Environmental Reserves and Environmental Reserve Easements

A discussion of regulatory context and application

Environmental Law Centre

A Community Conserve Project
Building environment and conservation capacity for municipalities

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A note to our readers: Legislation and policy changes often. Our reports are written at a point in time, and as time passes, our laws, regulations and policy will change. These materials are for information only and one should seek independent legal advice where specific questions or issues arise.

Environmental Reserves and Environmental Reserve Easements

Alberta's *Municipal Government Act* sets out a variety of powers for municipalities to safely and sustainably plan and develop land.[1] Among these is the power to reserve lands. This report takes an in-depth look at one such reserve, the Environmental Reserve (ER), along with its counterpart the Environmental Reserve Easement (ERE).

Put simply, an ER is land that is transferred from the landowner to the municipality in the subdivision process, for one or more applicable reasons. Meanwhile, an ERE is another form of ER that gives an interest in the land to the municipality while permitting ownership to stay with the landowner. Both ER and ERE are important planning tools that can help municipalities "foster the well-being of the environment" by preserving natural features of land and preventing water pollution, as well as permit public access to water bodies and prevent development in unsafe or unstable areas.[2] This report aims to promote the effective use of ER and ERE by explaining how to implement, use and enforce these reserves as well as exploring some of the common issues or concerns that surround them.

What are Environmental Reserves (ER) and Environmental Reserve Easements (ERE)?

At the outset, it is important to understand that ER and ERE are only available to a municipality in the context of subdivision. By way of background, subdivision refers to the division of a parcel of land.[3] A person wishing to create one or more lots from a parcel of land must make an application and obtain approval from the municipal subdivision authority. A subdivision authority is established by council, via bylaw, to exercise subdivision powers and duties on behalf of a municipality.[4] The subdivision authority is responsible for receiving, processing and deciding subdivision applications, in accordance with the MGA and other applicable legislation.[5]

A decision of the subdivision authority must be given in writing and must state where to direct an appeal and, if an application is refused, it must state the reasons for refusal.[6] If approved, an applicant for subdivision must submit the plan of subdivision or other instrument that effects the

[1] RSA 2000 cM-26 s. 3(a.1), 664(1.1) [MGA].
[2] MGA s. 3(a.1), 664(1.1).
[3] MGA, s. 1(1)(ff).
[4] MGA, s. 632-625. Note that council may also, by bylaw, authorize a municipality to delegate any of its subdivision authority to select other planning authorities.
[5] MGA, s. 653-656.
[6] MGA, s. 656.

subdivision to the subdivision authority within one year.[7] Otherwise, an appeal may be brought to the subdivision and development appeal board or to the Municipal Government Board, depending on the circumstances.[8]

Environmental Reserves

An ER is authorized by the MGA.[9] Section 664 of the MGA provides that a subdivision authority may require the owner of a parcel of land (that is part of a proposed subdivision) to provide part of that parcel of land as an ER if it consists of:

(a) a swamp, gully, ravine, coulee or natural drainage course,
(b) land that is subject to flooding or is, in the opinion of the subdivision authority, unstable, or
(c) a strip of land, not less than 6 metres in width, abutting the bed and shore of any body of water.[10]

However, per the MGA, a subdivision authority may only require ER for one or more of the following purposes:

(a) To preserve the natural features of land (referred to in s. 664(1) subsection (a), (b) or (c)), where, in the opinion of the subdivision authority, those features should be preserved;
(b) To prevent pollution of the land or of the bed and shore of an adjacent body of water;
(c) To ensure public access to and beside the bed and shore of a body of water lying on or adjacent to the land;
(d) To prevent development of the land where, in the opinion of the subdivision authority, the natural features of the land would present a significant risk of personal injury or property damage occurring during development or use of the land.[11]

The MGA also specifies circumstances where ER may not be taken. An ER is not required where:

(a) one lot is to be created from a quarter section of land,
(b) land is to be subdivided into lots of 16.0 hectares (or more) and used only for agricultural purposes,
(c) land consists of 0.8 hectares or less, or
(d) ER, ERE or money in place of it was previously provided in respect of the land that makes up the proposed subdivision.[12]

A municipality is not required to compensate a landowner for lands taken for ER.[13]

Environmental Reserve Easements

An ERE can occur where the landowner and municipality agree that any or all of the land that is to be taken as ER should instead be the subject of an easement for the “protection and

[7] MGA, s. 657.
[8] MGA, s. 678(2).
[9] MGA, s. 664(1).
[10] MGA, s. 664(1).
[11] MGA, s. 664(1.1).
[12] MGA, s. 663.
[13] MGA, s. 661(a.1).

enhancement of the environment".[14] An easement is an agreement that gives a non-possessory interest to the holder to use another party's real property in some way. Legal title to the property remains with the landowner but the easement may restrict their use of the subject lands.[15] It follows then that an ERE gives the municipality an interest in the landowner's property. An ERE may be registered against the land in favour of the municipality at a land titles office.[16]

Section 664(3) of the MGA states that an ERE:

a) must identify which part of the parcel of land the easement applies to,

b) must require that land that is subject to the easement remain in a natural state as if it were owned by the municipality, whether or not the municipality has an interest in land that would be benefitted by the easement,

c) runs with the land on any disposition of the land,

d) constitutes an interest in land in the municipality, and

e) may be enforced by the municipality.

An ERE can be advantageous for both parties. It permits the landowner to retain title and some measure of control or use of the reserve lands, while the municipality can ensure the land remains in a natural state without accruing much (if any) in the way of maintenance costs or liability concerns.

ER and ERE can be contrasted with Conservation Reserves, which are a newer tool under the MGA. Conservation reserves can be required by a subdivision authority if the land has an environmental significant feature, is not land that would be required as ER, has a conservation purpose and taking of the land is consistent with a municipal development plan and area structure plan.[17] The municipality must pay fair market value of the land taken as CR.[18]

Common Issues pertaining to ER and ERE

Recent amendments to the MGA have expanded the purpose of ER in Alberta but have also more narrowly defined the scope of the types of bodies of water to which it applies. ER and ERE can be an effective tool for municipalities to support sustainable development. Nevertheless, its use is (understandably) dependent on being well-understood. A review of the applicable legislation and jurisprudence surrounding ER and ERE suggest the following issues may be worthy of discussion:

1) In what circumstances do ER/ERE apply?
2) How should municipalities determine body of water is permanent and naturally occurring?
3) How is ER put in place? What about ERE?

[14] MGA, s. 664(2).
[15] Thomson Reuters Practical Law Glossary, online: https://ca.practicallaw.thomsonreuters.com/0-507-1054?transitionType=Default&contextData=(sc.Default)&firstPage=true
[16] MGA, s. 664(2).
[17] MGA, s. 664.2
[18] S.662.2(2).

1) In what circumstances do ER/ERE apply?

To reiterate, section 664 of the MGA permits municipalities to require the developer of a proposed subdivision to set aside a parcel of land as an ER (or alternatively ERE) if it consists of:

a. a swamp, gully, ravine, coulee or natural drainage course;
b. land that is subject to flooding or is, in the opinion of the subdivision authority, unstable; or
c. a strip of land, not less than 6 metres in width, abutting the bed and shore of any body of water.

A common thread amongst all types of land that may be taken as ER is the presence of water, in various forms, both permanent and ephemeral. Some of the terms used above are defined in the MGA and others are not. The following section discusses select terms and seeks to add clarity to when ER or ERE is permitted.

a. "Swamp, gully, ravine, coulee, or natural drainage course"

"Swamp" is not defined in the *MGA*. However, "swamp" is described in the Alberta Wetland Classification System (AWCS)[19] as "a mineral wetland with water levels near, at or above the ground surface for variable periods during the year which contains either more than 25% tree cover of a variety of species or more than 25% shrub cover".[20] Arguably, so long as a wetland qualifies as a "swamp" as it is defined in the AWCS, it is likely eligible for protection as part of an ER.

"Gully, ravine, coulee" are also not defined in the MGA, however they are terms that have general definitions. While delineating these features on the landscape may create some challenges and disputes municipalities can take ER based on a reasoned and science informed view of these geomorphological features.

"Natural drainage course" is not defined by the MGA. Case law has observed that "natural drainage course" must mean, at minimum, a defined path or channel formed by the natural flow of water in one direction.[21] In this case the court noted that general observation of drainage from high to lower lands may be insufficient in the absence of a drainage study, elevation surveys or

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[19] Government of Alberta, "Alberta Wetland Classification System", June 2015 accessed at: https://open.alberta.ca/dataset/92fbfbf5-62e1-49c7-aa13-8970a099f97d/resource/1e4372ca-b99c-4990-b4f5-dbac23424e3a/download/2015-alberta-wetland-classification-system-june-01-2015.pdf [AWCS]. The AWCS was established in June 2015 with the goal of providing a standardized provincial system for classifying wetlands across the entire province. It incorporates and merges information from existing wetland classification systems and is designed to be aligned with legislation and policies that may affect wetlands such as the *Water Act*, *Public Lands Act* and *Alberta Wetland Policy*.

[20] AWCW at p. ix.

[21] Stettler (County No. 6) v. Ruttan, 2005 ABQB 74 (CanLII), <https://canlii.ca/t/1jrxm>,

measurements. [22]The Court appeared to focus on the inclusion of the word "course" as opposed to general water migration over a parcel generally.

b. "land subject to flooding" or "unstable" land

"Land subject to flooding" is not defined by the MGA. Case law has found that in the context of the MGA "land that is subject to flooding" does not mean land that is subject to any risk of flooding but rather land that is reasonably likely to flood in the normal course of events.[23] "Unstable" land is also not defined by the MGA. Again, a reasonable finding of what land is unstable, whether due to the potential for erosion or subsidence, will be sufficient to justify ER. The stability of land however may be a source of conflict where the proponent of the subdivision is of the view that engineered methods may make the land "stable". The taking of ER however is not based on what land become "stable" with intervention, rather at ensuring lands that may cause risks are taken as ER.

c. "the Bed and Shore" of a "Body of Water"

Municipalities may require the developer of a proposed subdivision to set aside a parcel of land as ER if it consists of, among other things, a strip of land, not less than 6 metres in width, abutting the bed and shore of any "body of water".[24]

The MGA defines the term "body of water" as "(i) a permanent and naturally occurring water body, or (ii) a naturally occurring river, stream, watercourse or lake."[25] This definition is undoubtedly meant to dovetail with section 3 of the *Public Lands Act,*[26] which provides the title to the beds and shores of all permanent, naturally occurring bodies of water and all naturally occurring rivers, streams, watercourses and lakes are vested in the Crown in right of Alberta.[27] Accordingly, when read together, the MGA and *Public Lands Act* provide that a municipality controls the "bodies of water" within its boundaries while the Crown in Right of Alberta owns the beds and shores of said bodies of water. In terms of municipal environmental outcomes this is limiting insofar as non-Crown owned bodies of water should benefit from similar land use protections as Crown owned ones.

Delineating the beds and shores under the *Public Lands Act* is done pursuant to the *Surveys Act* and this is incorporated into the MGA amendments around ER/ERE for determining setbacks for the purposes of pollution prevention or for providing public access to the body of water .[28]

This public land- municipal linkage is reflected in the requirement to refer subdivision applications to "the Deputy Minister of the Minister responsible for administration of the *Public Lands Act* if the proposed parcel (i) is adjacent to the bed and shore of a body of water, or (ii) contains, either

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[22] Ibid. at para 27.
[23] *Seabolt Watershed Association v. Yellowhead (County)*, 2002 ABCA 124 at paras. 24-29 cited in *Stettler (County No. 6) v. Ruttan*, 2005 ABQB 74.
[24] MGA, s. 664.
[25] MGA, s. 1(1.2).
[26] RSA 2000, c P-40.
[27] *Ibid.*, s. 3(1).
[28] MGA at s. 664(1.2).

wholly or partially, the bed and shore of a body of water;"[29] Further, the regulation notes that a municipality may agree to "further define the term "body of water" but the definitions may not include dugouts, drainage ditches, manmade lakes or other similar man made bodies of water".[30]

Note that, previously, the MGA was more compatible with the *Water Act* as it did not define the term "body of water" and simply stated that municipalities had control over "the rivers, streams, watercourses, lakes and other natural bodies of water within the municipality". However, in Fall 2017 the Act was revised to its current form. These revisions have had the effect of removing non-permanent water bodies, such as temporary and seasonal wetlands, bogs and fens, from the definition of "body of water" in the MGA as well as from general municipal jurisdiction under section 60(1) of the Act. Section 60(1) of the MGA provides that "a municipality has the direction, control and management of the bodies of water within the municipality, including the air space above and the ground below".

Nevertheless, it should be noted that this change does not mean that municipalities are unable to regulate water bodies that fall outside the definition of "body of water". Municipalities continue to have many powers to regulate the hydrology within its boundaries, including land planning and subdivision powers, zoning and municipal wetland policies. Indeed, the Subdivision and Development Regulation clearly reflects this as the application for subdivision must include a suite of information relevant to assessing the hydrology of the land, including topography, soil characteristics, and the potential for flooding, subsidence and erosion.[31]

d. Issues around water body permanence and human augmented natural bodies of water.

Due to the nature of the definition of "body of water" under the Act there are a variety of questions that might arise related to water influenced features on the land scape that are not "permanent" or where a natural water body has been augmented by human built structures. The issue of permanence of a body of water has significant consequences as, under Alberta law, the beds and shores bodies of water that are permanent and naturally occurring are owned by the Crown and, as has been discussed, determines when ER may be required. Many landowners either don't realize this fact or may take issue the permanence determination (whether done under the MGA or under the *Public Lands Act*.

One question that may arise is whether non-permanent wetlands may be subject to ER and/or ERE? Non-permanent wetlands do not qualify as a "body of water" under the MGA but it is may still possible for municipalities to take ER or ERE to protect these wetlands.

First, the term "swamp" in s. 664(1)(a) could likely encompass wetlands that are excluded from being a "body of water" for lack of permanence. As noted above the Wetland Classification system definition of a swamp does not indicate the need for permanence nor does the legislation state that only permanent swamps may be protected. This is likely a wrinkle in how the MGA was amended and reflects an inconsistency in the legislation.

Second, subsection 664(1)(b) includes "land that is subject to flooding" and would likely include flood risk areas and ephemeral wetlands that only appear during spring snowmelt or heavy rainfall

[29] *Subdivision and Development Regulation*, Alta Reg. 43/2002 at s. 5(5).
[30] *Ibid.* at s. 5(4).
[31] *Ibid.* at s.7.

events. This section appears to allow a municipality to require the dedication of ephemeral wetlands and lands in the flood fringe of water bodies as ER. As mentioned above case law has found that in the context of the MGA "land that is subject to flooding" is "land that is reasonably likely to flood in the normal course of events."[32] Seasonal wetlands are a result of overland and groundwater flow and could be considered lands that are subject to flooding. How an appellant body or court would treat this approach is open to question and will be circumstances specific. For instance, "normally flooded" area near a surface drainage course may be viewed differently from a depression in the landscape where water seasonally accumulates.

Third, section 664(1.1) of the *MGA* provides that land may only be set aside as an environmental reserve for select purposes. These "purposes" were recently expanded and include: to preserve the natural features of the land, to prevent pollution, to ensure public access, and to prevent development where the natural features of the land would present a significant risk of personal injury or property damage.[29] This section appears to provide additional direction and support to municipalities to conserve and manage bodies of water and other surface water resources and environmentally significant areas (including non-permanent wetlands) under the ER provision of the MGA. In particular, the language "to preserve natural features of the land" and "to prevent development where natural features of the land would present a significant risk" could be interpreted to suggest that the drafters were concerned about flood resiliency and the protection of environmentally significant areas.

Finally, the drafters of the legislation had the option to limit ER to bodies of water as defined in the MGA. Nevertheless, they chose to also include land consisting of "swamp, gully, ravine, coulee or natural drainage course" and "land that is subject to flooding", which at least gives the appearance that they wanted municipalities to have the flexibility to go beyond "permanent" water bodies when it comes to ER and/or ERE.

Another question that may arise is whether a body of water is "natural" notwithstanding human augmentation and the installation of works. Can a municipality ever take ER with respect artificial works? What about natural bodies of water adjacent to these works?

For our purposes, the term "works" refers to artificial or human-made water bodies as is consistent with its use in various Alberta legislation. For instance, the *Water Act* defines "works" to mean "any structure, device or contrivance made by persons, or part of it, including a dam or canal" along with any "land and mitigative measures associated with it.[33] Similarly, the *Irrigation Districts Act* defines "irrigation works" to mean any structure, device, contrivance or thing or any artificial body of water or watercourse used or to be used by a district and includes, without limitation:

i. any dike, dam, weir, breakwater, drainage works, ditch, basin or reservoir,

ii. any canal, tunnel, bridge, culvert, embankment, headwork, aqueduct, pipe, pump or floodgate,

iii. any contrivance for measuring water, and

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[32] *Seabolt Watershed Association v. Yellowhead (County)*, 2002 ABCA 124 at paras. 24-29 cited in *Stettler (County No. 6) v. Ruttan*, 2005 ABQB 74.

[33] RSA 2000, c W-3, s. 1(1)(mmm).

iv. any building or fence or other works in any way used in or in relation to the carrying out by a district of its obligations or responsibilities to supply water.[34]

empowers irrigation districts to, among other things, convey and deliver water through irrigation works and divert and use quantities of water in accordance with the term and conditions of its licence.[35] The Act

Generally speaking, ER does not apply to wholly artificial human made works because they are not "naturally occurring" and therefore do not qualify as bodies of water or as other natural features such as a "swamp, gully, ravine, coulee or natural drainage course". Note the term "naturally occurring" is not defined in the MGA (or the *Public Lands Act)*. Alberta's *Guide for Assessing Permanence of Wetland Basins* (the "*Guide*") provides some assistance in that it notes a naturally occurring wetland feature must be of "geomorphic origin and not a man-made landscape feature".[36] However, the question of whether a body of water is natural or not mostly depends on the circumstances, and is made more difficult where human-made works have collateral or incidental effects on water and bodies of water.

In addition to wholly artificial works, a person or entity may also use a natural creek or other body of water as a spillway, or as the basis for a dam, reservoir or some other artificial works. Yet, these bodies of water do not cease to be "natural" when they are enlarged or deepened by human activity. This is because section 3(3) of the *Public Lands Act* states that a river, stream or watercourse does not cease to be naturally occurring by reason only that its water is diverted by human act.

Most bodies of water are impacted by works in some way and yet we still treat them as natural. For instance, Pigeon Lake has a weir that is focused on managing flooding downstream on the Battle River. This augments both the lake and river but both would still be considered natural. In both cases however it may impact how ER is taken. Determining when and how a body of water is "natural" will be circumstance specific process.

The issue of whether a water body retains its "natural state" even when impacted by human works was dealt with by the Alberta Court of Appeal in the 2019 case *Erik v McDonald.*[37] The case concerned a dispute between neighbours on the Pedersen reservoir, an irregularly shaped body of water used as recreational lake, and whether one of the parties was entitled to build a fence across the water. In the course of determining who owned the water, the Court found that the beds and shores of the original stream and slough used to make the dam (called Twelve Mile Coulee) belonged to the Crown as they were permanent and naturally occurring. When the dam was built, it caused the slough to becomes deeper and the stream to overflow its banks and encroach upon adjacent grounds. While it was likely that the creek used to ebb and flow and perhaps flood with the seasons before, the dam made the enlargement of the stream more permanent and stable. The Court concluded that even though the dam was the result of a human act, s. 3(3) of the *Public Lands Act* provides that the stream and slough still qualify as being "naturally occurring" and that the water was still owned by the Crown.

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[34] RSA 2000, c I-11, s. 1(w)[IDA].
[35] IDA, at 6(1).
[36] Government of Alberta, "Guide for Assessing Permanence of Wetland Basins", January 2016 at p. 5 accessed at: https://open.alberta.ca/dataset/02b938d2-a26b-41e8-b343-602b4b6c0c57/resource/98b50b87-6ffe-4c32-ae34-c49e2a3c706c/download/2016-assessingpermanencewetlandbasins-feb2016a.pdf [*Guide*].
[37] 2019 ABCA 217.

Note, however, that this decision was made in the context of a private dispute between landowners and interpretation of the *Public Lands Act*. It is very unlikely that the Court considered impacts on ER or ERE in reaching its decision. The Crown did not participate in the hearing and government had communicated that it was of the view that the land under the reservoir was private property.[38] The court found that the government communication could not be viewed as the Crown absolving any claim to the bed and shore and that the formalities of disposing of Crown land under the *Public Lands Act* were not met. The court concludes "the Crown is *prima facie* the owner of the bed of the Pedersen Reservoir, and there is nothing on this record that would amount to a quit claim of any Crown interest to the appellants."[39]

Nevertheless, where a person or entity modifies or utilizes a natural body of water, stream, coulee etc. it could still arguably be subject to ER. Overall, the question of whether ER is applicable to artificial works within a municipality will be highly fact dependent and turn on whether the water body in question can be characterized as naturally occurring. In this regard, the taking of ER in these instances may give rise to disputes and litigation. From a purposive approach to interpreting the legislation, it makes sense that ER may still apply to foster the underlying nature of the landscape and not unduly undermined by the imposition of works or human augmentation. As already noted many natural lakes, streams and rivers have water control structures in place, including weirs, dams and culverts. Would these bodies of water then be considered no longer to be natural?

With respect to irrigation districts, in cases where a municipality is permitted to require ER with respect to bodies of water used by the irrigation district, the municipality is still subject to the limits of the MGA as well as other provincial legislation. Municipalities only own and control the use and development of municipal lands.[40] The MGA applies specifically to "municipalities and improvement districts"[41] and does not bind the Crown. ER or ERE are only applicable in circumstances where the municipality becomes owner of the land in question. The MGA is also subject to other provincial legislation. For example, section 9 of the *Irrigation Districts Act* permits an irrigation district to acquire an estate or interest in land required for, among other things, the irrigation works of the district, by expropriation under the *Expropriation Act*.

2) How should municipalities determine whether a body of water is permanent and naturally occurring?

Determining permanence

As previously discussed, the question of whether a wetland or other type of water body is "permanent" is relevant to determining if it qualifies as a "body of water" under the MGA. However, the MGA does not define the term "permanent" nor give any meaningful guidance as to how municipalities should determine permanence under the Act.

Determinations of wetland permanence are usually undertaken by Alberta Environment and Parks (AEP). Nevertheless, the Government of Alberta's *Guide* purports to provide land users and

[38] *Ibid.* at para 21.
[39] *Ibid.* at para 26.
[40] Judy Stewart, "Municipal "Direction, Control and Management" of Local Wetlands and Associated Riparian Lands: Section 60 of Alberta's *Municipal Government Act*", 74 Alberta Law Review (2009) 47:1 at p. 6.
[41] MGA, s. 2(1).

environmental practitioners with a standardized methodology acceptable to Alberta Environment and Parks (AEP) for assessing the permanence of wetlands. The methodology set out in the Guide is used to determine wetland permanence for the purpose of establishing provincial ownership of beds and shores of bodies of water pursuant to section 3 of the *Public Lands Act*.[42] Practically speaking, this methodology could also be used to make these same types of determinations (i.e. establishing bodies of water) under the MGA. That being said, there is limited legislative linkage between the role of a subdivision authority under the MGA and the determination of Crown ownership under the *Public Lands Act*. The *Subdivision and Development Regulation* does require referral of a subdivision application where the application relates to a parcel that is adjacent to a "body of water". The referral is made to the relevant Minister of the Crown (that administers the *Public Lands Act*). However, the regulation does not specify strict alignment of how a body of water is evaluated or defined. The regulation does provides for the ability for a municipality to agree to come to a "further define the term of a "body of water" with the Minister.[43]

Once a permanent and naturally occurring body of water has been identified delineating the bank of a body of water for purposes of Crown claims under the *Public Lands Act* employs the determination under the *Surveys Act*. The MGA also references the *Surveys Act* in references to when a subdivision authority is taking ER for preventing pollution of a body of water or the purpose of providing public access to a body of water.[44]

The AEP *Guide* notes that a key identifier of wetland permanence is the length of time the basin in question is inundated with water – the longer the basin is flooded the greater the likelihood of permanence. For instance, under the Alberta Wetland Classification System (AWCS), a basin that is flooded for 5-17 weeks per year is characterized as a "seasonal" wetland type, whereas one that is flooded for 52 weeks per year is considered "permanent".[45] Associated vegetation indicators are also diagnostic of permanence type.[46] The Guide states that "AEP is reasonably confident that AWCS classified semi-permanent and permanent wetland types by their nature are permanent and Crown claimable" (i.e. flooded for 18-40 or more weeks).[47]

For the purposes of ER, municipalities likely have the choice of either requiring landowners to obtain a formal wetland assessment or performing their own non-technical assessment of wetland permanence in applicable circumstances. Note that neither the MGA nor the case law suggests that a formal wetland assessment is *required* for ER.[48] Nevertheless, this option may be advantageous for municipalities because it transfers the cost of the assessment to landowners as well as the workload and potential liability to an objective third party. Obtaining a formal wetland assessment at the outset may also encourage certainty in the process and dissuade litigation.

Conversely, it can also be advantageous for a municipality to provide a non-technical assessment of whether a body of water is permanent and naturally occurring. Doing so would significantly reduce costs for landowners and give the municipality greater control over the process. Moreover, there is nothing stopping a municipality from providing an initial non-technical assessment, and in the case of a disagreement, moving to require a formal wetland assessment. However, the

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[42] Guide, p. 3.
[43] *Subdivision and Development Regulation* at s. 5.
[44] MGA, at s. 664 (1.2).
[45] Guide, referring to Alberta Wetland Classification System wetland types, p. 6.
[46] Guide, p. 6.
[47] Guide, p. 7.
[48] See for example *Bonik v. County of Barrhead No. 11 (Subdivision Authority)*, 2019 ABMGB 10 at para 42.

downside to providing a non-technical assessment is that a municipality may be taking on additional liabilities. Insofar as ER is in effect a "taking" of private property, a court would be less deferential to municipal decisions makers.[49] Any non-technical permanence determinations should be founded on a clear and reasonable procedure that includes identifying and recording the rationale for the determination.[50] In this regard, the assessment of permanence creates a bit of a challenge for municipalities vis-à-vis the notion of Crown ownership. Municipalities are not the legal entity to make this determination, but one can see how it may cause some confusion, should the Crown and the municipality make different determinations in this regard or should the Crown not engage on the issue in a timely fashion. Having a survey done (pursuant to the *Surveys Act*) to delineate the bank of the body of water, once a determination as it being permanent and naturally occurring, can mitigate some of this potential confusion or conflict.

Determination of "natural"

As illustrated by the decision in *Erik v McDonald* (discussed above) the determination of whether a body of water is "natural" or remains natural enough to be considered for ER may give rise to confusion and conflict. Whether a body of water remains "natural" appears to be based on a matter of extent to which human action has created the waterbody. Is the underlying hydrological system intact, notwithstanding human augmentation? If so, one might conclude that the "natural" state of the body of water is not lost. Or perhaps more simply, how, despite the augmentation, is the water body treated?

3) How is ER put in place? What about ERE?

Enacting ER

The MGA states that a subdivision authority may require a landowner to provide part of the proposed subdivision lands as ER or, before a subdivision approval application is made (or after it is made but before it is decided), a municipality and landowner may enter into a written agreement providing that the owner will provide part of the parcel of land as ER as a condition of subdivision approval.[51]

The Subdivision and Development Regulation outlines that any reserve land must be included in the sketches or plans of the proposed subdivision to the subdivision authority.[52] Once a plan of subdivision is submitted to the authority with ER noted and once the plan meets all the requirements the plan is endorsed (pursuant to section 657 of the MGA and the Subdivision and Development Regulations) the plan can be subsequently registered at land titles (or it becomes void 1 year after the endorsement unless an extension is granted).[53] Upon registration of the plan at the land titles office the land vests, free of all encumbrances, in the municipality.[54] (Referral

[49] For instance, in *Stettler (Count No. 6) v. Ruttan*, 2005 ABQB 74 the County of Stettler tried to have two parcels of land declared as ER land. The land was already reserve land (not ER) and subsequently sold which distinguishes it from a current taking of ER. Nevertheless, the case is useful in illustrating how a court may look into the rationale and reasoning behind ER designations. In this case the designation of land as a drainage course or land subject to flooding was rejected by the Court based on insufficient evidence.

[50] See discussion of this above.

[51] MGA, s. 664(1), 664.1.

[52] *Subdivision and Development Regulation*, Alta Reg 43/2002, <https://canlii.ca/t/5313r at section 4 (3).

[53] *Ibid.* and MGA at section 657(5)

[54] Section 84 (3) of the *Land Titles Act*, RSA 2000, c L-4, <https://canlii.ca/t/5528g>

the subdivision application to the relevant Minister where parcels that are adjacent to bodies of water is also required.)[55]

Once the ER is in place a municipality may want to pass a bylaw to deal with access, use, management and compliance and enforcement on the municipal ER lands. This type of bylaw should delineate how the lands will be kept in a natural state and can outline the types of activities that will be contrary to this outcome.[56] ER related policies should also be put into place for added management context and clarity.

Enacting ERE

The MGA and regulations does not mandate how to put an ERE into place. This is not surprising as easements are basically a grant of property related rights between two private parties. The MGA adds to the general concept of an ERE by mandating specific outcomes for the easement lands, specifying that they "easement remain in a natural state as if it were owned by the municipality".[57]The MGA provides that an ERE "may be registered against the land in favour of the municipality at a land titles office" but stops short of requiring registration.[58] To be enforceable against future landowners the easement must be registered. The Act does provide that an ERE must identify which part of the parcel of land the easement applies.[59] In addition, when an ERE is presented for registration, the Registrar must endorse a memorandum of the ERE on any certificate of title relating to the land.[60]

The framing of the easement agreement will be important in determining the rights and responsibilities in relation to the easement lands. In this regard the municipality will want to ensure that the easement agreement reflects its expectations for the part of the parcel covered by the easement, what constitutes the "natural state" of the easement lands, and the responsibilities of the landowner in relation to the easement lands.

Just as with ER, a municipality would benefit from enacting policies and procedures to guide the contents and process of entering into the ERE. The terms of the easement agreement

4) How can ER lands be used? Is public access to ER and/or ERE lands required?

In general, ER land must be left in its natural state or used as a public park.[61] The MGA does, however, provide for some exceptions. Council may make changes to an ER's use or boundaries

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[55] *Ibid.* at s.5(5).
[56] Section 7 of the MGA gives municipalities general jurisdiction to pass bylaws respecting a variety of matters, as well as bylaws respecting the enforcement of any bylaw made under section 7 or any other enactment. An ER bylaw would be pursuant to the section 7 matters such as "the safety, health and welfare of people and the protection of people and property", and/or "services provided by or on behalf of the municipality". Generally, municipalities are given broad latitude when it comes to their bylaw making powers.
[57] MGA, s. 664(3)(b)
[58] MGA, s. 664(2).
[59] MGA, s. 664(2)-(3).
[60] MGA, s. 664(5).
[61] MGA, s. 671(1).

after giving notice and holding a public hearing in accordance with the MGA.[62] The Act provides that council may by bylaw:

a) use an ER for a purpose not specified in the Act;
b) transfer an ER to the Crown or an agent of the Crown for consideration;
c) lease or dispose of an ER other than by a sale for a term of not more than 3 years; and
d) change the boundaries of an ER or ERE in order to correct an omission, error or other defect in the certificate of title, or rectify an encroachment problem or other concern.[63]

Proceeds from a lease or any other disposition on ER lands may only be used to provide land for any or all of the purposes referred to in s. 671(2) of the MGA, which include a public park, public recreation area, school board purposes and to separate areas of land that are used for different purposes.[64]

In addition, a municipality or a municipality and a school board may authorize the construction, installation and maintenance of a roadway, public utility, pipeline or transmission line on, in, over or under reserve land, as well as the maintenance and protection of reserve land, if the interests of the public will not be adversely affected.[65]

In the event a municipality opts to leave ER lands in its natural state, they are not required to provide public access. Section 664(1.1) of the MGA provides that a subdivision authority *may* require land to be provided as ER for the purpose of ensuring public access. It would appear that a municipality has the option to permit public access to ER lands but is not required to do so. In fact, a municipality could also choose to limit public access to ER lands (for example, where features of the lands could attract increased liability for the municipality).

For ERE lands the issue of public access to lands will be a point of negotiation between the landowner and the municipality. Landowners may prefer to have an ERE on their lands insofar as it allows them to have more control over access in contrast to ER lands.

5) When is an ERE more appropriate than an ER?

The MGA states that an ERE may be registered when *both the landowner and the municipality agree* that the prospective ER lands should instead be the subject of an ERE for the protection and enhancement of the environment.[66] Accordingly, it would seem that an ERE is appropriate when both parties are in agreement that an ERE (as compared to ER) would be a beneficial instrument to protect the subject lands.

The decision between using ER or ERE raises a variety of questions around the level of management, control and risks the municipality and the landowner are prepared to take on within the subject lands. For the landowner, it maintains the parcel as a whole and is likely to result in greater control around access. An ERE must maintain the land in its natural state so there are clear limitations on what a landowner can do with the lands and municipalities should ensure that

[62] MGA, s. 676(1).
[63] MGA, s. 676(1).
[64] MGA, s. 676(3).
[65] MGA, s. 677.
[66] MGA, s. 664(2).

landowners are aware of the nature of this limitation and encourage landowners to get legal advice around the legal implications of the ERE and how it binds current and future landowners.

For the municipality an ERE may be preferable where the ER may have monitoring and management challenges or where the municipality doesn't wish to take on the same type of liability as owning the land. Under the *Occupiers' Liability Act* the party having possession, management and control of the property has a duty to ensure all reasonable care to ensure that the property is safe for visitors.[67] The obligation does extend to those who have legal access to the premises and can conduct activities on the property (i.e. they are within the definition of "occupier" under the Act), and therefore this liability may extend to the municipality under an ERE. That said, comparatively speaking the nature of the duty of care for fee simply owner of and that of an easement holder will be, in most circumstances, be different. It should be noted that an occupiers' liability in instances where there is recreational use of property that is "forested or wilderness" or that on land that is "vacant or undeveloped" the burden of care is lower for the occupier.[68] This lower duty of care for certain types of lands was confirmed recently in the case of *Wythe v Grande Prairie Regional Agricultural and Exhibition Society*.[69]

As mentioned the MGA states that an ERE may be used instead of ER where there is mutual agreement between the municipality and the landowner. Nevertheless, there have been decisions at the Municipal Government Board (MGB) which appear to impose ERE on unwilling or reluctant parties. For instance, in *Bonik v. County of Barrhead No. 11 (Subdivision Authority)* the MGB found that a wetland located on the subject lands required protection.[70] The SA advised that it preferred ERE "as it is not in favour of having small ER parcels spread throughout the County," however, the landowners opposed providing either ER or ERE.[71] Regardless, the MGB relied upon s. 664 of the Act and found it was appropriate to dedicate ERE, with its boundaries to be determined by survey.[72]

In *Dick v. County of Wetaskiwin No. 10 (Subdivision Authority)* the MGB allowed a boundary adjustment and determined that the majority of the parcel should "receive ERE status" to safeguard it against future use and development.[73] The landowner was interested in ERE but the County preferred ER as it gave them greater control.[74] Regardless, the MGB found that the policy of the Municipal Development Plan contemplated ERE and the property owner was committed to implementing environmental safeguards and therefore ERE was an "appropriate mechanism to achieve this goal".[75]

Similarly, in *Hutchison v. Municipal District of Wainwright No. 61 (Subdivision Authority)* the landowner was opposed to ER (and presumably ERE) while the SA preferred ERE.[76] The MGB

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[67] *Occupiers' Liability Act*, RSA 2000, c O-4, <https://canlii.ca/t/544dm>
[68] Ibid. at ss. 6.1, 12 and 13. These sections operate to lower the duty of care to adult visitors (treated as trespassers under the Act) to where an injury results from the willful or reckless conduct of the occupier. This duty is not the same as those owned to child trespassers which is set out in section 13 of the Act.
[69] 2019 ABQB 358 (CanLII), <https://canlii.ca/t/j08ct>
[70] 2019 ABMFB 10 [*Bonik*]
[71] *Bonik* at paras. 18, 30.
[72] *Bonik* at paras. 41-43.
[73] 2020 ABMGB 56 at para. 2 [*Dick*].
[74] *Dick* at paras. 12, 19.
[75] *Dick* at para 25.
[76] 2020 ABMGB11 at paras. 14, 18-19 [*Hutchison*].

was satisfied that a strip of ER or ERE adjacent to a lake on the subject lands was necessary and ordered ERE so that the landowner could retain ownership and control access.[77]

To date, none of the aforementioned decisions have been challenged and that fundamentally, where ERE is not agreed to, then ER should be the result. Admittedly this puts appellate bodies is a tough situation where a landowner wants neither and ER or an ERE and the legislation, on its face, pushes the subdivision authority to take fee simple ownership in the form of ER.

Conversely, we note there is at least one MGB decision that appears to recognize the limitations of the Act with respect to ERE. In *Murphy v County of Two Hills No. 21 (Subdivision Authority)*, both the SA Subdivision Authority (SA) and the MGB recognized that they did not have the legislative authority to unilaterally impose ERE.[78] The land in question was the first lot to be subdivided from a quarter section of land and therefore not eligible for ER subject to s. 663 of the MGA. However, the MGB determined that some form of protection was required for the lands and proposed to either grant the SA a restrictive covenant (per s. 651.1 of the MGA) or provided that the parties could agree to an ERE.[79] The case does not reveal what the parties ultimately decided. It may have been determinative that the land itself was not eligible for ER (absent the agreement of the parties).

6) How are ER lands regulated (and enforced)? What about an ERE lands?

Regulation and enforcement of ER lands

ER lands belong to the municipality and they are entitled to access, monitor and maintain these lands as they see fit (and in accordance with the MGA and its rights as a "legal person"). Given that ER lands are mostly under the care and control of the municipality, enforcement issues are likely to be limited to trespassing or public use/misuse of the lands.

Generally speaking, with respect to trespass, a municipality may rely on the *Trespass to Premises Act*.[80] An in-depth discussion of trespass on municipal property is outside the scope of this report, but suffice it to say that the Act prohibits trespassing on premises where a person has had notice not to trespass and makes it an offence to do so.[81]

Due to the nature of environmental reserves and how they may be subject to a variety of pressures that may impact their natural state it is preferable that a municipality pass an ER bylaw. While it is feasible to create a private written agreement with the owner prior to subdivision this is likely not the preferred approach as it unnecessarily limits enforcement options.

The MGA's enforcement provisions are only engaged when there is a contravention of the MGA, an "enactment", or a "bylaw" and the MGA itself does not speak to how the public may use or not use ER lands. The MGA does, however, provide that a municipality is required to either leave ER

[77] *Hutchison* at para. 37.
[78] 2019 ABMBG 50 at paras. 20, 34 [*Murphy*].
[79] *Murphy* at para. 28.
[80] RSA 2000, c T-7 [TPA].
[81] TPA, s. 2-3.

lands in their natural state or use them as a public park.[82] Note that if a municipality has bylaws with respect to the use of natural lands or public parks then it should be entitled to enforce its rights under these bylaws. Otherwise, the municipality may have to rely on civil law remedies to seek redress for any wrongs or misuse of the ER lands.

The MGA enforcement provisions expressly contemplate that designated officers of the municipality may enforce its bylaws.[83] The ER bylaw must, however, set out whether and how the public may access and use the ER lands for it to be enforceable against the public.

Practical matters of enforcing "natural state"

The enforcement of ER generally can face challenges where a municipality seeks to maintain the ER/ERE in a natural state. Insofar as "natural state" is not defined there will be a need to delineate what constitutes the "natural state" and potentially any activities that the municipality may view as impairing the natural state. This will primarily be an issue where lands are not readily accessible.

Where the natural state is degraded there is also a need for a reference state to be able to direct restoration efforts (i.e. order a remedy for a contravention of the bylaw as permitted in the MGA).[84] In the absence of evidence of a baseline condition the municipality may have limited options to direct restoration or seek other remedies. Whether in an ER bylaw or in the easement agreement of an ERE how a municipality defines "natural state" is important. The municipality must ensure it still complies with the MGA, even though "natural state" is not defined. A reasonable interpretation of "natural state" is the lands retain their natural character and function. Activities that impair, degrade or destroy that character should be prohibited and/or managed.

Managing and enforcing ERE

In most instances, municipalities will be able to work directly with landowners to ensure compliance with an ERE. There may, however, be circumstances where a municipality has to step in and unilaterally enforce the terms. How should municipalities go about doing this?

Insofar as ERE create two parties with property rights the management and enforcement of ERE is inherently more complex. The expectations of the parties are likely source of this potential complexity: a landowner who retains fee simple ownership and a municipality who expect the lands to be kept in a "natural state" as if the municipality owned it (as stated in the MGA).

The starting point for managing and enforcing easements is the content of the agreement of the easement agreement itself. As property rights tools easements are typically enforced through civil law and looking at what rights of access, management and control, and remedies does an easement agreement create.

There remains some question as to whether a municipality may seek to manage and enforce an ERE through a bylaw. While the MGA does state an ERE "may be enforced by the municipality" and this reflects similar language in the enforcement provisions of the Act (Part 13, Division 4) the scope and nature of most provisions of an ERE agreement are likely to be viewed of a private easement and therefore, once registered at land titles, enforced as such.

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[82] MGA, s. 671(1).
[83] MGA, s. 542.
[84] MGA, s. 545.

7) Is a municipality still entitled to access landlocked ER lands?

In some instances, ER lands may be landlocked (i.e. only accessible by traversing across private property). Most of the time access is unlikely to be an issue. In instances where it is, however, what right does a municipality have to access its ER lands?

Municipalities have both a statutory and common law right of way to access the ER lands they own. For one, the *Land Titles Act*[85] appears to provide a statutory easement or right of way to municipal ER lands. Section 84(1) of the *Land Titles Act* permits the municipality to register a plan of survey subdividing land which vests title to all land shown on the plan, including ER lands. The Registrar is then required to issue new certificates of title to the municipality for those parcels.[86] Meanwhile, section 61(1) of the *Land Titles Act* expressly provides that the land mentioned in any certificate of title granted under the Act is subject to "any right of way or other easement granted or acquired under any Act or law in force in Alberta".[87] It seems likely that s. 664 of the MGA, which grants a municipality the right to take ER, also grants a municipality a right of way to access these lands and would qualify as a "right of way…granted…under [an] Act…in force in Alberta".

Regardless, the phrase "law in force in Alberta" has also been recognized as including the common law regarding implied easements.[88] Municipalities also have a common law right of way to access the ER lands. Case law has established that there is an implied "easement of necessity" when the implied grantee has no other means whatsoever of reaching its land.[89] An "easement of necessity means an easement without which the property cannot be used at all…[i]t is not one that arises as a matter of inconvenience".[90]

Accordingly, municipalities can rest assured they are entitled to access ER lands, even landlocked ones, and will not be prevented from monitoring and maintaining these lands by unfortunate geography.

8) Can a municipality dispose of an ER or ERE?

A municipality may change the use and/or boundaries of ER lands but may not dispose of an environmental reserve for a period of more than 3 years. As previously noted, s. 676 of the MGA provides that council may, by bylaw:

a) Use an ER for a purpose not specified in the Act;
b) Transfer an ER to the Crown or an agent of the Crown for consideration;
c) Lease or dispose of an ER other than by a sale for a term of not more than 3 years; and
d) Change the boundaries of an ER in order to correct an omission, error or other defect in the certificate of title or to rectify an encroachment problem or other concern.

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[85] RSA 2000, c L-4 [LTA].
[86] LTA, s. 84(3)(a)(i).
[87] LTA, s. 61(1)(f).
[88] See for example *Germain v. Brar*, 2010 ABQB 530 at para. 28.
[89] *Germain v. Brar*, 2010 ABQB 530 at paras. 36-37.
[90] *Condominium Plan No. 7810477 (Owners) v. Condominium Plan No. 7711723 (Owners)*, 1997 CanLII 14869 (AB QB) at para 50 cited in *Germain v. Brar*, 2010 ABQB 530 at para 37.

A municipality must give notice and hold a public hearing in accordance with the Act before passing a bylaw that does any of the above.[91]

Section 676(1)(d) of the MGA also permits council to change the boundaries of an ERE but again only to correct an omission, error or other defect in the certificate of title or rectify an encroachment or other concern. Notice and a public hearing are still required.[92] Upon receipt of a bylaw changing the boundaries of an ERE, the Registrar must cancel the existing certificates of title or amend the ERE and issue any new certificate of title required.[93]

An ERE may also be cancelled, but only where the entire plan of subdivision that necessitated the ERE is also cancelled pursuant to s. 658 of the MGA.[94] Cancellation can occur when, on the application of one or more of the landowners in a plan of subdivision, council opts to pass a bylaw ordering the cancellation of the subdivision. Note that an ERE is only cancelled when the whole (i.e. not part) of a subdivision plan is cancelled.[95]

A final note

The power to reserve lands as ER and ERE are important tools for municipalities to safely and sustainably plan and develop the land within its borders. However, their effective use depends on municipalities having clarity on how best to deploy these powers. Landowners may often have conflicting views in relation to how ER is identified and managed. There may be misunderstanding of the law and its purpose or simple disagreement with the law itself. In this way challenges around ER and ERE are also communications challenges.

Alberta's legislation aims to guide the subdivision process in a way that minimizes development and environmental risks through the use of ER/ERE. In this way ER and ERE can serve multiple purposes and functions that municipalities should incorporate into its plans, policies and land stewardship programming.

[91] MGA, s. 676(1).
[92] MGA, s. 676(1).
[93] MGA, s. 676(d)(4).
[94] MGA, s. 664(6).
[95] MGA, s. 658(3.1).