was not a conflict with a municipal council's decision to reject extending and amending an application for aggregate extraction even though the aggregate company had the required provincial approvals.[128] In finding that the Council was correct in its interpretation of its power the court noted:[129]

> there is no conflict between the Alberta Environment approval and the Council's decision not to extend the development permit.
> The Alberta Environment permit does not enjoy any paramountcy. Rather, this is one of the situations where the two types of approval operate concurrently. Neither permit compels what the other forbids or, to put it another way, there is no barrier to dual compliance. There is no operational conflict in the two types of approval.

In this case, the aggregate company had sought to have a permit extended for aggregate extraction for two additional years. The company subsequently sought to extend the permit further and to change conditions around landfilling. The matter went before council and a motion to alter the permit was denied.

It is not always clear cut however, as illustrated by a recent case involving an appeal of a "deemed refusal" of subdivision of lands where an authorization is granted by Alberta Environment and Parks (now Environment and Protected Areas). These decisions are now appealed to the Alberta Land and Property Rights Tribunal.[130]

In the 2022 decision of *Verville v Athabasca County* (Subdivision Authority), the ALPRT overturned a deemed refusal for subdivision made by the Athabasca County subdivision authority.[131] Due to the environmental nature of the lands that were subject to subdivision, the authority had requested a biophysical impact assessment prior to considering the subdivision application. As the biophysical assessment was not provided, no decision was made by the authority in the prescribed time and the application for subdivision was deemed refused. In its review, the ALPRT disregarded the need for the biophysical assessment stating that the information supporting a *Water*

[127] See Spraytech *supra* note 20. Also see a discussion of this in Judy Stewart, Municipal "Direction, Control and Management" of Local Wetlands and Associated Riparian Lands: Section 60 of Alberta's Municipal Government Act, 2009 47-1 Alberta Law Review 73, 2009 CanLIIDocs 204, https://canlii.ca/t/2d03.
[128] *Northland Material Handling Inc. v. Parkland* (County), 2012 ABQB 407 (CanLII).
[129] *Ibid*. at para 57. In this case the contrasting language between section 619 and section 620 are most salient.
[130] *Supra* note 18.
[131] 2022 ABLPRT 1066 (CanLII), https://canlii.ca/t/jr485.

Act (a wetland assessment) approval was sufficient.[132] The Tribunal concludes "the application contains the information required to determine site suitability and compliance with the LUB", citing acceptance by department of Alberta Environment and Parks as its main rationale.

This decision can be viewed as problematic from a municipal planning perspective as it conflates *Water Act* authorizations with whether land is suitable for development, something that is more clearly in the scope of municipal decision makers. Problematically, the tribunal states that "AEP did not request a BIA – nor did they oppose or raise significant concerns with the Proposal". In so doing, the tribunal may undermine municipal considerations of land use in favour of provincial ones. Nothing in current law or policy would motivate AEP to require a biophysical assessment in exercising their discretion under the *Water Act.* Further, AEP is not in the business of land use planning and the tribunal decision failed to consider the role of biophysical assessments for county developments, as reflected in its Municipal Development Plan. The SA and related policies appear to have been overridden by the AEP's perspective on the wetland in this case.

This decision will be of interest to those who wish to pursue environmental assessment processes that may be at odds or not aligned with provincial authorizations and policies. The decision is also a flag that the objectives of a municipality, perhaps focused on the well-being of the environment, may run into conflicts with provincial authorizations, and that this may be used by appellant bodies to justify overruling municipal processes.

V. Differential treatment of lands and variable vs fixed riparian setbacks

Municipal decision makers should be concerned with fairness in the decision-making process. Decisions should be clearly guided by policy, statutory plans, and bylaws to ensure that applicants are treated similarly in similar development scenarios. That being said, it is recognized that different land uses and different lands may have different risks associated with them. This is reflected in the MGA and reflects a valid planning purpose.

The question arises, can a municipality apply different riparian regulations and if so, what are some of the advantages and disadvantages of differing approaches?

Fixed setbacks around riparian lands offer administrative efficiency as well as an opportunity to apply a precautionary approach to environmental management. Fixed setbacks may be augmented by optional processes whereby applicants undertake an assessment of environmental factors that may allow for a narrower setback distance (with relevant mitigation measures in place).

[132] 2022 ABLPRT 1066 (CanLII), https://canlii.ca/t/jr485.

Variable width setbacks allow for place-based approaches to riparian management, but also require further compliance oversight and review. Variable width setbacks are often based on slope and soil conditions, but also may vary depending on the activity that is being proposed for the property. For instance, a residential development versus a confined feeding operation clearly give rise to different environmental risks.

The planned duration of an activity may also be relevant, where riparian area restoration (with mitigation in place during the activity) may be an area of focus for time limited development permits and conditions.

Notwithstanding the regulations to riparian management there will often be a tendency for landowners, occupiers (leaseholders and renters), and developers to seek to minimize riparian area management. In this regard, challenges to riparian based municipal approaches may take various forms, including that standards and setbacks are arbitrary, discriminatory or are otherwise flawed (e.g., vague, biased or made in bad faith).

Treating different lands differently is what planning is really about. Municipal councils and staff plan and develop around place-based circumstances. A change in zoning in one area of a municipality does not mean the same change in zoning should occur elsewhere. As noted in K*eephills Aggregate Co. Ltd. v. Parkland (County of) Subdivision and Appeal Board*:[133]

> The MGA permits discrimination in order to facilitate planning and development: *6988114 Alta. Ltd. v. Banff*, 2000 ABCA 237 (CanLII), [2000] A.J. No. 992 (C.A.). Where the proposed use is discretionary, as is the case here, the SDAB may authorize a use on some lands and refuse to authorize the same use on others.

In this regard, treatment of lands in different ways is unlikely to become a legal issue so long as it is not arbitrary. Rather there is a practical matter of how to ensure decisions are properly guided and enabled in a variable setback framework. This is most straightforwardly done by prescribing a process by bylaw to determine how an appropriate setback will be determined. An example of this is provided later in the report.

Decision support tools to integrate into decision making

As with many other aspects of municipal management, riparian area management is best conducted with a solid footing in science and data. This not only bolsters decisions and mitigates litigation risks, it can be an essential ingredient to compliance and enforcement actions taken by a municipality.

[133] 2003 ABCA 242 (CanLII), https://canlii.ca/t/1thxr.

The North Saskatchewan River Basin Watershed Alliance, along with other basin watershed planning and advisory councils, have been working toward providing salient riparian area information through the Riparian Web Portal (www.riparian.info). This portal provides data on which decisions regarding riparian impacts may be screened, including data regarding intactness of riparian areas as well as area-based pressure on the landscape. This tool can be used as a regional screening and reference tool that can inform more localized actions, whether that is restoration programming or for the implementation of regulatory controls on development to mitigate harms to riparian areas (as described further below).[134]

A focus on function

Whether it is through a bylaw or through subdivision, it is important to have a riparian policy and regulation reflective of the natural function and variability of riparian areas. In this regard, one function of riparian areas that are prone to flooding may require additional setbacks to address water quality functions. Similarly, natural processes of accretion and erosion must be recognized in how riparian areas are approached.

Having policies and procedures that reflect these functions therefore can be critical. This is particularly the case for areas where there are clear statutory functions that are set out in legislation.

vi. Retroactive vs proactive riparian health

From a municipal regulatory perspective, it is difficult to retroactively address harms to a riparian area on privately owned lands. This is due to the fact that past land uses will be considered legal non-conforming uses under the MGA. In this regard, subdivision and development regulation can be used to effectively maintain riparian areas that are intact at the time of the regulation coming into force but will not address past land uses, buildings or infrastructure.

Typically, when new bylaws (and related statutory plans) come into force, historical activities will be treated as non-conforming uses that are generally only altered where the landowner seeks to change the nature of a structure or building. The MGA describes non-conforming buildings and non-conforming use as buildings or uses that were lawful at the time of construction or original use but no longer conform to the municipality's bylaws.[135]

The Act further describes the nature of how non-conforming land uses and buildings may have to comply with the new bylaw standards.[136] Relevant for land uses, the MGA

[134] For further insight into the approach taken to assess riparian intactness see Fiera Biological Consulting, Riparian Assessment Validation for North Saskatchewan Region Lakes, January 2019, Project 1853.
[135] MGA at s. s.616.
[136] MGA at s.643.

provides that if a "use is discontinued for a period of 6 consecutive months or more, any future use of the land or building must conform with the land use bylaw then in effect".[137] For buildings, a non-conforming structure must conform to the bylaw if the building is enlarged, "add-to" or structurally altered (with some exceptions).[138]

Likewise, bylaw provisions related to riparian areas will only apply to proposed and future uses and buildings. For legacy activities, i.e., those activities that occurred prior to the passage of statutory plans and bylaws, there will need to be a focus area for other municipal programming, including education, communication, and restoration programming. In this regard, it is important to remember there are a variety of other provincial and federal laws that still may apply to repair and restore these legacy impacts. Collaboration with other levels of government in this regard may be a central strategy to get impaired riparian areas restored.

Where private land is at play, a regulatory focus will be focused on future developments, buildings and uses, at preventing or mitigating harms to riparian health and intactness. In this regard, the focus of regulatory instruments should be on a) limits on impairment (i.e., prohibitions on the removal of trees and/or vegetation) in a prescribed buffer and b) conditional development of the land base (i.e., putting in place restoration conditions in riparian setbacks during the development permit process.)

In light of the evolving nature of administrative law, a municipality is well served by ensuring that decisions are clearly articulated, supported by the facts and are embedded in statutory plans, bylaws and policies.

"Policy coherence" around riparian area management will assist in creating a system of decision making in the municipality that is difficult to impugn. This policy coherence will include:

- Integration of values and objectives for riparian areas being integrated into statutory plans, subdivisions processes and policies, land use bylaws, development permitting processes, and overall policies;
- Access to and incorporation of relevant scientific justifications for regulatory actions, including scientific rationale and logic of specific regulatory steps (such as a prescribed setback); and
- Inclusion of relevant compliance and enforcement powers in relation to relevant bylaws.

[137] *Ibid*. at s.643(2).
[138] Exceptions are set out at sections 643(5) & (6).

Conclusion: Assessing policy coherence within plans and bylaws

Reaching riparian targets within a municipality requires coordinating policy, statutory plans, subdivision, bylaws, and regulatory decisions. Using tools to assess appropriate means of delineating riparian function is also essential. Bringing both the knowledge of riparian intactness and pressures to bear on current and future planning and decision making is needed to:

1. ensure further impairment of riparian areas is prevented, and
2. to target communication and outreach efforts to restore past riparian impairments.

Ideally, the approach taken to riparian assessment and management will run through relevant intermunicipal plans, municipal development plans and, perhaps most importantly, to deal with regional intactness and pressure issues, through area structure plans. Case law has indicated that prescriptive provisions in statutory plans can be an effective way to drive municipal decisions to meet riparian outcomes. Land Use Bylaws should ensure the statutory plan goals and objectives for riparian areas are effectively translated into subdivision and development decisions. Integration of language of the provincial Land Use Policies will also support decision making.

Planning documents and bylaw approaches should clearly guide subdivision authorities around environmental reserves, and policies should be developed around environmental reserve easements, and, where seen as feasible, conservation reserves.

Development conditions should similarly be driven from riparian outcomes in statutory plans and linked to development permitting processes within the land use bylaw.

A fundamental step in establishing riparian policy coherence is to audit the various planning, bylaws, and policies currently in play in the municipality to inform uniform and effective direction to decision makers and to mitigate against decision appeals that undermine riparian objectives.

For those who are seeking to innovate and lead the way in riparian restoration, offset programs could be pursued under the auspices of the *Alberta Land Stewardship Act*. Similarly, to elevate the consideration of riparian areas in decision making, municipalities can seek to have sub-regional plans adopted that implement riparian targets under ALSA.

Finally, for legacy impacts, a municipality should ensure it has sufficient capacity to migrate non-conforming uses and buildings into its current riparian management

system. Alternative voluntary approaches should be used to facilitate riparian restoration where regulatory tools do not fit.

Additional reading

Arlene J Kwasniak, Conservation Easements: Pluses and Pitfalls, Generally and for Municipalities, 2009 46-3 *Alberta Law Review* 651, 2009 CanLIIDocs 230, https://canlii.ca/t/2d0w

Judy Stewart, Alberta's Riparian Land Governance System, Canadian Institute of Resources Law, 2021 CanLIIDocs 1568, https://canlii.ca/t/t999

Judy Stewart, Municipal "Direction, Control and Management" of Local Wetlands and Associated Riparian Lands: Section 60 of Alberta's *Municipal Government Act*, 2009 47-1 Alberta Law Review 73, 2009 CanLIIDocs 204, https://canlii.ca/t/2d03