Emerging Trends

In Municipal Law 2017

The Latest Issues Impacting Municipalities

Calgary - February 9, 2017

Edmonton - February 16, 2017

www.brownleelaw.com

BROWNLEE LLP
Barristers & Solicitors

Emerging Trends in Municipal Law 2017

Edmonton Office
2200, 10155 – 102 Street
Edmonton, Alberta T5J 4G8
Phone: 780.497.4800
Fax: 780.424.3254
Toll Free: 1.800.661.9069

Calgary Office
700, 396 – 11th Avenue SW
Calgary, Alberta T2R 0C5
Phone: 403.232.8300
Fax: 403.232.8408
Toll Free: 1.877.232.8303

contactus@brownleelaw.com

www.brownleelaw.com

INDEX

** For a copy of the above PowerPoint presentations, please visit:
http://www.brownleelaw.com/resources/articles-a-publications

BROWNLEE LLP
Barristers & Solicitors

INTERMUNICIPAL COLLABORATION FRAMEWORKS

Review of Municipal Government Act Amendments

Written by:

Rodd C. Thorkelsson
Partner

John M. McDonnell
Partner

Michael S. Solowan
Partner

Table of Contents

A. Introduction

Bill 21 and the amendments to the *Municipal Government Act* have been passed by the legislature, and most or all portions are likely to be proclaimed in force upon passage of the underlying Regulations supporting each of the major areas of change. As discussed in our July 2016 Municipal Law Bulletin, the changes and impacts created by Bill 21 will transform the municipal landscape. Inter-municipal and regional collaborations, in the form of collaboration frameworks, inter-municipal development plans, and the agreements, services, ownership and governance to implement and maintain it all, will be a large part of these changes and will define the future roles, responsibilities and structures of municipalities in Alberta.

With Bill 21, intermunicipal collaboration frameworks will be mandatory, must be in place within 2 years, and must have a plan to implement it all, amongst many other requirements. With the regulations to support the Bill 21 amendments to the *Municipal Government Act* still being drafted by the Province, we await more details on what this specifically means for municipalities. However, our experience with inter-municipal and regional collaborations allows us to prepare municipalities for the coming changes, and hit the ground running once they arrive. The most common comment and question we receive municipalities is that they already have been told what needs to get done, so what they want to know is: how? How to do it, where to start, and what to do in order to keep it all on track.

B. Bill 21

First, to be clear, the changes implemented by Bill 21 and the Regulations will include mandatory establishment of an intermunicipal development plan, and an intermunicipal collaboration framework (an "ICF"), with your neighbours (subject to limited exemption for members of a growth management board) within 2 years of the applicable sections coming into force. The ICF must be adopted by matching bylaws, and all other bylaws must be amended to accommodate the ICF. Plus, the ICF must address how transportation, water and wastewater, solid waste, emergency services, recreation, and any other inter-municipal services are provided. Lastly, there must be clear plans and time frames for implementation of the resulting inter-municipal or regional collaborations on those identified services.

For a full summary of the impacts of Bill 21, please refer to our July 2016 Municipal Law Bulletin, as well as the short brief on ICF's attached as **Appendix "A"**.

C. Successful Inter-Municipal and Regional Collaborations

Recommending, advising on, and implementing inter-municipal and regional collaborations has always been a part of our advice and service, particularly within the past 20-30 years. We have seen resoundingly successful collaborations, which have been game-changers in their own right in terms of how municipalities live, work, operate, grow and succeed together. We have also seen collaborations stall, slide backwards, run off course, or simply end at the conceptual/idea stage. So a large part of the "how" question for the future under Bill 21 and the Regulations can be answered by looking and applying what we have learned from the past and the history of inter-municipal and regional collaborations in Alberta.

What do successful inter-municipal and regional collaborations have in common? And, what do municipalities need to know about inter-municipal and regional collaborations in preparation for satisfying the ICF requirements of Bill 21?

What we do know from our extensive experience is that successful collaborations share the following characteristics:

- **Comprehensive** – Firstly, all inter-municipal and regional collaborations can have far reaching impacts, affecting areas of responsibility and operation such as planning and development, public works and operations, taxation and revenues. Consequently, we know from attempts at most inter-municipal or regional collaborations, the collaboration must be comprehensive enough to have covered issues that matter today and will matter in the future. The breadth of Bill 21 and the services and operations that an ICF is required to address, and the variety of existing interactions between municipal neighbours, similarly indicates the implications for municipalities and the need to cover all aspects – i.e. the services, but also the land use and planning that impacts them, and the ultimate issue of revenue.

- **Balanced –** Balancing the benefits and the burdens. While single service or project-specific collaborations can be more discreet such that they have limited impacts, and the participants can try to limit or restrict the broad impacts of a collaboration, long term sustainable collaborations (particularly one's considering a broad array of services) need to have a comprehensive approach in order to manage and balance all benefits and burdens

long term. Ideally, the parties covering all of the bases, and ensuring that there are no winners or losers because of the balancing based upon clear, agreed upon principles and the fact that benefits to be obtained are shared by all parties.

- **Mindset & Lifestyle Change** – Just as most diets do not result in long term success at keeping weight off, a collaboration also requires something more: a mindset and a lifestyle change. Ultimately, municipalities will no longer look at and refer to themselves individually. You will be referring to yourselves as a collective, a region, defined geographically by also defined by your strengths, your collective vision, your joint pursuit of a successful, growing, vibrant, and sustainable community. This is even more important today, in an era of transition from reliance upon industries traditionally relied upon, competition over new industries, and corresponding threats to the growth or even existence of some communities. More than ever, municipalities are going to have to collaborate and cooperate, and that is a lifestyle change.

- **Relationship & Trust –** Trust is not manufactured or forced, but earned, fostered and reinforced. It allows for the leap of faith to enter, and provides the means to address the inevitable barriers and challenges that will arise, to make collaborations possible. This ranges from trust in each other, to trust in the advice and the direction received, to trust in the process that is being undertaken. If trust is lacking, something must be done to establish and foster it.

- **Collective Vision** – A collective vision and understanding of what community means, what the existing and future needs of the community are, and what the existing and future strengths and weaknesses are (economic, social, services, planning, infrastructure, etc.). Collective vision means that there is already, or there is developed, an understanding of mutual challenges and aspirations, and the trust needed to address them collectively and not individually.

- **Mission** – In addition to a vision there is a reasonable, practical, and achievable mission to act upon. Something that can be embarked upon immediately in order to meet the community vision and needs of the community in the future. In developing this, the vision and the assumptions or desires that flow from it are tested against some of the legal, practical and financial realities that apply, in order to ensure that the proposed pathways to

collaboration do not have dead ends. Inevitably, trade-offs, prioritizing and rationalizing will occur with respect to elements of the vision and mission, in order to arrive a collective path forward.

- **Realistic/Long Term Outlook –** Another way of saying this is to provide the means, method, and information necessary to manage expectations of all of the participants and the stakeholders. Having a view of and insight into all of the actual or potential issues, and the reasonable and probable impasses or hurdles, as well as a realistic knowledge of the likely time frames involved, are all must-haves. Then providing a reasonable and effective means to manage these issues over a long term.

- **Strategic Plan for Implementation –** Implementation does not stop at agreement upon an inter-municipal collaboration framework. If the prior elements of successful collaborations have occurred with the right review, advice, insight, trust building, etc., an actionable plan of implementation should be possible. This requires a clear plan for implementation that anticipates the issues and requirements, addresses the potential impasses and hurdles, provides for clear actionable steps to be taken within clear time frames, and most importantly assigns both responsibility and accountability for all actions and steps. In many cases, the implementation plan starts with small changes and builds from there, because collaboration on any particular service will have several steps, conditions, pre-requisites or other requirements (i.e. whether regulatory, Ministerial approval, ownership and/or governance structure, further detailed agreement on services, etc.) in order to make it happen. What those are in each case comes from the experience of having seen it or done it before.

- **The People in the Room** – Lastly, in order to accomplish or provide for these key elements, there are many types of skills and experience that need to be applied to the variety of tasks, undertakings and long term process that encompasses inter-municipal and regional collaborations required by the ICF requirements of Bill 21. While this is listed last, having the right people in the room for the discussions that need to occur in fact comes first. The matter is so large, it is naturally difficult to know where to start. Consequently, successful collaborations have the right people involved and in the room from the outset.

Successful collaborations involve the right people for the creation of each of the other elements that define successful inter-municipal and regional collaborations.

D. Who is in the Room?

So who are the people that are critical to carrying out successful inter-municipal and regional collaborations? What skills, experience, and tasks are needed to not only satisfy the ICF requirements under Bill 21, but also reap all of the benefits that inter-municipal and regional collaborations can provide? Who are the people that, sooner or later, every inter-municipal and regional collaboration needs to involve in order to provide the visioning, develop a mission, manage expectations, provide for leadership and accountability, implement the proposed collaboration, and throughout it all establish and maintain the trust needed to make it all come together?

The Councils and senior administration are obviously involved throughout, from start to finish. However, whether the collaboration is involving planning, utilities, operations, infrastructure or social/community services, the earlier that the following key roles are filled and performed, the swifter and more successful the collaboration will be:

- **The Champion and/or Relationship Manager** – Part motivational speaker, part relationship manager, this role delivers on the question "Why?", and sets the table with key or core principles that will motivate and guide the parties throughout the remainder of the process. Past, present and future relationships play a huge role in the success or failure of any collaboration. As a result, the person or persons filling this role have the local history, knowledge and respect, or simply the external experience or advice as well as the trust of the participants or the ability to build it, or they have the combination of these attributes, in order to be the champion(s) for change and/or collaboration and the relationship manager(s). Someone who is able to provide insight and guidance on dealing with the issues of the present, while recognizing where and how the future interests of the municipalities are aligned or need to become aligned. Sometimes this is more than one person. Sometimes these are community leaders, sometimes this is a well-respected outsider with particular knowledge and experiences to share and contribute, and sometimes this is provided through a combination of the other key players. Don't be surprised if some

of this comes from outside of the participating municipalities, providing a fresh, logical, or practical perspective to the same ground that has been covered before.

- **The Researcher –** Given the broad nature of the services that are required to be covered by the ICF process, information gathering in a comprehensive, accurate and efficient manner is an absolute must. Discussions and decisions must be made on the basis of solid facts and information, which are capable of being easily managed, circulated, manipulated, and relied upon. Given the breadth of the impacts that the identified services have, this review and assembly of information also goes deeper than simply who is doing what, where and when.

- **The Legal Guide to Issues, Process and Implementation** – Who has the experience and knowledge to balance the new expectations created by Bill 21 while guiding you in the right direction by avoiding pitfalls, managing expectations and offering innovative solutions? These are the experienced lawyers that have been there before, that provide advice, guidance and resources beyond strictly legal advice, that have seen the successes, the failures, and everything in between, that will anticipate the roadblocks and hurdles, and that can address the concerns and apprehensions with real experience and immediate responses and actions. The legal guide must be able to provide a perspective on the impacts upon all aspects of the role, responsibilities and operations of the municipal participants, ranging from the application and impacts of statutes, regulations and bylaws that apply, the impacts and requirements of municipal governance issues, impacts upstream into the municipal operations like planning and development authorities, processes and practices, impacts and issues on practical issues of contracting, asset ownership and operation, and so forth. The earlier these are known, explained, addressed and accounted for, the more successful the later stages of collaboration will be (e.g. visioning, mission and goal setting, planning, management), making the implementation of that collaboration faster, less costly, and more successful

- **The Engineer of Rational Demand and Practical Solutions** – Experienced engineering and asset management consultants, as well as public works people, will all tell you, correctly, that the focus has to be on the services and service levels provided (i.e. quality, quantity, cost, demands, etc.). This becomes a guiding principle, because the necessary

service and service level has to support the vision and lead the collaborative efforts to the future goal. However, the wish list, desires and needs of communities can be, and in many cases literally are, endless. In addition, the nature of many services creates service demands that grow exponentially by the power of the expectations of the consumer – which expectations can be endless and certainly influenced by many external forces. One only needs to look at the demands for broadband internet service to see how external forces drive expectations and demand for service. The reality is that with all services there are limits of capacity, limits of existing infrastructure, practical limits of design, technology and materials, and financial limitations on all of that - which in turn impacts what can and should be envisioned, considered, or pursued. In short, needs, expectations and practical realities result in trade-offs, rationalization, and prioritization, and will result in changes to the nature, extent and methods of collaboration. Assessing these in an efficient manner, with a real-time sense of costs and practical limitations, is a specialty of only a few engineering, asset management and planning firms. Even fewer have been involved in enough inter-municipal and regional collaborations to be able to also impart and contribute the advice and experiences to truly assist and facilitate the collaboration.

- **The Planner** – Demand, capacity, service level expectations, all change constantly with development and growth. Accordingly, any information or assumptions relied upon today can be or become incorrect tomorrow. This is the role of planning. However, as many of the services involved in ICF's also can make or break the ability to approve and/or undertake development, the planning and development is intricately intertwined with many or even most of the services to be addressed by ICF's. This means that planning, and its outcome development, becomes part of the balancing that must be done to make the collaborations under the ICF successful and sustainable. The importance of this role and this area cannot be understated, as this is the main variable in the equation that the parties are attempting to balance under the ICF. Intermunicipal Development Plans and related statutory mechanisms provide for the means of control and variation over time. But the planning of the areas within the municipalities that will be impacted by the collaboration and shared services is the starting point, and critical to the long term success.

- **The Financial Analyst** – In support of all of the above, the impacts upon revenues, costs, and the municipal budgets will play a major role in guiding the parties to the collaboration.

In addition to cost savings, revenue generation, and revenue and cost sharing, the inter-municipal or regional collaboration normally also needs to establish appropriate rates and charges to fund the service from an operational perspective, a capital cost perspective, and a capital renewal/replacement perspective, both in the short term and the long term. This involves significant decisions and impacts, and requires a vision of the current, near-term and long-term financial picture. These are the people who can provide the financial analysis needed to prove or disprove assumptions, proposals, concepts or ideas, before there is investment of time, energy and resources by the municipal parties, their councils and senior administrations, and the other people in the room. Again, specialized, professional and experienced advice is needed.

If you want to successfully undertake and implement an inter-municipal or regional collaboration, you need to fill these shoes. You need to be sure that you have the right people in the room in order to provide the visioning for the municipalities, address the history that is relevant to the existing and future relationships, the legal and practical experience gained from travelling these roads before, the assessment of the practical, engineering and financial realities and trade-offs, and the financial analysis to verify what is proposed. All of which sets some expectations going forward, and will inform the actions required under the implementation plan.

E. The Process

Preparing an ICF is a big deal – a substantive undertaking and not a bureaucratic exercise to check things off a list just to meet a filing deadline. Each ICF is going to be unique to the municipalities who are parties to the agreement, and there is no "one size fits all" solution. At the same time, it is a delicate process, such that in order to reap all of the benefits of creating an ICF the process itself cannot result in any of the parties feeling like you're being forced into an arranged marriage. There is a lot of collaboration that has to occur in order to create an ICF, and that is the first test for the participants. You are no longer an island unto yourself, so govern yourself accordingly.

Any ICF process must work hand in glove with the concurrent planning and development process for the creation of the corresponding IDP. If we had to boil it all down to some typical steps or phases of a process for creating an ICF (knowing full well that these can be broken down even further, and re-ordered and re-aligned), we would envision something like the following:

- **Development of Relations, Principles and Vision** – this is the on-boarding process but also the development of the foundation for later steps in the future. The development of relations where they don't exist, or enhancement and clarification where they do exist. The development of collective vision for the municipalities, and the principles to guide the parties in pursuit of that vision.

- **Information Gathering** – assembly of all of the information relevant to the services identified within the ICF provisions (transportation, water and wastewater, solid waste, emergency services, and recreation), as well as *any other inter-municipal services* that are or could be provided. This should also identify the collateral impacts of the services.

- **Analysis and Discussion –** analysis and discussion of the relevant services and how they are provided, the infrastructure involved and the cost/capacities thereof, and the options for providing the services on an inter-municipal collaborative basis. This must be reflective of the current state of affairs (operations, capacity, capital costs, etc.), as well as address the future for the municipalities.

- **Development –** the development of the options that will form part of the ICF, based upon the information, analysis and advice assembled. Again, building upon what is already in place, but addressing the future for the municipalities and in particular the collective vision that has been developed.

- **Preparation** – of the ICF and IDP documentation themselves, and ensuring coordination between that documentation.

- **Bylaws** – creation and passage of the ICF and IDP bylaws, as well as revisions to all other bylaws impacted by the change initiative within the ICF and IDP; and

- **Implementation** – commencement of the implementation of the plans outlined within the ICF through the tools, mechanisms and means available. This is a long term process, normally requiring a service by service approach.

The balance of the appendices provides some more specific discussions of issues important to portions of any typical ICF process, and implementation thereof. This is further augmented by additional information from our panel presenters.

For more information on ICF's you may contact one of the following members of the Brownlee LLP General Counsel and Corporate/Governance Teams:

Edmonton Office

Barry A. Sjølie, Q.C.	(780) 497-4818	bsjølie@brownleelaw.com
Rodd C. Thorkelsson	(780) 497-4843	rthorkelsson@brownleelaw.com
John C. McDonnell	(780) 497-4801	jmcdonnell@brownleelaw.com
Michael S. Solowan	(780) 497-4893	msolowan@brownleelaw.com

Calgary Office

Derek J. King	(403) 260-1472	dking@brownleelaw.com

Appendix "A" - Bill 21 ICF Summary

A. INTERMUNICIPAL COLLABORATION REQUIREMENTS

1. **Mandatory Intermunicipal Collaboration Framework (ICF):** Municipalities with a common border must create a framework with each other within two years of this section coming into force. These ICFs will address the sharing of services on an inter-municipal basis. An ICF is NOT complete unless municipalities have also adopted an inter-municipal development plan (IDP) or an IDP is an appendix to the framework.

2. **Purpose:** The stated purpose of an ICF is:

   (a) to provide for the integrated and strategic planning, delivery and funding of inter-municipal services;

   (b) to steward scarce resources efficiently in providing local services; and

   (c) to ensure municipalities contribute funding to services that benefit their residents.

3. **ICF Must Address:** each ICF must:

   (a) List the services being provided by each municipality, the services being shared on an inter-municipal basis by the municipalities, and the services in each municipality that are being provided by third parties by agreement with the municipality;

   (b) must identify which services are best provided on a municipal basis, which services are best provided on an inter-municipal basis, and which services are best provided by third parties by agreement with the municipalities;

   (c) for services to be provided on an inter-municipal basis, outline how each service will be inter-municipally delivered (including which municipality will lead delivery of the service), inter-municipally funded, and discontinued by a municipality when replaced by an inter-municipal service;

   (d) set the time frame for implementing services to be provided on an inter-municipal basis; and,

(e) address services relating to: transportation, water and wastewater, solid waste, emergency services, recreation, and any other services where those services benefit residents in more than one of the municipalities that are parties to the ICF.

4. **Exceptions:** The exceptions to this are as follows:

EXCEPTION: Members of a growth management board only need to create an ICF with other members of the same growth management board in respect of those matters that are not addressed in the growth management plan.

EXCEPTION: The Minister can exempt one or more municipality from creating an ICF.

5. **Resolving Disputes:** If municipalities cannot come to an agreement on an ICF or with issues upon review of an ICF, the dispute must be referred to an arbitrator in accordance with the regulation. If the municipalities do not amend bylaws to be consistent with the Arbitrator's framework, other participants in the ICF may apply to the Court of Queen's Bench for an order requiring compliance.

6. **Mandated Compliance:** For all ICFs, the Minister may take "any necessary measures to ensure that the municipality complies with the framework."

7. **Agreement:** The existence of an ICF relating to a service constitutes agreement among the municipalities that are parties to the ICF for the purposes of the new provisions.

8. **Term and review:** The municipalities under an ICF must review the framework at least every 5 years after the date created, or such shorter period of time as provided for in the ICF.

9. **Implementation:** The impact is not just in planning for collaborations. Implementing a vision through a multitude of agreements, regulatory compliance, new entities and other tools, creates another new role and responsibility for municipalities.

B. OTHER RELATED CHANGES

1. **New Municipal Purpose:** Bill 21 adds to the purposes of a municipality to "work collaboratively with neighbouring municipalities to plan, deliver and fund inter-municipal services." This entrenches the message that municipalities must work together, which is a

theme that runs throughout the amendments, largely in the way of mandatory inter-municipal development plans and inter-municipal collaboration frameworks.

2. **New Councillor Duties:** Bill 21 adds an additional "duty" of a councillor to "promote an integrated and strategic approach to inter-municipal land use planning and service delivery with neighbouring municipalities." This furthers the message that municipalities must work together.

C. WHAT DOES IT ALL MEAN?

Just like in 1995, everything is changing again. The fundamental role and purpose of municipalities is changing, and everything from planning, to service delivery, to ownership of assets, to paying for it all, will change. Beyond these specific changes to the wording in the Act, we are talking about a whole new way of thinking, new visioning, and ways to implement it all.

TOP 13 INSIGHTS: Getting Attitudes, Leadership, And Communities To The Collaborative Starting Line

1. Transformative breakthrough is generated from changes in attitudes, not plans.
2. Change is accelerating and is exponential. You need to embrace change as an opportunity rather than resist it with status quo perspectives.
3. Collaboration isn't about the past and re-litigating old grievances. It's not about romancing what once was…It's about the future.
4. Community leaders need to bravely step forward to introduce change into processes that tend to resist change. This includes acknowledging that consensus is rarely possible nor the best option for community-engagement, and are open to other options that draw people toward both a vision of the future and the actions required to get there.
5. Trust is THE critical issue for high performance governments. If people do not believe in your ability to address jobs, provide quality basic services, and perceive your governance as honest, transparent, and engaging, you will never be able to elevate your message to focus on quality of life differentiators.
6. FEARS (Fire-up Everyone Against Reasonable Solutions) resist change and yell the loudest. Your success will be measured by your ability to stop listening to the FEARS and start embracing the ideas and solution-seeking voices in your community. Everyone is NOT an equal voice in the collaborative process if you want to generate transformative breakthroughs.
7. Community identity is what people will fight most to retain. It's a false fear; identity can be retained regardless of actions.
8. Jobs sit at the top of the hierarchy of human need in a community context. Lead the collaborative conversation with discussion around jobs of the future.
9. "*We have so many plans, no one understands what the damn plan is*" a common lament we hear often. Develop the ONE plan that brings parts together to create a compelling whole. Use graphics to help visualize the plan and support engagement with your community about its future. A picture in a plan is worth a thousand words.
10. Legacy is a very powerful, emotive concept that will move self-interests toward more common interests.
11. Be emotional! Use emotive language and conversation when talking about positioning for a successful future. Now is not the time for facts and figures! People what to "feel" a connection with their community and the payback can be quickly seen in positive impacts from volunteerism to quality of citizen engagement.
12. Connect the dots between actions so that people can see a single, sustained direction and…VISION. (#9 helps with this)
13. Services are as much about investment attraction and retention as they are about serving today's population. Services expectations are high, and the gap between expectation and reality – particularly for rural communities – is a critical economic development challenge. Many rural communities are "sacrificing Peter to pay Paul" – holding the line on today's taxes while sacrificing the future in the form of increasing infrastructure recapitalization deficits.

About Us….

The 13 Ways team has extensive experience in governance, planning, economic development, and community building. We will help you cut through the clutter and understand the benefits, pitfalls and choices your community faces when discussing Regional Collaboration with your neighbors.

www.13ways.ca | 587-573-1313 | info@13ways.ca

The *WAYFINDER* Newsletter – Launching in March!!
Sign up on our website at www.13ways.ca

ADAPTING TO CHANGE:
REIMAGINING INTER-MUNICIPAL COLLABORATION

As the Modernized Municipal Government Act (MGA) introduces new requirements for collaboration through the Inter-Municipal Collaboration Frameworks (ICF) and new requirements for Inter-Municipal Development Plans (IDP), we have a collective opportunity to reimagine how we think about and construct these collaborative processes. While not a traditional checklist, the following provide overarching themes that should be considered as part of any collaborative efforts. These themes provide you with key questions and concepts to explore as you begin to define and design your project.

1. **Community vs. Municipal Mindset:** Arbitrary lines on a map are what define the municipality but often have little to do with how people think about their community, and they clearly cannot contain positive or negative impacts within individual municipal borders.
   a. Reimagine boundaries from a community perspective: As you embark on preparing your ICF and IDP consider your service delivery and planning boundaries from the perspective of how residents think about the broader community.
   b. Establish shared objectives: When you are able to define a shared "community" boundary, you can begin to move forward with an understanding of a shared accountability that considers what you are trying to achieve together that you cannot do alone.

2. **What problem are you trying to solve:** Typically we are very good at solving problems. What we sometimes fail to take the time to consider is whether or not we are actually solving the right problems. When we are driven by action, our tendency is to move to solutions without evaluating whether or not we fully understand the problem.
   a. Include multiple perspectives: Sometimes we can fall in love with a solution before fully understanding the problem. Multiple perspectives in the room can help reduce the potential that individual "silo's" drive the design of the collaboration. This should focus on those who span boundaries and understand but aren't fully immersed in the problem (e.g. including Engineering, Operations, and Finance in designing Inter-Municipal Land Use Plans).
   b. Question the objective: The point of reframing what you are trying to achieve isn't necessarily about finding the "real" problem, but to see if there is a different one to be solved. As you design the process, be clear about the answers to the following questions:
      i. What is the real issue?
      ii. What do we each really want?
      iii. Why is it important to resolve this issue?
      iv. What do we both share as common interests, goals or beliefs? What is the agenda that is greater than both of us?
      v. How can we resolve this together? What concrete action steps can we take?

3. **Focus on the services that your assets provide:** It isn't about the physical infrastructure that you have, it is about the services that they enable. Decision-making processes need to understand the interdependencies among services, risks, and costs to ensure trade-offs are fully understood and that these are not evaluated in isolation of one another.
   a. Services: All infrastructure exists to support the delivery of services to the community and is only as valuable as the service that it provides. Ensure the priorities for limited resources are aligned with what the community values and not just with what has "always been done".
   b. Risks: Assessing the impact and the likelihood of individual events or occurrences helps you define the level of risk. This can be risks to the assets themselves (e.g. occurrences of potholes on roads) or strategic (e.g. impacts of changing demographics on recreation facilities).
   c. Costs: These are financial and human resources that are required throughout the lifecycle of an asset and help you determine if you are getting value for money. Understanding the costs focus on making decisions that minimize lifecycle costs and maximize value for money.

4. **Preparing for collaboration:** Inter-municipal collaborations are often born from a grant application that requires a partnership or there is a box that needs to be checked indicating you are collaborating with your neighbour. Starting from this point ignores a shared understanding of why the collaboration is important in the first place and whether or not collaboration is a good fit among the partners. As a part of preparing for any collaborative effort, the following should be considered:
   a. Prerequisites for collaboration: Trust among the partners is critical for success and if it doesn't exist, then much of the collaborative efforts focus on spinning your wheels trying to come to a consensus on every detail. Building alignment around shared goals can help move the process forward, accepting that you will each have influence over the other and it isn't about "winning or losing".
   b. Clarity of expectations: When you have determined that the "fit" is there among the partners, equally critical is being clear about the expectations that each of you have on how the collaboration will move forward and what success will look like.
   c. Review, evaluate, and adjust: If all of the prerequisites and expectations are clear and worthy, it is important that this arrangement evolve over time in the same way the challenges and the people will evolve over time. The prerequisites and expectations must be continually reviewed so everyone understands why the relationship exists and be willing to make the necessary changes over time to ensure that it endures.

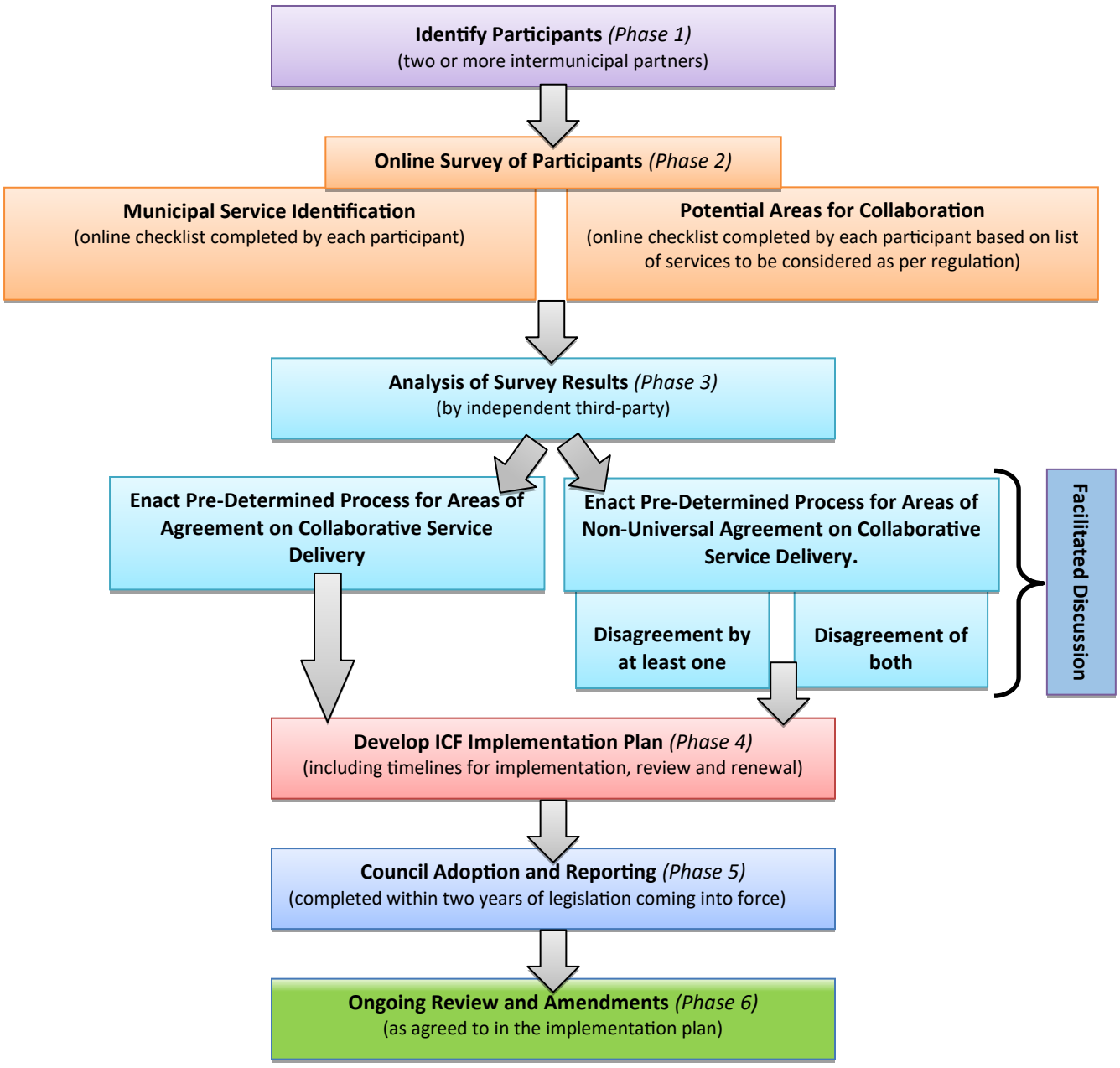
While many collaborations embark assuming they know why it is important, the why is often based on a poor foundation or simply on the notion that "you have to". We often want to jump into the how to do it, but without clearly understanding why it is important many will not survive the test of time. Please do not hesitate to contact me if you would like to discuss any of this further:

Chris Ulmer RPP, MCIP – culmer@urbansystems.ca - 780-430-4041

Intermunicipal Collaboration Framework - Process Flow

Strategic Steps and IMPACT Consulting have developed a tool to assist Alberta municipalities through the implementation of Intermunicipal Collaboration Frameworks (ICF) that are mandated in the modernized *Municipal Government Act*.

What follows is a high-level description of the process to arrive at agreement between two or more collaborating municipalities. The process adds values to municipal work, is flexible in its implementation so to minimize work while ensuring required regulatory outcomes in a timely manner, and includes an independent third-party to support the fulfillment of the mandated ICFs.



Intermunicipal Collaboration Framework—Timeline

To have ICFs prepared and submitted by the Government of Alberta's deadline of late 2019, a time sensitive process must be followed, and a series of tasks must be completed.

To assist Alberta municipalities with completing ICFs in a timely way, the following task list is provided as a tool, recognizing that each municipal collaboration initiative is somewhat different and that the process will need to adapt to reality.

ICF Phase	Time Required	Task
1) Identify Participants	One to Two Months	Identify participating municipalities (and Indigenous communities), develop ICF working group with participants.
2) Online Survey	One to Two Months	Third-party support to identify existing services that are provided municipally, inter-municipally, and identify areas for potential collaboration.
3) Analysis of Survey Results	Six to Twelve Months	Third-party analysis of the survey results to confirm areas for enhanced collaboration. Facilitated discussion led by third-party to negotiate additional areas for collaboration.
4) Draft ICF and Implementation Plan	One to Four Months	Draft ICFs based on the outcomes of Phase 3, and in alignment with regulatory requirements in the MGA.
5) Council Adoption and Reporting	Within Three Months of the Completion of Phase 4	Councils review, amend (if necessary) and adopt ICFs. Submit ICFs to the department of Municipal Affairs.
6) Ongoing Review and Amendments	Working Group or MGA Timelines	Review ICFs and recommend changes. Municipal Working Groups explore and recommend additional areas for collaboration.

Appendix "C" – Implementation of Collaborations Under ICF's

What does an ICF look and feel like when it is implemented? In addition to the ICF bylaw, and the IDP managing the impacts in the area of planning and development, ultimately implementation of ICF's will involve addressing each service on a case by case basis. Soft services such as recreation services are vastly different than the infrastructure-heavy services such a water and sanitary sewer. Accordingly, where and how the collaboration will occur, and where and how it will be documented and implemented, will differ from service to service. In addition, some services will come with particular statutory and regulatory requirements that have to be considered, accommodated, or addressed.

A. CATEGORIES

Generally speaking, collaborations on services fall into one of two (2) general categories:

1. **Collaboration by Agreement** – which simply provides for the delivery or availability of services by or through one municipality for the benefit or use of other municipalities, residents and businesses; and

2. **Collaboration by Joint Ownership/Governance Structure** – wherein the assets required to provide the services are owned jointly by the participating municipalities, are operated in a joint manner, and therefore requires an ownership and governance structure to keep it all together.

We will leave the discussion of collaborations by joint ownership/governance structures for the more detailed discussion within Appendix "D".

B. COLLABORATION BY AGREEMENT

While certainly the most immediately available collaboration solution, collaboration by agreement is not necessarily the simplest. Depending upon the nature of the services, the infrastructure required, and the operations involved, collaborating by agreement could become very complex and the agreement can easily become very large and unwieldly. However, collaboration by agreement has its place, and this can range from:

1. **Collaboration by Funding Agreement** – the simplest manner of accommodating and accounting for the delivery or use of services by residents or businesses of multiple municipalities is to document the benefits and burdens under a form of agreement focussed upon the funding and financial impacts of the services. This is most often applied to recreational services such as the operation and availability of recreation centres, arenas, etc., and used on a facility by facility basis. The primary exchange between the parties generally involves open public use, and provision of some level of annual funding. While these arrangements often work quite well:

   (a) most will focus upon operational cost sharing only;

   (b) even with operational cost sharing, this can lead to additional involvement in budget-setting and planning;

   (c) introduction of capital cost-sharing generally complicates the agreement and relationship significantly, potentially leaning the parties towards questions of ownership and potential need for collaborations by joint ownership/governance structures;

   (d) definition of and segregation between operational costs and capital costs is normally not well defined and results in frequent revisiting and/or negotiation;

   (e) services, service levels, and other offerings are rarely part of the initial agreement, but as the relationship continues there is often a need to also evolve the relationship to address each parties' thoughts, concerns, needs or suggestions;

   (f) balancing of benefits and burdens normally requires some level of annual reviews of usership and/or general benefit, and resulting adjustments to the sharing formula(s), which can lead to complicated documentation of that process and also potential for disagreement;

2. **Collaboration by Service/Supply Agreement** – service and supply arrangements are most often used for delivery of material services such as water and wastewater services, and are applied also to solid waste, emergency services, and occasionally transportation. Generally, these are a fee for service relationship, and can take the form

of services to the public in the neighbouring municipality or bulk service to the neighbouring municipality itself. Again, very common collaborative solutions, however:

(a) such agreements are a substantive step up in complexity and length, compared to the collaborations by funding agreements;

(b) the services managed under such agreements often have substantive impacts upon planning and development, and consequently require consideration of the balance of comprehensive amount of issues in addition to the service arrangement itself (e.g. IDP's and planning considerations, revenue sharing, etc.);

(c) given the nature of the services and reliance upon them, very long term agreements are generally deemed necessary or warranted;

(d) the longer the term of the agreement, the greater the need to address the impacts of capital repairs and replacement costs, which may or may not be incorporated into rate structures;

(e) utility services are subject to a variety of statutory and regulatory requirements that are often not known or understood by the municipalities;

(f) some of the utility related statutory and regulatory requirements can amount to third party approvals being required, or the introduction of a whole new regulatory authority, which if known at the outset might have guided the parties in another direction;

3. **Collaboration by Comprehensive Agreement** – many attempts have been made by municipalities to try and address all, or a vast array, of services under one agreement. While billed and sold as being capable of providing the level of collaboration that ICF's now are trying to implement:

(a) the agreements have been drafted by parties that often or generally do not understand the specific individual requirements applicable to each service;

(b) the agreements often failed to address critical issues and variables, most often the issue of planning and development, and revenue sharing;

(c) the agreements tend to set a course without a reasonable and efficient means of addressing changes, issues, and re-balancing of benefit and burdens in the future;

(d) in virtually every single example encountered, the agreements failed to or could not address how the collaborations were to be implemented;

(e) generally fail to recognize or address the fact that each service will require more detailed discussions and, ultimately, the implementation of the collaboration by agreement or by a joint ownership/governance structure;

(f) result in the creation of expectations that are inconsistent with what the comprehensive agreement is actually capable of accomplishing.

It is worth noting that each of these kinds of agreements are very much "relationship" based (i.e. long term, with intended performance such that default/termination are not really a solution). They need to be capable of addressing normal and expected changes as they occur throughout the term of the agreement. Consequently, to be effective long term, the agreements must incorporate reasonable and functional means to address and resolve disputes efficiently and amicably, and ideally adjustment mechanisms that can address changes without resorting to dispute resolution mechanisms.

The complexities of joint ownership, and capital costs, typically tip the balance towards pursuing the collaborations through joint ownership/governance structure. But it is also the nature of the services themselves, the complexities, specialized training and/or certifications, which can also lead to the "centralizing" of operations under one roof. Lastly, cost efficiencies and economies of scale will also play a part.

Appendix "D" – Implementation of ICF Collaborations Through Joint Ownership/Governance Structures

A. HOW TO IMPLEMENT THE INTERMUNICIPAL RELATIONSHIP

After all the regional neighbours have gone through the ICF process, there may be a decision made to transition certain services to an inter-municipal service delivery model. How is this best done?

There is no one size fits all solution. Typically, it comes done to two different options:

1. **Joint/Co-Ownership Agreement** – This is the most immediately available solution, and is best suited for simpler operations or services. The parties enter into an all-encompassing agreement which will govern all aspects of the relationship, such as ownership of assets, level of service, cost of service, etc. No separate corporate entity is created. The entire relationship is governed by the agreement amongst the parties. In this regard:

   (a) **Application** – These typically are best suited for joint services of a limited term, simpler types of services, services with few assets, or services with very few jointly owned assets.

   (b) **Limits** – More complex relationships are not typically suited for a simple shared services agreement. When there is a more complex arrangement amongst the parties, a better avenue is to pursue the relationship through a separate legal entity that will own the infrastructure and that entity will be the service provider to the municipal group.

2. **New Entity is Created** – The group of municipalities decide to create a new entity, which entity will be the owner of the assets and will also be the service provider to the municipalities (and any other customers). This is more suited to matters where one or more of the following circumstances exist:

   (a) There is a long term provision of services, which is expected to survive turnovers in both councils and administration multiple times;

(b) There are many assets (such as water system or solid waste services) that are to be collectively owned by the regional group;

(c) There will be a mixture of pre-existing assets transferred into system and new infrastructure to be constructed, and/or new assets by virtue of capital replacements;

(d) Each municipality is expected to provide substantial capital contributions to the joint service; and

(e) Each municipality will transfer their individual ownership of their infrastructure to the regional service collective.

B. CHOICE OF LEGAL ENTITY

Not all legal entities are the same. Municipalities must also understand that just because the Regional Services Commission is an option under the *Municipal Government Act*, this does not mean that it should always be the only option to proceed. An analysis of the different options should be investigated.

Appended is a handout of an analysis of the different options. Note that this handout assumes that the new rules in Bill 21 for amending the *Municipal Government Act* for creating a Municipally Controlled Corporation under the *Business Corporations Act* are in force. As of the date of this Emerging Trends presentation, these provisions have been proclaimed but are not yet in force. We assume that these will come into force sometime shortly, however.

The **common theme** for all the corporate entities is the following:

- All are separate legal entities. As separate legal entities, they are not just a department of the municipality/municipalities that control them.
- As separate legal entities, there is the principle of shareholder/member immunity from liability. Municipalities are not automatically responsible for their debts or liabilities.
- The new legal entity will be the service provider for the services.
- None of them are the same and all have significant differences amongst them.

The **available options** are:

1. **Corporation (municipally controlled corporation)** –

   (a) The most flexible and most adaptable of all the options.

   (b) Once all aspects of Bill 21 are fully enacted, it will be significantly easier than it formerly was to have created. It no longer requires ministerial approval to create.

2. **Regional Services Commission**

   (a) The model that municipalities may be most familiar with (which does not necessarily mean that it is the best option).

   (b) It is the most difficult and complex option to create, with the ministerial approval process.

3. **Part 9 Company**

   (a) The oldest model of non-profit entities.

   (b) No ministerial consent is needed to create.

   (c) Very archaic corporate legislation and may be difficult to amend in the future.

4. **Society**

   (a) Non-profit entity.

   (b) No ministerial consent is needed to create.

5. **Federal Non-Profit Corporation**

   (a) Non-profit entity.

   (b) Most modern and most flexible of all the non-profit corporate choices.

6. **Cooperative**

   (a) A co-op is created.

   (b) Does not require ministerial consent to create.

Contact John McDonnell at Brownlee LLP at 780-497-4801 or jmcdonnell@brownleelaw.com for questions

OPERATING MODELS FOR ALBERTA PUBLIC PROJECTS MATRIX

DECISION – MAKING MATRIX	CORPORATION (Municipal Utility Corporation)	COMMISSION	PART 9 COMPANY	SOCIETY	FEDERAL NOT-FOR-PROFIT CORPORATION	COOPERATIVES
Governing Legislation	*Business Corporations Act*	*Municipal Government Act*	*Companies Act*	*Societies Act*	*Canada Not-for-profit Corporations Act*	*Cooperatives Act*
Can a Commission be a member?	Yes	No	Yes	Yes	Yes	Yes
Can profits of entity be paid to Members?	Yes	Only with Minister's consent	No	No	No	Yes
Ease of changing governing corporate documents	Easy	Municipal Affairs consent necessary	Court order necessary	Easy	Easy	Easy
Issuance of shares?	Yes	No	Yes	No	No	Yes
How do Members financially contribute to entity?	Through rates and in membership agreement	Through setting of rates for services	Through rates/dues and membership agreement	Through rates/dues and membership agreement	Through rates/dues and membership agreement	Through rates/dues and membership agreement
Will Members also pay entity for services provided?	Yes, if it is set it up as such	Yes, if it is set it up as such	Yes, if it is set it up as such	Yes, if it is set it up as such	Yes, if it is set it up as such	Yes, if it is set it up as such
Are capital contributions mandatory?	Only if agreed	Yes, through setting of rates	Only if agreed	Only if agreed	Only if agreed	Only if agreed
Can other binding obligations be imposed upon members?	Through: 1. membership agreement and 2. service agreements	Through service agreements	Through: 1. membership agreement and 2. service agreements	Through: 1. membership agreement and 2. service agreements	Through: 1. membership agreement and 2. service agreements	Through: 1. membership agreement and 2. service agreements
Can there be disproportionate share/ membership interest?	Yes	No	Yes	Yes	No	No
Restrictions on who can be	No	Only elected	No	No	No	No

		CORPORATION (Municipal Utility Corporation)	COMMISSION	PART 9 COMPANY	SOCIETY	FEDERAL NOT-FOR-PROFIT CORPORATION	COOPERATIVES
	directors?		officials				
	Municipal Affairs consent necessary to create?	No	Yes	No	No	No	No
	Municipal Affairs approval to sell assets?	No	Yes	No	No	No	No
	Corporate Registrar consent necessary?	Yes	No	Yes	Yes	Yes	Yes
	How long to obtain external consents?	Advance public hearings are required to create	9-18 months	About a month	About a month	About a month	About a month
	Are there mandatory public hearings on material changes to entity?	Yes	No	No	No	No	No
	Ongoing reporting to Municipal Affairs?	No	Yes	No	No	No	No
	Can assets be paid to members upon dissolution?	Yes	Yes, only with Minister's consent	Yes	No	Yes	Yes
	Is there a need to register in both provincial and federal corporate registries?	No	No	No	No	Yes	No
	Will entity automatically own assets upon creation?	No	No	No	No	No	No
	Will it be necessary to take additional steps to transfer assets to entity after its creation?	Yes	Yes	Yes	Yes	Yes	Yes
	Can entity expropriate land in its own name?	No	Yes	No	No	No	No

BROWNLEE LLP
Barristers & Solicitors

Intermunicipal Collaboration Frameworks

Notes

BROWNLEE LLP
Barristers & Solicitors

Intermunicipal Collaboration Frameworks

Notes

BROWNLEE LLP
Barristers & Solicitors

Intermunicipal Collaboration Frameworks

Notes

BROWNLEE LLP
Barristers & Solicitors

The NEW Planning and Development:

The Municipal Government Amendment Act, 2015 and The Modernized Municipal Government Act – Changes to Alberta's Rules for Land Use, Planning and Development

Written by:

Jeneane S. Grundberg
Partner

Lorne I. Randa
Partner

Charlotte St. Dennis
Associate

Table of Contents

A. Introduction

The Alberta Government's review of the *Municipal Government Act* ("*MGA*") started in 2012. On March 30, 2015, the first round of amendments to the *MGA* in the *Municipal Government Amendment Act, 2015* (the "2015 Amendments") was given Royal Assent. Only a small number of the 2015 Amendments have been proclaimed to be in effect. On December 9, 2016, the second round of amendments in the *Modernized Municipal Government Act*, (the 2016 Amendments") was given Royal Assent. As was the case for the 2015 Amendments, only a few sections of the 2016 Amendment are actually in force as of January 1, 2017.

Numerous supporting regulations will be required before all of the 2015 Amendments and 2016 Amendments will be declared in force. Exactly how soon the necessary regulations will be passed is not certain. The Municipal Affairs website indicates that the regulations will be posted for public review in early 2017.[1] The Department's website indicates that all changes to the *MGA*, including the necessary regulations, will be proclaimed before the next general municipal election that is to be held October 16, 2017 (third Monday in October).[2]

Even though we may not know exactly when the rules will change, it is important for municipalities to prepare for the changes. This paper focuses on changes to the *MGA* that will impact on how the planning process in Alberta works. This paper concentrates on the changes to Part 17 of the *MGA* and the changes to other sections of the *MGA* that directly impact on the operation of Part 17. Our goal is to identify what laws are changing and what municipalities will need to do before and after the changes come into force.[3]

[1] See Government of Alberta MGA Review website: http://mgareview.alberta.ca/whats-changing/.
[2] See Government of Alberta MGA Review website: http://mgareview.alberta.ca/get-involved/.
[3] We recognize that there is a requirement for there to be Intermunicipal Collaboration Frameworks ("ICFs") in place between neighbouring municipalities and that this requirement may indirectly impact on how municipalities plan. However, a discussion of ICFs is beyond the scope of this paper. ICFs will be the focus of another paper presented today.

B. Intermunicipal Development Plans ("IDPs"or "IDP") – New Section 631

Municipal collaboration is an important theme throughout the 2016 Amendments. In light of this, Intermunicipal Development Plans ("IDPs") will no longer be optional but will become compulsory for all municipalities.

Municipalities will need to have an IDP with each of their neighbours. An IDP can apply to more than two municipalities provided that all participating municipalities pass the same bylaw.

The *MGA* used to state that IDPs must provide for procedure to resolve intermunicipal conflict between the municipalities who have adopted the plan, a procedure to amend or repeal the IDP and provisions related to the administration of the plan, and may (at the discretion of the involved municipalities) provide for future lands uses within the area; proposals for future development within the area; and other matters related to the physical, social or economic development of the IDP area.

The 2016 Amendments will expand the list of items that must be addressed in the IDP, including those items that were only discretionary. IDPs must now address future land uses in the area; proposals for future development; provisions for transportation systems for the area; coordination of intermunicipal programs relating to the physical, social and economic development of the area; and environmental matters within the area.[4] Each IDP must also still contain a procedure to resolve or attempt to resolve conflict between the participants, a procedure to amend or repeal the IDP, and provisions relating to the administration of the plan.

IDPs are to be in place within **2 years** from the date that the amended section comes into effect. Municipalities that are part of a growth region do not need to have IDPs with other members of the growth region. However, a member of a growth region must still have an IDP with any neighbour that is not a part of the growth region. Municipalities will have the option of the IDP becoming part of the Intermunicipal Collaboration Framework (ICF) or the IDP can be an independent document. If municipalities are not able to develop an IDP on their own within

[4] S. 631(a), *MGA.*

the prescribed time, the preparation of the IDP must be referred to arbitration just like with the ICFs.[5]

IDP To Do List:

- ☐ Do you have an existing IDP?
  - ☐ If so, does the IDP address the issues set out in s. 631(2)(a)?
  - ☐ Prepare amendment to the IDP and applicable bylaw to address all aspects set out in s. 631(2)(a).
- ☐ If you do not have an IDP:
  - ☐ Who are your neighbours?
  - ☐ Is there any possibility of having an IDP that involves more than one neighbour?
  - ☐ Develop a budget for the process.
  - ☐ Identify and retain a consultant(s).
  - ☐ Begin work on background documents.
  - ☐ Prepare IDP and applicable bylaw.
- ☐ Obtain legal review of IDP and applicable bylaw.
- ☐ Consider whether consequential amendments are required to your municipality's Land Use Bylaw or statutory plans.
- ☐ Advertise the IDP and provide opportunity for suggestions and representations in accordance with s.606, s.636 and s. 692 of the *MGA.*
- ☐ Hold a public hearing on the IDP.
- ☐ Councils of all municipalities involved pass the IDP.
- ☐ Completion date is not longer than **2 years** from the date that the amended section comes into effect: _____

[5] New section 631(4) of the *MGA* provides that if municipalities cannot agree on a plan, then sections 708.33 to 708.43 will apply as if the IDP were an ICF. Sections 708.33 to 708.43 create the process whereby an ICF would be created through an arbitration process. See Brownlee LLP's paper and presentation on ICFs.

C. Municipal Development Plans ("MDPs" or "MDP") – New Section 632

Currently, only municipalities with a population greater than 3500 are required to have a MDP. The 2016 Amendments will require that all municipalities have a MDP.[6]

The requirements for what must be in a MDP are not changing. The MDP must address future land use; proposals for future development; co-ordination of land use, growth patterns and infrastructure with adjacent municipalities; required transportation systems; provision for municipal services and facilities; municipal, school or municipal and school reserves; and protection of agricultural operations. Optional matters include proposals for financing; co-ordination of programs relating to the physical, social and economic development of the municipality; environmental matters; financial resources; and development constraints.

MDPs are to be in place within **2 years** of the coming into force of the section.[7] A municipality could therefore be concurrently working on a MDP, one or more IDPs, and one or more ICFs. The 2015 Amendments include a provision that make it expressly clear that the MDP and any IDP must be consistent. Further provisions in the 2015 Amendments also expressly provide that any area structure plans (ASPs) and area redevelopment plans (ADPs) also be consistent with the MDP and any IDP that refers to the same land. This means that in preparing a MDP, the municipality must ensure that there is consistency with any IDP, ASPs and ARPs that refers to the same land.

MDP To Do List:

- ☐ Do you have a MDP?[8]
- ☐ If you will need to prepare a MDP
  - ☐ Develop a budget for the process.
  - ☐ Identify a consultant(s).

---

[6] S. 632(1), *MGA.*
[7] S. 632(2.1), *MGA.*
[8] Based on 2014 population information, there are approximately 194 municipalities in Alberta that had a population less than 3500 people, so those municipalities had the option of not having an MDP. Moving forward, these municipalities will now have to have a MDP. See http://www.municipalaffairs.alberta.ca/documents/LGS/2014_Municipal_Affairs_Population_List.pdf for the 2014 Population List.

- Begin work on background documents.
- Prepare MDP.
- Obtain legal review of MDP.
- Consider whether consequential amendments are required to your municipality's Land Use Bylaw or statutory plans.
- Advertise the MDP and provide opportunity for suggestions and representations in accordance with s.606, s.636 and s. 692 of the *MGA.*
- Hold a public hearing on the MDP.
- Council pass the MDP.

- If you have a MDP, consider how that MDP may need to be amended as IDPs are prepared. The IDP will prevail over a MDP in the event of a conflict or an inconsistency.
- If you have Area Structure Plans or Area Redevelopment Plans, consider how they may need to be amended as MDP and IDP are prepared. The MDP will prevail over an ASP or ARP if there is a conflict or inconsistency.
- Completion date is not longer than **2 years** from the date that the amended section comes into effect: _____

D. Publishing Policies – New Section 638.2

The 2016 Amendments create a new obligation for municipalities related to policies that address matters dealt with in Part 17 of the *MGA*. Municipalities will be required to compile a list of any policies that may be considered in making decisions under Part 17. The list must include policies approved by council or made by a person to whom council has delegated policy making powers, duties or functions or to whom the chief administrative officer has delegated policy making powers, duties or functions.

The policies must be published on the municipality's website so that it is easily available to the public and the development community. As well as publishing a list of the policies and the policies themselves, the municipality must also publish a summary of each policy and indicate how the policy relates to others and how the policy relates to statutory plans and bylaws under Part 17. Any document incorporated by reference in any bylaw under Part 17 must also be published on the website.

This section came into effect immediately upon Royal Assent for the 2016 Amendments. However, municipalities will have until January 1, 2019 to put together and publish this information.

After January 1, 2019, if a policy is not listed and/or not published on the municipality's website, then the development authority, the subdivision authority, the subdivision and development appeal board, the Municipal Government Board or a court shall <u>not</u> have regard to that policy. Diligence will be required to not only ensure that all the relevant policies are identified and published but also to ensure that the list of policies is kept current.

Policy To Do List:

- <u>Content</u>:
  - Are there "unwritten" practices that need to be formalized into writing?
  - Identify any and all written material that is or may be considered by the development authority or subdivision authority (i.e. design and engineering standards, drainage standards, imposition, collection and deferral of offsite levy payments, statements

regarding the taking of or deferral of reserves, statements related to the calculation of money-in-lieu of reserves, statements as to what needs to be submitted as part of an application for a change in districting or preparation of a statutory plan).

- Are these documents already "policies"? If not, how can they be made policies?
- Review IDP, MDP, ASPs, ARPs and the municipality's Land Use Bylaw to identify any documents "incorporated by reference" that will also need to be published.
- Identify who will prepare summary.
- Prepare policies.
- Pass policies by Council.
- Prepare policy list and policy summaries.

- Technical:
  - Confirm that website can manage the publication of the list, necessary searching etc. that users might need/want to do. If not, identify and implement necessary upgrades to ensure functionality exists.
  - Develop plan for publishing and maintaining content on website.
- Completion Date:
  - All policies passed by Council and policies and policy list/summaries posted on municipal website by no later than January 1, 2019.

E. Land Use Bylaws

The 2016 Amendment will necessitate some changes to a municipality's Land Use Bylaw ("LUB").

Inclusionary Housing – New Section 640(4)(s)

Section 617 defines "inclusionary housing" as *the provision of dwelling unit or land or money in place of dwelling units or land, for the purpose of affordable housing as a condition of subdivision approval or of being issued a development permit.* The true meaning of the rules that will surround the provision of "inclusionary housing" will not be known until the regulation is proclaimed.

The regulation will be critical to understanding the "inclusionary housing" process. Questions that have to be answered include but certainly are not limited to:

- How will affordability be determined?
- To whom will land be given if a developer is obliged to give land?
- How will the amount of land or money to be given be determined?
- Will the land have to be held indefinitely by the municipality or some form of housing authority?

Once the LUB is amended, the amendments to s. 650 of the *MGA* will allow a development authority to impose requirements related to inclusionary housing as a condition of issuance of a development permit. Similarly, an amendment to s. 655 of the *MGA* will allow agreements flowing from a subdivision approval to include requirements for the provision of inclusionary housing.

Inclusionary Housing To Do List:

- Assess whether it is reasonable or necessary to include standards and requirements for inclusionary housing in LUB.[9]
- If the answer is yes, draft necessary amendments and amend the LUB.

[9] This assessment will depend on the provisions in the Inclusionary Housing Regulation. A municipality may decide that because of its size, resources, or need for inclusionary housing to wait or defer amending its LUB to include standards and requirements for inclusionary housing.

- Obtain legal review of LUB amendments.
- Advertise the amendment to the LUB in accordance with s. 606 and s. 692 of the *MGA*.
- Hold a public hearing on the amendment to the LUB.
- Council pass the amendment to the LUB.

Processing of Development Permits and Subdivision Applications – New Section 653.1 & Section 683.1

The amendments to the *MGA* will require a new step in the approval process for development permits and subdivision applications. The development authority and the subdivision authority will have to now indicate to an applicant whether his or her application is complete or incomplete.[10] In both cases, the application for development or subdivision must be reviewed for completeness within 20 days of the application being filed with the municipality.

Municipalities will need to amend their LUBs to establish the form and manner for which the development authority or subdivision authority will issue an acknowledgment or notice that the application is complete or incomplete or deemed refused for failing to provide the necessary additional information. The LUB will also need to be amended to specify what an applicant must submit to the development authority for a development permit application to be considered complete.[11]

Complete Applications To Do List:

- Development Permits - s. 683.1
  - Confirm LUB defines what must be submitted for development permit application to be complete.
  - If not, draft necessary amendments to the LUB to describe what is required for a complete development permit application.
  - Draft amendments to LUB that:

[10] See s. 683.1 and s. 653.1, *MGA*.
[11] In the case of a subdivision application, section 4(2) of the *Subdivision and Development Regulation,* Alta. Reg. 43/2002, provides for what a complete subdivision application contains.

- Define the form and manner for the development authority to issue an acknowledgment to the applicant that the application is complete.
- Define the form and manner for the development authority to issue an acknowledgment to the applicant that the application is incomplete.
- Define the form and manner for the development authority to issue a notice to the applicant advising that the application is deemed refused because outstanding information was not provided by the specified date. Notice must give reasons for the refusal.

- <u>Subdivision Applications – s. 653.1</u>
  - Draft amendments to LUB that:
    - Define the form and manner for the subdivision authority to issue an acknowledgment to the applicant that the application is complete.
    - Define the form and manner for the subdivision authority to issue an acknowledgment to the applicant that the application is incomplete.
    - Define the form and manner for the subdivision authority to issue a notice to the applicant advising that the application is deemed refused because outstanding information was not provided by the specified date. Notice must give reasons for the refusal.
- Obtain legal review of LUB amendments.
- Advertise the amendments to the LUB in accordance with s. 606 and s. 692 of the MGA.
- Hold a public hearing on the amendments to the LUB.
- Council pass the amendments to the LUB.

In the case of a city or a municipality with a population of 15,000 or more, the new s. 640.1 of the *MGA* provides that the municipality may provide in its LUB for an alternative period of time in which its development authority or subdivision authority determines if a development permit or subdivision application is complete and when a decision on that application is required to be made. That is, such a municipality can amend its LUB to provide for longer or shorter time periods for reviewing and making a decision in relation to development permit and subdivision approval applications.

Alternative Time Periods for Applications To Do List:

- Draft amendments to LUB that:
  - Provide for an alternative period of time for development authority to review completeness of a development permit application (default is 20 days, s. 683.1(1) of the *MGA*).
  - Provide for an alternative period of time for development authority to make decision on a development permit application (default is 40 days, s. 684 of the *MGA*).
  - Provide for an alternative period of time for a subdivision authority to review completeness of a subdivision application (default is 20 days, s. 653.1(1) of the *MGA*).
  - Provide for an alternative period of time for subdivision authority to make a decision on a subdivision application (default is 60 days, s. 6 of the *Subdivision and Development Regulation*).
- Obtain legal review of LUB amendments.
- Advertise the amendments to the LUB in accordance with s. 606 and s. 692 of the *MGA*.
- Hold a public hearing on the amendments to the LUB.
- Council pass the amendments to the LUB.

F. Off-site Levies – New Section 648(2.1)

Currently off-site levies can only be collected for roads, water service, storm sewers and sanitary sewers and for lands associated with such infrastructure. Once the amendments to s. 648 of the *MGA* are proclaimed in force, it will be possible for a municipality to pass an off-site levy bylaw to collect levies for one or all of the following additional infrastructure types:

- community recreation facilities;
- libraries;
- fire halls; and
- police stations

(the "Public Facilities").[12]

As with the previous categories of off-site levies, the monies collected through the off-site levy process for Public Facilities can only be spent on the land and capital costs for the Public Facilities. Prior imposition of a road, water, sewer or transportation levy on land does not bar the imposition of a levy on that same land for Public Facilities.

However, if your municipality has already been asking developers to contribute to the costs of providing one or more of the Public Facilities, the new s. 648(8) deems those fees or charges to be off-site levies and to have been validly imposed and collected. Of course this means that for the land that has "voluntarily" contributed to recreation facilities, for example, the municipality will not be able to collect a second time for recreation facilities pursuant to a bylaw passed after the amendments to s. 648 come into effect.

The new legislation (when proclaimed into force) will provide for a range of ways to appeal or challenge an off-site levy for Public Facilities. Currently, the application or imposition of off-site levies for water service, sanitary sewer, storm sewers or roads can be appealed (albeit on limited grounds) to the Subdivision and Development Appeal Board. A challenge on the validity of the off-site levy bylaw can also be brought to the Court of Queen's Bench through judicial review. For off-site levies for Public Facilities, these same opportunities will be available. In addition, subject to the regulations, a person will be able to appeal an off-site levy

[12] S. 648(2.1), *MGA.*

for a Public Facility to the Municipal Government Board ("MGB"). The grounds for an appeal to the MGB include:

- that the benefit from the Public Facility to future occupants of the land against which the levy is imposed does not meet the level prescribed by the regulation;
- that the municipality failed to comply with the principles and criteria in the regulations when passing the off-site levy bylaw;
- that the off-site levy is not for the payment of capital costs for a Public Facility;
- that the calculation of the levy is incorrect; and
- that an off-site levy for the same purpose has already been imposed and collected from the land.

The MGB will have the power to dismiss the appeal or declare the off-site levy bylaw or a portion of the off-site levy bylaw invalid.[13] With this new authority for the MGB, it is possible that a municipality will have to defend the same bylaw in two different arenas.

Further specifics related to the requirements for establishing off-site levies for Public Facilities and on the appeal process to the MGB are expected in to be included in new regulations for off-site levies.

Off-site Levies To Do List:

- ☐ Has your municipality ever collected a fee or charge that could be characterized as an off-site levy for a Public Facility?
- ☐ Review Off-site Levy Regulation for specific requirements related to Public Facilities.
- ☐ Assess whether, based on the requirements of the regulation, your municipality can proceed with an Off-Site Levy for Public Facilities.
- ☐ If yes:
  - ☐ Begin analysis for Public Facilities, including cost estimate, identification of need and benefiting area, and levy rate.
  - ☐ Identify and retain a consultant(s).

[13] S. 648.1(2), *MGA.*

- Prepare new Off-Site Levy Bylaw for Public Facilities or amend existing Off-Site Levy Bylaw to include Public Facilities.
- Obtain legal review of the new Off-Site Levy Bylaw or amendment to existing Off-Site Levy Bylaw.
- Consult with developers and affected landowners.
- Advertise the new Off-Site Levy Bylaw for Public Facilities or amendment to the existing Off-Site Levy Bylaw in accordance with s. 606 of the *MGA.*
- Council pass new Off-Site Levy Bylaw for Public Facilities or amendment to the existing Off-Site Levy Bylaw.

G. Brownfield Incentives – New Section 364.1

Communities often struggle with how to deal with the abandoned gas station site. The 2016 Amendments include a new tool that may help with these types of issues. A new section, s. 364.1, which is in Part 10 of the *MGA* that deals with taxation, creates a process that will allow a municipal council to encourage the redevelopment of these sites by granting partial or full exemptions from taxation or defer the collection of the property tax. A municipality can be proactive and pass a bylaw (a "Brownfield Bylaw") setting the parameters for the granting of a property tax exemption or deferral. Whether or not the municipality has passed a Brownfield Bylaw, a municipality can still grant a property tax exemption or deferral of current taxes or tax arrears (but not on future taxes) on a case by case basis pursuant to s.347 of the *MGA*.

Brownfield Incentive To Do List:

- Assess whether your municipality wants to proactively pass a bylaw to establish a brownfield incentive process or respond to requests from property owners when a property owner raises the possibility of a tax exemption or deferral.
- If decision is to establish a process:
  - Identify properties (i.e. brownfield sites) that could potentially qualify for a tax exemption or deferral.
  - Develop parameters of how the brownfield incentive process of a property tax exemption or deferral might work, for example consider the years for which the exemption or deferral is approved (both number of years and whether during or after remediation/development), the conditions upon which the exemption or deferral is granted and the consequences, rights and remedies in the event of a breach.
  - Prepare bylaw that identifies potentially eligible parcels and sets out principles of brownfield incentive process.
  - Obtain legal review of bylaw.
  - Hold public hearing on bylaw prior to second reading of the bylaw.
  - Council pass bylaw.
  - Once the bylaw is passed, designated officer will be able to determine if property meets bylaw requirements and issue a certificate granting the exemption or deferral.

H. Requirements for Advertising – New Section 606.1

Currently the requirement in the *MGA* for advertising is that any notice that must be given under the *MGA* must be published in a newspaper once a week for 2 consecutive weeks or mailed or delivered to every residence in the area to which the proposed bylaw, resolution or thing relates, or in which the meeting or hearing is to be held.. Once proclaimed, an amended s. 606 of the *MGA* will expand the ways a municipality may advertise to include publishing the notice on the municipality's website and allowing the notice to be given in accordance with a bylaw passed under the new s. 606.1. The new s 606.1 of the *MGA* will allow a council to pass a bylaw to provide for one or more methods, which may include electronic means, for advertising proposed bylaws, resolutions, meetings, public hearings (i.e. an "Advertising Bylaw").

What is important to remember is that the municipality's obligation to give specific written notice to the assessed owner of land that is being redistricted (s. 692(4)(b), *MGA*) and to the owners of land that is adjacent to the land that is being redistricted (s. 692(4)(c), *MGA*) is <u>not</u> changed with the amendments to the *MGA*. Specific written notice will still have to be given to these landowners even if the municipality adopts an advertising bylaw. Notice can be given to landowners electronically only if the landowner has consented to receive documents from the municipality electronically and has provided an email address, website or other electronic address to the municipality for that purpose.

Advertising To Do List:

- Assess whether to continue with traditional advertising methods, enhance those methods by including posting notices on website or replace traditional advertising methods with posting on website only.
- Assess whether the municipality wants to allow for methods of advertising other than those provided in s. 606.
- If answer is yes, prepare Advertising Bylaw.
- Advertise Advertising Bylaw in accordance with s. 606 (2)(a), (b) or (c) of the *MGA.*
- Hold a public hearing on the Advertising Bylaw.
- Council pass Advertising Bylaw.

I. Subdivision and Development Appeal Boards

Subdivision and Development Appeal Board Bylaws will likely need to be amended to reflect the following changes to the provisions related to subdivision and development appeal boards ("SDABs"). Note that these provisions will only take effect upon proclamation of the 2016 Amendments. Only one member of a municipal council can be a member of the SDAB panel that hears an appeal.[14] Council must now appoint the clerk of the SDAB[15] and the person appointed as the clerk must be a designated officer.[16] A designated officer is not eligible for appointment as the clerk of the SDAB unless that person has completed the required training program.[17] Before participating in a hearing of the SDAB, members of the SDAB must be qualified to do so in accordance with the regulations. Previously, there were no obligations related to the appointment of a clerk or on the qualification of the clerk or the SDAB members.

Further, the new s. 628.1 of the *MGA* gives explicit immunity to members of an SDAB and expressly states that no member of an SDAB is liable for court costs in the event a decision of their SDAB is appealed.

SDAB To Do List:

- Review your municipality's SDAB Bylaw.
- Obtain legal review of the SDAB Bylaw and any required amendments to the Bylaw.
- Amend the SDAB Bylaw to provide that:
  - Clerk of the SDAB must be designated officer.
  - Clerk of the SDAB must be appointed by council.
- Amend recruitment process to advise possible appointees of qualifications required to be eligible for appointment.
- Implement or retain appropriate training for Clerk and SDAB members.
- Advise existing SDAB members of immunity provisions.

[14] See amended of s. 627(3) of the *MGA*. Currently, more than one member of council may be on a SDAB provided that the councillors do not form the majority of the SDAB that is hearing the appeal.
[15] S.. 627.1(1), *MGA.*
[16] S. 627.1(3), *MGA.*
[17] S. 627.1(4), *MGA.*

J. Environmental Reserves and Conservation Reserves – New Sections 664, 664.1 and 664.2

The *MGA* amendments include new and amended provisions related to environmental reserves. The type of land that can be taken as environmental reserve is not changing but now the subdivision authority will only be able to require environmental reserve to be provided if the dedication is:[18]

- to preserve natural features of the land where, in the opinion of the subdivision authority, those features should be preserved;
- to prevent pollution of the land or bed and shore of an adjacent water body;
- to ensure public access; or
- 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.

It will, therefore, be necessary for the subdivision authority to consider not only what land should be taken as environmental reserve but why that land is being taken.

New in the context of environmental reserves is the creation of an opportunity for the municipality and the landowner to enter into an environmental reserve agreement.[19] This agreement can be made before or after the subdivision application is made but would have to be made before a decision on the application is made by the subdivision authority. The agreement can provide that the landowner does not need to dedicate environmental reserve or the agreement may define what portion of the land being subdivided will be provided as environmental reserve. Once an environmental reserve agreement is in place, the subdivision authority is bound by that agreement unless it can be demonstrated that a material change affecting the lands has occurred since the agreement was made.[20]

[18] S. 664(1.1), *MGA.*
[19] S. 664.1, *MGA.*
[20] S. 664.1(3) and (4), *MGA.*

In addition to environmental reserve, the subdivision authority will now have the ability to require the owner of a parcel of land that is being subdivided to provide part of the parcel as a conservation reserve.[21] Conservation reserve can be required if:[22]

- in the opinion of the subdivision authority, the land has environmentally significant features;
- the land is not land that could be required to be provided as environmental reserve;
- the taking is to enable the municipality to protect and conserve the land; and
- the taking of the land is consistent with the municipality's MDP.

The "downside" of taking a conservation reserve is the requirement that the municipality must compensate the landowner for the taking. The compensation is to be equal to the market value of the land at the time of application for subdivision approval is received by the subdivision authority. If the landowner and municipality cannot agree on the amount of compensation, the matter of compensation will be determined by the Land Compensation Board.[23]

Once a conservation reserve is created, the land must remain in its natural state and the municipality must not sell, lease or otherwise dispose of the conservation reserve.[24]

A consequential effect of this additional type of reserve is in the calculation of municipal reserves. If the subdivision authority requires the dedication of land as a conservation reserve, the calculation of municipal reserve is now to be done on the size of parcel being subdivided less environmental reserve and the conservation reserve or made subject to an environmental reserve easement.[25] The calculation does, however, include any lands required for roads and public utilities under section 662 of the *MGA*.[26]

[21] S. 664.2, *MGA.*
[22] S. 664.2(1), *MGA.*
[23] The Land Compensation Board deals with a variety of matters including the determination of compensation payable when land is expropriated.
[24] S. 674.1, *MGA.*
[25] See amendment to s. 666 of the *MGA.*
[26] See s. 666(3.1), *MGA.*

Environmental Reserves and Conservation Reserves To Do List:

- When a subdivision application is likely to trigger the obligation to dedicate environmental reserve, provide the subdivision authority with sufficient information that the subdivision authority will be able to identify which "purpose" is triggering the requirement that environmental reserve be provided.[27]
- If entering into an environmental reserve agreement, obtain legal review of such agreement or assistance in drafting and negotiating such agreement.
  - Ensure environmental reserve agreement(s) is flagged for future subdivision applications related to the affected lands.
- Identify land within the municipality that could or should become the subject of a Conservation Reserve.
  - Update the MDP to reflect conclusions/findings related to potential Conservation Reserve land.
  - Identify options for funding acquisition of Conservation Reserve.

[27] S. 664(1.1) (a) to (d), *MGA*

K. Conclusion

These amendments to the *MGA* will have a significant impact on land use planning in Alberta. This paper highlights some of these changes and provides general "To Do" Lists that can assist municipalities in preparing for the changes. Because the operation of so many of the amendments will be dependent upon what comes in regulations, it is hard to fully appreciate what is to come and to plan for those changes. As such, further items to the "To Do" Lists may be necessary in order to ensure that your municipality is fully compliant with these amendments to the *MGA.*

For more information on Municipal Planning and Development or Municipal Governance and Authority, you may contact any one of the following members of the Brownlee LLP Planning and Development team:

Edmonton Office

Barry A. Sjølie, Q.C.	(780) 497-4818	bsjølie@brownleelaw.com
Jeneane S. Grundberg	(780) 497-4812	jgrundberg@brownleelaw.com
Lorne I. Randa	(780) 497-4832	lranda@brownleelaw.com
Michael S. Solowan	(780) 497-4893	msolowan@brownleelaw.com
Charlotte A. St. Dennis	(780) 497-4829	cstdennis@brownleelaw.com
Rebecca L. Kos	(780) 497-4846	rkos@brownleelaw.com
Bryce C. Lawrence	(780) 497-4845	blawrence@brownleelaw.com

Calgary Office

Derek J. King	(403) 260-1472	dking@brownleelaw.com
John H.J. Gescher	(403) 260-1471	jgescher@brownleelaw.com
Kelley L Fiske-Nielsen	(403) 260-1464	kfiskenielsen@brownleelaw.com
Marlena (Marny) S. Paul	(403) 260-5314	mpaul@brownleelaw.com
Greg G. Plester	(403) 260-1475	gplester@brownleelaw.com
Michael D. McLaws	(403) 260-1469	mmclaws@brownleelaw.com

BROWNLEE LLP
Barristers & Solicitors

The NEW Reality in Planning and Development:
The Municipal Government Amendments Act, 2015 and The Modernized Municipal Government Act – Changes to Alberta's Rules for Land Use, Planning and Development

Notes

BROWNLEE LLP
Barristers & Solicitors

The NEW Reality in Planning and Development:
The Municipal Government Amendments Act, 2015 and The Modernized Municipal Government Act – Changes to Alberta's Rules for Land Use, Planning and Development

Notes

BROWNLEE LLP
Barristers & Solicitors

The NEW Reality in Planning and Development:
The Municipal Government Amendments Act, 2015 and The Modernized Municipal Government Act – Changes to Alberta's Rules for Land Use, Planning and Development

Notes

BROWNLEE
LLP
Barristers & Solicitors

Changing Tides in the Assessment and Taxation Landscape:

Review Of Municipal Government Act Amendments: Assessment And Taxation

Written by:

Alvin R. Kosak
Partner

Adina Preda
Associate

Table of Contents

1. Creation of new property type: "Designated Industrial Property"

Under the new provisions of the MGA, a new property type "designated industrial property" is created. Designated industrial property is defined as:

(i) Facilities regulated by the Alberta Energy Regulator, Alberta Utilities Commission, or the National Energy Board;
(ii) Linear property;
(iii) Property designated as a major plant by the regulations;
(iv) Any other property designated by the regulations.

A facility regulated by the AER, AUC or NEB is defined to include "all components of the facility, including any machinery and equipment, buildings and structures servicing or related to the facility and land on which the facility is located." These entities regulate a broad range of facilities, including:

- AUC: hydro developments, power plants, substations, and electric and natural gas transmission lines;
- AER: operating wells, intra-provincial pipelines, gas processing plants, oil sands mines, bitumen upgraders, coal mines, and coal processing plants;
- NEB: interprovincial and international oil and gas pipelines, international power lines and designated interprovincial lines under federal jurisdiction.

Further, the power of the Minister to designate property as a "major plant" is also broad. For example, the Minister may include as a "major plant" any parcel of land, improvements, or other property, even if the property is used for residential or agricultural purposes, or is vacant. An application can be made to "a court" in respect of the validity of a regulation designating a major plant as "designated industrial property", but the application is limited to "whether a specific parcel of land, improvement or other property for which the applicant is the assessed person is or is not all or a part of a major plant."

The definition of "linear property" has been changed as well. Linear property now means:

- Electric power systems
- Street lighting systems

- Telecommunication systems
- Pipelines
- Railway property; and
- Wells

In addition to the creation of a new property type, the assessment of "designated industrial property" will be the responsibility of the provincial assessor. This removes the responsibility of assessment of major "machinery and equipment" from the local municipal assessor. Assessment of property types other than designated industrial property will continue to be the responsibility of each municipal assessor.

As will be addressed further below, there is also a change respecting assessment appeals for major machinery and equipment, which are now part of the designated industrial property type. Under the new legislation, all assessment appeals for designated industrial property will go to the Municipal Government Board ("MGB") rather than Composite Assessment Review Boards ("CARBs").

The taxing powers of municipal councils with respect to designated industrial property are further limited insofar as a council may pass a bylaw imposing a supplementary tax for designated industrial property only if a supplementary tax is imposed in respect of all other property in the municipality.

Taken together, these amendments potentially limit or reduce municipalities' control over the assessment and taxation of a potentially significant proportion of their assessment base. The impact on municipal revenues will vary depending on the make-up of each municipality's assessment base, and the Province's approach to assessment going forward. If assessment values go down under the provincial assessor's mandate, tax revenues may decrease proportionally. Municipalities may have to address lower assessments by raising tax rates. However, given the limitation on municipalities' taxing powers embodied in the new maximum tax rate ratio (addressed below), raising non-residential tax rates may not be available without also raising residential tax rates.

An appeal of the provincial assessment may be the only option available to the municipality to address a potentially incorrect assessment (and the potential revenue impacts of that incorrect

assessment). Access to assessment information may be an issue for municipalities, both for the purpose of reviewing and determining whether the provincial assessment is correct, but also with regard to advancing an assessment complaint. The new MGA provisions currently do not give municipalities the same rights as taxpayers to request information from the provincial assessor about the preparation of assessments for designated industrial property.

Overall, some of the issues and challenges related to the new designated industrial property type, and the Province taking over the assessment of this property type, include the following:

(1) Potential issue with regard to who actually prepares the assessment for designated industrial property. It is unclear whether Municipal Affairs is going to do the assessments in-house, or is going to contract with independent assessors and/or municipalities (utilizing municipal employees) to prepare the assessments;

(2) Municipalities are going to have to revisit the scope of work in their contracts with independent assessors. Clearly the scope of work for the municipally appointed assessor will be reduced given that the provincial assessor will be responsible for the assessment of designated industrial property going forward.

(3) Who is the legal custodian of the assessment files with regard to designated industrial property? Under the legislation, the legal custodian is the provincial assessor. This means that municipalities will no longer have easy access to this information.

(4) To the extent that a municipal employee (municipal assessor) is contracted by the province to prepare an assessment of designated industrial property on behalf of Provincial assessor, that municipal employee will be prohibited from sharing the assessment file with the municipality, as the provincial assessor has a legal and ethical obligation to maintain the confidentiality of the taxpayer, including a duty not to disclose such information to the municipality.

(5) To the extent that a municipal employee (municipal assessor) or an assessor contracted by the municipality is contracted to prepare an assessment of designated industrial property on behalf of provincial assessor, if the municipality files an assessment complaint, the municipality will be adverse in interest (and challenging the work of) its employee or contract assessor.

2. Maximum Tax Rate Ratio

The new section 358.1 imposes a "cap" on the ratio of non-residential-to-residential tax rates. Specifically, non-residential tax rates cannot be more than 5 times higher than residential tax rates in any municipality. There is a grandfathering provision applicable to "non-conforming municipalities". A "non-conforming municipality" is a municipality that has a tax ratio greater than 5:1 as calculated using tax rates set out in its most recently enacted property tax bylaw as of May 31, 2016.

For non-conforming municipalities, the tax ratio "cap" is the tax ratio in force as of May 31, 2016. If a non-conforming municipality's tax ratio is lower than its previous "cap" in any subsequent year, that new ratio becomes the new "cap" thereafter. If at any time a non-conforming municipality's tax ratio falls below 5:1, its new "cap" thereafter will be 5:1.

Most municipalities in the Province have an effective tax rate ratio that is less than 5:1, in which case they will not be affected by this new provision. However, for non-conforming municipalities, the new maximum tax rate ratio may have significant impacts on revenues, particularly when combined with the centralization of assessment of designated industrial property under the Province's umbrella.

Some of the issues and challenges related to the new 5:1 maximum tax rate ratio include:

(1) If you are a municipality that is currently a non-conforming municipality:

   (a) you will not be able to increase your non-residential tax rate without also increasing your residential tax rate. Of course, there is always a potential political price to raising residential tax rates.

   (b) If you lower your non-residential tax rate, that lower rate is now your maximum non-residential tax rate unless you raise your residential tax rate.

   (c) Although not part of the new legislation, there has been a lot of discussion respecting a potential phase-out of the "grandfathering clause" within a specified number of years. If this comes to pass, all municipalities will have to be within the 5:1 tax ratio. This may have a significant impact upon a presently non-conforming municipality.

(2) If you are a municipality that is currently within the 5:1 maximum tax ratio, care must be taken to ensure that you stay within this maximum ratio.

(3) In all cases, given that there is now a cap on the maximum non-residential tax, it is vitally important that the assessment of non-residential property be accurate and correct. This requires review and scrutiny of the assessment of designated industrial property that is prepared by the provincial assessor.

3. Assessment Review Boards

As a result of the amendments to the MGA, the entire Part 11, Division 1 dealing with assessment review boards has been repealed and replaced. However, not all provisions have changed substantively. Of substance, the jurisdiction of CARBs has changed. CARBs can now hear only complaints regarding:

- Residential property with more than 3 dwelling units;
- Property other than farmland or designated industrial property;
- Business tax or improvement tax notice; and
- A designated officer's refusal to grant an exemption or deferral of tax for a brownfield property.

Importantly, complaints regarding "designated industrial property" are to be heard by the MGB. Previously, CARBs were responsible for assessment appeals of industrial property as well as M&E, whereas the MGB was responsible for linear property appeals. In municipalities with few M&E and/or industrial property assessment appeals, the MGA amendments will likely not affect the number of appeals being heard by CARBs.

The other significant change in this area concerns the process by which MGB and assessment review board decisions can be challenged. Previously, decisions of all three types of boards were subject to statutory appeal, with leave, before the Court of Queen's Bench. This has now been replaced with a provision for judicial review before the Court of Queen's Bench. The key differences are that (1) there is no leave requirement, so the process consists of one step instead of two; (2) a broader range of questions can be challenged; and (3) a challenge may be brought

within 60 days after the date of the Board decision (as opposed to 30 days previously for statutory appeals).

On balance, these changes may encourage more court challenges, because the process has been streamlined and its scope has been expanded to a broader range of permissible issues. At the same time, board decisions are subject to review by the Courts on a reasonableness standard, which means that they cannot be overturned unless the Courts finds them unreasonable (whether or not they are correct), making the threshold for a successful appeal harder to meet. Overall, the impact of these changes to the appeal process on municipalities will vary, depending on whether the municipality is the party appealing a board decision, or the party defending a board decision.

4. Brownfield Tax Incentives

There is a new tax incentive for "brownfield" properties. There are two streams for obtaining this incentive, one via bylaw and one via agreement. Although, as noted below, the council has the authority to impose additional criteria for qualification for an exemption under the bylaw stream, the new amendments provide the minimum requirements to meet the definition of "brownfield property" under either stream, which are:

- Industrial or commercial property, except for designated industrial property;
- Property that, in the opinion of the council making the exemption bylaw, (a) is or possibly is contaminated; (b) is vacant, derelict or under-utilized, and (c) is suitable for development or redevelopment for the general benefit of the municipality when either the bylaw is passed or the agreement is made.

Under the first stream, the council may pass a bylaw providing for full or partial exemptions from property tax, or deferrals of tax, for brownfield properties in the municipality. The purpose of such bylaw must be to encourage development or redevelopment for the general benefit of the municipality. To obtain an exemption or deferral of tax under such bylaw, the owner of the brownfield property must make an application (as discussed below).

The bylaw:

- Must identify the brownfield properties in respect of which an application may be made;
- May set criteria to be met for a brownfield property to quality for an exemption or deferral;
- Must specify the taxation year or years for which the identified properties may quality for an exemption or deferral;
- Must specify (i) any conditions which, if breached, will result in the cancellation of the exemption or deferral; and (ii) the taxation years in which the condition applies.

Before giving second reading to the bylaw, the council must hold a public hearing with respect to the proposed bylaw in accordance with s. 230, after giving notice in accordance with s. 606.

After the bylaw is passed, the owner of a brownfield property identified in the bylaw may make an application for an exemption or deferral. The application is reviewed by a designated officer of the municipality who, if satisfied that the property meets the requirements of the bylaw, may issue a certificate granting the exemption or deferral. Subsequently, if at any time, the designated officer determines that the property did not meet or has ceased to meet the requirements of the bylaw, the officer *must* cancel the exemption or deferral for the taxation year in which the requirements are not met. Otherwise, the exemption or deferral remains in force subject to the conditions and criteria on which it was granted, even if the bylaw is repealed or amended.

If the designated officer refuses to grant an exemption or deferral, notice must be given stating the reasons for refusal, and there is a right of complaint (to the CARB) within 60 days after written notice of the refusal is sent.

Under the second stream, the council may enter into an agreement with the owner of a brownfield property to provide for full or partial exemptions from property tax, or deferrals of tax. The agreement must specify:

- The taxation years to which the exemption or deferral applies (which cannot be retroactive);
- The conditions on which the exemption or deferral is granted; and
- The consequences, rights and remedies arising in the event of any breach.

Before voting on a resolution to enter into such agreement, the council must hold a public hearing with respect to the proposed agreement in accordance with s. 230, after giving notice in accordance with s. 606.

There is no right of complaint regarding an exemption or deferral granted by agreement unless the expressly provides for such right.

These brownfield tax exemptions can be a useful tool for municipalities to encourage redevelopment of property that might otherwise not be prime subjects for redevelopment.

For more information on Municipal Assessment and Taxation, you may contact any one of the following members of the Brownlee LLP Assessment and Taxation team:

Edmonton Office

Barry A. Sjølie, Q.C.	(780) 497-4818	bsjølie@brownleelaw.com
Alvin R. Kosak	(780) 497-4882	akosak@brownleelaw.com
Jeneane S. Grundberg	(780) 497-4812	jgrundberg@brownleelaw.com
Adina Preda	(780) 497-4894	apreda@brownleelaw.com
Rebecca Kos	(780) 497-4846	rkos@brownleelaw.com
Bryce Lawrence	(780) 497-4845	blawrence@brownleelaw.com

Calgary Office

Derek King	(403) 260-1472	dking@brownleelaw.com
Greg G. Plester	(403) 260-1475	gplester@brownleelaw.com

BROWNLEE LLP
Barristers & Solicitors

Changing Tides in the Assessment and Taxation Landscape:
Review of Municipal Government Act Amendments:
Assessment and Taxation

Notes

BROWNLEE LLP
Barristers & Solicitors

Changing Tides in the Assessment and Taxation Landscape:
Review of Municipal Government Act Amendments:
Assessment and Taxation

Notes

BROWNLEE LLP
Barristers & Solicitors

Changing Tides in the Assessment and Taxation Landscape:
Review of Municipal Government Act Amendments:
Assessment and Taxation

Notes

BROWNLEE
LLP
Barristers & Solicitors

CASELAW POTPOURRI

Written by:

Michael S. Solowan
Partner

Kathleen M. O'Driscoll
Student-at-Law

Table of Contents

A. ASSESSMENT AND TAXATION

Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47

Facts:

Edmonton East (Capilano) Shopping Centres Limited (the "Company") owned the Capilano Shopping Centre (the "Subject Property"), located in Edmonton, Alberta. In 2011, the Subject Property was assessed by the City of Edmonton (the "City") at approximately 31 million dollars. The Company disputed this assessment under section 460 of the *MGA,* by making a complaint to the Composite Assessment Review Board for the City of Edmonton (the "CARB"). The Company argued that the assessed value should have been approximately $22 million. In the course of the complaint process, the City discovered an error in the original assessment and requested that CARB increase the assessed value of the Subject Property to approximately $45 million. The CARB increased the assessment, though to a lower value than requested by the City (approx. $41 million).

On appeal, the Alberta Court of Queen's Bench set aside the CARB's decision on the basis that it did not have the jurisdiction to increase the assessment value. The Court of Appeal dismissed the City's further appeal, finding that the CARB had erred in interpreting section 460 as permitting the CARB to increase the assessed value of the Subject Property.

Issues:

In this case, the Supreme Court of Canada considered whether an assessment review board has the power to increase an assessment disputed by a taxpayer, or whether the assessment review board only has the authority to lower or confirm the assessment.

Held:

The Supreme Court of Canada allowed the appeal, reinstating the decision of the CARB. The CARB's decision was reviewed on a standard of reasonableness, with a majority of the Supreme Court of Canada holding that "it was reasonable for the Board to find it had the power to increase the assessment" (paragraph 3).

Specifically, the Supreme Court held that the CARB's interpretation of section 467(1) was reasonable. Section 467(1) states that "an assessment review board may … make a change to an assessment roll or tax roll or decide that no change is required." [emphasis added] The Supreme Court considered the ordinary meaning of the word "change", and determined that it contemplated both a decrease as well as an increase in assessment. The Supreme Court held that this interpretation of the word "change" was consistent with the purposes of the legislation, which included ensuring that the assessment process is fair and equitable (paragraph 46).

The Supreme Court also commented on the power of municipalities to make changes to an assessment. Pursuant to section 460(3) of the *MGA,* municipalities cannot file complaints in regards to assessments. However, pursuant to section 305(1), municipalities can "correct the

assessment role for the current year" if there is "an error, omission or misdescription". This can be done any time prior to the filing of a complaint (section 305(5)). The Supreme Court decided that the word error "is not limited to typographical or similar errors" and that "it is reasonable to conclude that s. 305(1) empowers a municipality to change an assessment it later determines is too low – i.e., was made in error." (paragraph 52) After a complaint has been filed, and the municipality can no longer exercise its powers under section 305(1), the municipality can instead "ask the Board to correct the error and increase the assessment." (paragraph 54)

Practical Implications:

This decision confirms that assessment review boards have the power to increase, as well as decrease (or confirm) the assessment value of property under complaint. This means that, in addition to the power to change assessments under s. 305(1) prior to a complaint being filed, municipalities also have the ability to seek an increase in assessment after a complaint has been filed, through the assessment appeal process before the assessment review board.

B. MUNICIPAL UTILITIES

Kozak v Lacombe (County), 2016 ABQB 385

Facts:

In 2013, the landowners in this case, the Kozaks, built a house on their property which was serviced by an approved private sanitary waste system. A waste hauling company was hired by the Kozaks to remove their waste. By all accounts, the Kozak's private sanitary sewer system operated effectively. Then, in 2015 the County of Lacombe (the "County") passed a bylaw requiring property owners to connect to the County's wastewater system at the property owner's expense even in the case of properties that had an independent septic system in place.

The Kozaks' property was subject to the requirements of the new bylaw. The County advised the Kozaks of the requirement to connect to the County's wastewater system. Mr. Kozak refused to pay the costs for connecting to the County's wastewater system and commenced a court application to strike those sections of the bylaw that related to the connection and provision of municipal sewage disposal services. The challenge of the bylaw was based on the argument that the County's attempt to compel property owners to connect to the wastewater system exceeded the County's statutory authority.

Issues:

The Court considered whether the County of Lacombe had the power under the *MGA* to compel a landowner to "connect their private sewage system to the County system and to pay for it" (paragraph 7).

Held:

The Court held that a municipality does not have a general authority to compel a property owner to connect to a public utility. In reaching this conclusion, the Court noted that the Kozak's sewage system was functioning well and there was no evidence that the private system was causing any danger or hazard.

The Court determined that while a municipality may have an obligation to allow a parcel to connect to a utility system adjacent to a parcel when requested by a landowner *(MGA*, section 34), a municipality does not have the authority to compel a landowner to connect to the utility system. Further, the County could not rely on section 33 of the *MGA* to prohibit the private waste hauling company from removing the Kozak's waste. Section 33 of the *MGA* states that "when a municipality provides a municipal utility service, the council may by bylaw prohibit any person other than the municipality from providing the same or a similar type of utility service in all or part of the municipality". However, the Court held that this section applies to "circumstances where a private company is in business to haul waste from the public generally, not a contract between such a company and one individual" (paragraph 12).

Practical Implications:

The Court determined that a municipality cannot force a landowner to connect to a public utility if their property is served by an existing lawful private sewage system. Therefore, a municipality cannot pass a bylaw that purports to require landowners to connect to a public utility and pay for the costs for doing so, in these circumstances. Additionally, this case calls into question the ability of a municipality to prohibit private waste hauling companies from removing waste from individual landowners' private waste systems. Although not specifically addressed in this case, in our opinion, a municipality can compel a landowner to connect to a municipal public utility in the case of new development or redevelopment of the property. Through appropriately drafted utility bylaws and land use bylaws, along with subdivision and development conditions, a municipality can restrict the use of new installations of private sewage disposal systems where appropriate.

C. CONSTITUTIONAL

Rogers Communications Inc v Chateauguay (City), 2016 SCC 23

Facts:

The Minister of Industry authorized the installation of an antenna system by Rogers Communications Inc. ("Rogers") in the City of Chateauguay (the "City") at 411 Boulevard Saint-Francis, pursuant to the *Radiocommunication Act*. However, the City argued that the health of individuals who lived closed to the antenna system would be at risk. Therefore, they "adopted a municipal resolution authorizing the service of a notice of establishment of a reserve… that prohibited all construction on the property at 411 Boulevard Saint-Francis pursuant to the *Cities and Towns Act* and the *Expropriation Act*" (paragraph 2). The reserve was also renewed for two years a few days before it would have lapsed.

Rogers objected to the notice of reserve and argued that it was unconstitutional. Specifically, Rogers stated that it was "an exercise of the federal power over radiocommunication and [was] therefore ultra vires the province" (paragraph 3). Rogers also argued that the notice of reserve was inapplicable to them due to doctrine of interjurisdictional immunity. The City and the Attorney General of Quebec responded to this argument by stating that the notice of reserve constituted "a valid exercise of the provincial powers over property and civil rights in the province and generally all matters of a merely local or private nature" (paragraph 4).

Issues:

In this case, the Supreme Court of Canada (the "SCC") considered "whether a municipality may intervene in the siting of a radiocommunication antenna system" (paragraph 1). This consideration was based on whether the notice of reserve was in pith and substance an exclusive federal power, whether it was inapplicable to Rogers due to the doctrine of interjurisdictional immunity, whether it was inoperative due to the doctrine of federal paramountcy, and whether it was ultra vires the City due to municipal law principle (paragraph 33).

Held:

The federal government has "exclusive jurisdiction over radiocommunication", which includes the power to determine the location for radiocommunication infrastructure (paragraph 42). Under the *Constitution,* the federal government also has "a broader jurisdiction over telecommunications undertakings where such undertakings operate outside the limits of a province" (paragraph 42). In this case, the City's purpose in developing the notice of reserve was to prevent the installation of the communication tower and limit the locations where Rogers could install the radiocommunication system. Based on this, the SCC held that the pith and substance of the notice of reserve was "the siting of a radiocommunication antenna system, which represents an exercise of federal jurisdiction" (paragraph 5). Therefore, the notice of reserve was "ultra vires the province" and it impaired "the core of the federal power over radiocommunication in that it [compromised] the orderly development and efficient operation of radiocommunication in Canada" (paragraph 5).

Although the SCC's determination that the notice of reserve was outside the City's jurisdiction, it stated that it would consider the doctrine of interjurisdictional immunity in order to clarify the law. The SCC stated that notice of reserve "seriously and significantly impaired the core of federal power over radiocommunication", as Rogers could not "meet its obligation to serve the geographic area in question as required by its spectrum license" (paragraphs 71-72). Thus, the SCC held that as a result of the doctrine of interjurisdictional immunity, the notice of reserve was inapplicable to Rogers.

Practical Implications:

This case confirms that the federal government has exclusive jurisdiction and control over radiocommunications. Therefore, municipalities cannot exercise their powers in a manner that prevents telecommunications companies from installing radiocommunication antenna systems. However, spectrum licence holders are still required to consult with local governments regarding the siting of antennae and take their concerns into account. Municipalities can and should continue to voice concerns regarding appropriate locations for radiocommunication systems, but if the licence-holder and the municipality are unable to agree, it will be the licence-holder who has the final say by virtue of the federal nature of the undertaking.

D. CHARTER OF RIGHTS AND FREEDOMS

American Freedom Defence Initiative v Edmonton (City), 2016 ABQB 555

Facts:

In 2013, Edmonton Transit Services (ETS) ran a bus advertisement displaying the photos of young Muslim women who had been honour killed and the following wording: *"Muslim Girls Honor Killed by their Families. Is your Family Threatening You? Is There A Fatwa on Your Head?"* The advertisement then went on to provide website information along with the logo for the American Freedom Defense Initiative ("AFDI") and the "Stop Islamization of America" ("SIOA") logo.

A number of complaints were received by a City of Edmonton Councillor, who requested that the matter be investigated. The advertisements were immediately removed from ETS buses, while ETS completed an investigation. Following the investigation, the Branch Manager of ETS concluded the advertisement was not becoming of the community and was offensive. The advertisement was not permitted back on ETS buses.

AFDI applied for a declaration that the City of Edmonton's (the "City") removal of the advertisement violated its right to freedom of expression.

Issues:

In the Application, the City conceded that ETS is subject to the *Charter of Rights and Freedoms* (the "*Charter*"), that the advertising space on ETS buses attracts the protection of section 2(b) of the *Charter* and that the refusal to post the advertisement based on its contents was an infringement of AFDI's freedom of expression. Therefore, the main issue in the decision was whether this infringement was effected pursuant to a reasonable limit prescribed by law that could be demonstrably justified in a free and democratic society under section 1 of the *Charter*.

Held:

The application was dismissed, and the City's removal of the advertisement was found to be demonstrably justified in a free and democratic society.

To defend its decision to remove the advertisement, the City relied on policies included in agreements between the City and Pattison Outdoor Group, a division of Jim Pattison Industries Ltd. ("Pattison"), which managed ETS advertising, as well as agreements between Pattison and advertising customers. The Court held that the intent of the agreement between the City and Pattison was to require Pattison to abide by the *Canadian Code of Advertising Standards*. Pattison then told prospective clients that it would abide by these standards. While the case did not ultimately turn on the *Code*, as the City relied on its discretion described in the agreements to remove the advertisement, the *Code* was an important consideration for the Court.

The City successfully established that the objective of the advertising policies in the agreements were to provide a safe and welcoming public transit system, and that restriction of advertising offensive to the moral standards of the community was rationally connected to this objective. Further, the prohibition on advertisements offensive to the moral standards of the community was considered a minimal impairment on freedom of expression.

The Court reviewed the advertisement as a whole, and accepted the City's position that the true aim of the advertisement went beyond the words included on the side of ETS buses. That is, that the true aim of the advertisement was to advance an offensive and discriminatory agenda. In reviewing the advertisement, it was not only the wording of the advertisement itself that was important, but also the logos on the advertisement, the background of AFDI and SIOA, and the website referenced on the advertisement, which contained discriminatory material.

The Court found that many Edmontonians and Canadians would find the positions advanced by AFDI and its SIOA initiative to be "offensive, discriminatory and demeaning". The benefits of providing a safe and welcoming transit system outweighed the effect of the policy which limited discriminatory advertising.

Practical Implications:

For years, it has been clear that the *Charter* applies to municipalities. Recently, there has been resurgence in case law regarding potential infringements on *Charter* protected freedoms by municipalities. This decision of the Alberta Court of Queen's Bench is one of the most recent developments in this line of cases. The resurgence of municipal *Charter* issues in the Courts serves as a reminder that such issues must be at the forefront of municipal decisions that may impact on these essential freedoms. In particular, it is essential that municipalities have policies that are "prescribed by law" to guide any decisions that may impact the right to freedom of expression.

E. FOIPP AND PRIVACY

***Edmonton (City) v Alberta (Information and Privacy Commissioner),* 2016 ABCA 110**

Facts:

This case considered the "various aspects of the obligation of a public body to provide access to records" under the *Freedom of Information and Protection of Privacy Act*" (the "*FOIPP Act*") (paragraph 1). The record request made by H.M. Louise McCloskey ("McCloskey") under the *FOIPP Act* was for "all records, regardless of format, relating to myself or my property that may be held by the City of Edmonton" (paragraph 2). In a subsequent telephone conversation between McCloskey and a City of Edmonton employee, McCloskey stated that "she was not seeking any third-party personal information" and that all she was "seeking were copies of complaints and any records generated to complaints" (paragraph 2). McCloskey also confirmed that her request was broad in nature because "she did not know what types of records the City might hold" (paragraph 2).

This matter was first referred to the Privacy Commissioner by McCloskey due to a disagreement over the payment of a fee. During mediation, the City produced numerous documents, with some of them being in a redacted format. Since McCloskey was unhappy with the scope of the City of Edmonton's production, an Adjudicator was appointed by the Commissioner to investigate.

The City did not challenge the Adjudicator's finding that they did not make "every reasonable effort to respond to the request within the timelines set out in s. 11 of the *FOIPP Act*" (paragraph 4). The Adjudicator also considered "whether the City had complied with its obligations under section 10 of the *FOIPP Act* to 'make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely'" (paragraph 5). After considering the facts, the Adjudicator found that the City did not comply with its obligations under this section. The main dispute "was over the meaning of the phrase 'personal information' as defined in s.1(n) of the *FOIPP Act*" (paragraph 6).

The Adjudicator ultimately concluded that the City of Edmonton had not assisted the applicant and therefore "ordered the City to process the request for documents 'in accordance with the act'" and "to 'consider all relevant circumstances' in processing the request" (paragraph 12).

Issues:

The issue in this case was whether the City of Edmonton had complied with its obligation to provide McCloskey with access to records under the *FOIPP Act*. One of the main considerations in this appeal was "whether the Commissioner's interpretation of the term 'personal information' [was] reasonable" (paragraph 22).

Held:

In regards to whether information is properly categorized as personal information or information about property the Court stated that the boundary between these 2 types of information is not

always clear. For example in cases "where the information related to property, but also had a 'personal dimension', it might sometimes be properly characterized as 'personal information'" (paragraph 25). Thus, the Court recognized that even when information relates to property, it can also fall under the category of personal information.

In order to determine whether a fee must be paid, it has to be determined what information is requested. For example, fees do not apply to a request for personal information but they do apply to requests for general information (paragraphs 29 and 30).

In regards to the City of Edmonton's redaction of information to protect third parties' privacy interests pursuant to section 17 of the *FOIPP Act*, the Court stated that the Adjudicator was not unreasonable to request information regarding why the City of Edmonton did not disclose certain information. The Commissioner is supposed to resolve problems regarding document production and "the Commissioner cannot fairly exercise its obligation to review the decisions of public bodies without knowing the basis on which production is made or refused" (paragraph 34).

Section 10(1) of the *FOIPP Act* requires that every reasonable effort is made to assist an applicant and that a response must be open, accurate and complete. The Court stated that these two components "should be interpreted as reflecting a single underlying obligation of the public body to be proactive in performing its duties under the *FOIPP Act*" (paragraph 37). Although public bodies are required to act in good faith when interpreting the *FOIPP Act* and have to "do their best to comply with their obligations to disclose documents", they are not required to be correct every time (paragraph 40). Therefore, the Court stated that "to the extent that the Adjudicator's finding of a failure to assist rested on the City's interpretation of 'personal information' and the rest of the statute, it was unreasonable" (paragraph 44).

Section 7(2) of the *FOIPP Act* states that "a request must be in writing and must provide enough detail to enable the public body to identify the record". However, the request made by McCloskey was very general and the City of Edmonton called her to clarify. The Court stated that this was not a failure to assist. However, the Court also stated that the City of Edmonton should have requested greater detail in writing because there would "have been no room for the subsequent accusation of 'failure to assist'" (paragraph 47).

In regards to the requirement that a response to a request must be open, accurate and complete, the Court considered the Adjudicator's finding that the City of Edmonton breached their obligation and that their response was overbroad. In response to this, the Court stated that "it is unreasonable and unrealistic to expect that every search for requested documents will be perfectly focused" (paragraph 52). The Court also stated that "unless third-party interest are engaged, it is much more in keeping with the spirit of the *FOIPP Act* to have the public body produce some documents that turn out not to be of interest, rather than to miss some documents that are genuinely of interest… an overboard production could only be characterized as inaccurate if the production was so unfocused that the documents of genuine interest are effectively hidden in a haystack" (paragraph 52).

The Court also recognized that pursuant to section 29(1)(a.1) of the *FOIPP Act*, a public body is "entitled to 'refuse to disclose' documents that are available for a fee, notwithstanding what the

FOIPP Act might otherwise require" (paragraph 55). In cases where a fee is not paid it is reasonable to expect "that the public body would at least tell a citizen that a request would not be processed until the fee was paid" (paragraph 56). However, the public body is not required to complete the search and produce documents in cases when a fee is not paid.

The Court ultimately allowed the appeal in part and set aside a portion of the Adjudicator's decision in regards to its finding that the City of Edmonton breached section 10 of *FOIPP Act*. Specifically, the Court stated that "making an erroneous judgment call in a difficult and complex context is simply a mistake, does not necessarily reflect a failure to make every reasonable effort, and is not per se a 'failure to assist'" (paragraph 58).

Practical Implications:

This case confirms the requirements of municipalities in regards to requests under the *FOIPP ACT*. First, although it can be difficult to distinguish personal information from information about property, information that is in part related to property (or an object) can still fall under the category of personal information when it has a personal dimension. Second, if a municipality receives a request for information that does not contain sufficient details, the municipality should request that further written details are provided or reduce any clarification of the request received by the applicant in a confirming letter. That is, the municipality should create a written record of the steps it has taken to satisfy the duty to assist under the *FOIPP Act*. Finally, if a citizen makes a request that requires a fee (for example, where the request is for general information and not personal information) and the fee is not paid, the municipality should tell the applicant that their request will not be processed until it is paid. Further, the municipality is not required to undertake and process the request and complete the search for records until the fee is paid.

F. PLANNING AND DEVELOPMENT

Thomas v Edmonton (City), 2016 ABCA 57

Facts:

The respondent developer applied to build a bare land condominium complex in the Groat Estates neighbourhood in the City of Edmonton. This neighbourhood falls within the geographical area to which the Mature Neighbourhood Overlay (Overlay) in the City's Zoning Bylaw applies. The Overlay requires developers to conduct community consolations where the developer proposes to develop new low density residential housing in mature neighbourhoods in the City.

Rather than requiring that the community consultation be undertaken in accordance with the Zoning Bylaw, the Development Officer simply denied the developer's application on the basis that the development failed to comply with various setback requirements in the Overlay. The House Company appealed to the SDAB. The SDAB allowed the House Company's appeal and granted a development permit. While confirming that the proposed development ran afoul of setback requirements in the Overlay, the SDAB relied on its power under s. 687(3)(d) of the MGA and waived the community consultation required under the Zoning Bylaw.

Issues:

The issued that the Alberta Court of Appeal considered in this case was whether the community consultation requirement in the Zoning Bylaw could be waived by the SDAB based on section 687(3)(d) of the *MGA*. Section 687(3)(d) of the *MGA* states that the SDAB has the power to "vary requirements in a land use bylaw and grant a development permit" (paragraph 1).

Held:

The Court held that the SDAB had no authority under s. 687(3)(d) of the MGA to waive the community consultation requirement mandated in the Zoning Bylaw. In unregards to this, the Court stated that "where mandated, community consultation is a condition precedent to the issuance of a valid development permit" (paragraph 30). In support of this holding, the Court discussed the following reasons.

First, based on the wording of section 687(3)(b) of the *MGA,* the SDAB has the authority to vary requirements in cases where the physical structure does not comply with development standards in the land use bylaw. This does not include the "failure to fulfill the procedural requirement for community consultation" (paragraph 33). Further, the variance authority under section 687(3)(b) of the *MGA* is not meant to deal with cases of "non-compliance with material procedural requirement", such as community consultation (paragraph 36). This is because under this section, the SDAB can vary the requirements where "the proposed development would not unduly interference with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment and value of the neighbouring parcels of land". Since community consultation would not interfere in either of these cases, it would "always be liable to be waived" and would

therefore render the Zoning Bylaw meaningless (paragraph 36). Based on this, section 687(3)(b) of the *MGA* does not apply to the community consultation requirement in the Zoning Bylaw.

Further, the Court recognized that there are "compelling public policy justifications for community consultation" (paragraph 40). These include that community consultation provides a way for affected citizens to express their concerns and is intended to reduce conflict between citizens. As well, it is important that the public has "confidence that the rules governing land use will be applied fairly and equally" (paragraph 43). Specifically, if the community consultation requirement was waived by the SDAB in some cases, this could lead to the Zoning Bylaw being applied in a discriminatory manner. Moreover, as a result of the SDAB's wide discretion to vary development standards under section 687(3)(d) of the *MGA,* it is important to ensure a fair process and not restrict the limited rights of those affected.

Finally, the failure to comply with the community consultation requirement constituted a breach of procedural fairness, which could not be waived by the SDAB. The Court stated that "a development permit remains open to challenge so long as a community consultation remains outstanding", which is an "incentive for City officials – and developers – to ensure compliance with the *Zoning Bylaw*" (paragraph 64).

In reaching its decision, the Court noted that it needed to consider the relationship between the *MGA* and the Zoning Bylaw since the *MGA* delegates to municipalities the obligation to pass land use bylaws and incorporates the same by reference. The Court held that in the absence of an inconsistency, the *MGA* and Zoning Bylaw should be interpreted in a manner that ensures harmony, coherence and consistency between them.

Based on this, the Court held that the SDAB did not have the jurisdiction to waive the community consultation requirement in the Zoning Bylaw. In cases "where a development standard variance is required and the Zoning Bylaw mandates a community consultation, that consultation is a condition precedent to obtaining a valid development permit" (paragraph 65).

Practical Implications:

This case is important because it dictates that in cases where there is a proposed development that requires the variance of requirements in a land use bylaw in order for a development permit to be granted, if the bylaw contains a community consultation requirement, this cannot be waived. Community consultation plays an important role as it allows affected citizens to express their concerns and helps maintain the public's confidence that the rules are fairly and equally applied as they related to the planning and development of land. Finally, if the requirement for community consultation in a land use bylaw is not complied with, the development permit can be challenged. Therefore, it is important to ensure that bylaws are complied with to avoid this problem.

BROWNLEE
LLP
Barristers & Solicitors

Case Law Potpourri

Notes

BROWNLEE
LLP
Barristers & Solicitors

Case Law Potpourri

Notes

BROWNLEE
LLP
Barristers & Solicitors

Case Law Potpourri

Notes

BROWNLEE
LLP
Barristers & Solicitors

Bear Pit Session

Notes

BROWNLEE
LLP
Barristers & Solicitors

Bear Pit Session

Notes

BROWNLEE
LLP
Barristers & Solicitors

Bear Pit Session

Notes