ORRSC Periodical

Winter 2024

Exemptions in Planning

Federal and provincial jurisdiction is protected through legislative exemptions, sometimes leaving local approval processes on the sideline.

The paramountcy of the federal and provincial governments is well recognized by municipalities. In many cases, higher-order governments can undertake actions that are exempt from the municipal process applied to non-government proponents of the same activity. Crown entities also exist to deal with matters of a provincial or federal interest, despite that impacts are felt the most locally. Municipalities often retain some ability to influence higher-order processes, and need to understand the various exemptions and processes in order to best fulfill their mandate.

Oldman River Regional Services Commission

Exemptions Context

Since municipal authority flows from provincial legislation, municipal powers cannot exceed those the province could validly delegate. Hence, any municipal action that conflicts with federal or provincial legislation will be ultra vires. These specific rules are classified as exemptions and can be found throughout many legislative documents.

For the purposes of this periodical, an exemption can simply be defined by the legislative powers established or enacted by the province or federal government that limit the powers provided to municipalities under the *Municipal Government Act,* including the powers under Part 17 Planning and Development. Whereas Part 17 provides broad scope for municipalities to govern subdivision and development, there are many aspects of these processes that are limited in favour of a Crown exception. Still, while a Crown approval will address the predominant aspects of a development, municipalities often retain the ability to address certain matters – either those expressly prescribed to it or matters not dealt with by the higher order government. The result of this multi-jurisdictional approval matrix often leaves questions as to jurisdictional scope and the timing of approvals relative to one another.

This periodical will identify the exemptions found in provincial legislation as well as the federal exemptions and explore the extent to which case law has either protected the Crown or limited the scope of the exemption.

Legislative Framework

Exemptions under Section 14 of the *Interpretation Act* state that the MGA is not binding on His Majesty. Thus, where the province is undertaking development, it is not required to obtain subdivision or development approvals although, in fact, it often does. Where the province has leased or transferred title to another party, that party must comply with the requirements of the *Act*. The federal government and federal government agencies are also exempt.

The legislative enactment of these exemptions are not found in a one stop shopping document but are spread across many federal and provincial Acts and Regulations. One of the most obscure is the *Universities Act* which in Section 62 states that Part 17 of the MGA does not apply to the use or development of real property owned by or leased to a university. This played out in a very real sense for the County of Newell when it was reported to municipal staff that construction was occurring in a remote rural area. Upon inquiry it was found that the construction was for research accommodation of University of Alberta students.

Under Section 618 of the MGA, subdivision or development for roads, wells, or batteries, pipelines, designated Crown lands, and the geographic area of Metis settlements is exempt from the provincial regulations and municipal bylaws under Part 17 of the Act. The *Planning Exemption Regulation* (AR 223/2000)

List of Developments with Exempt Status*

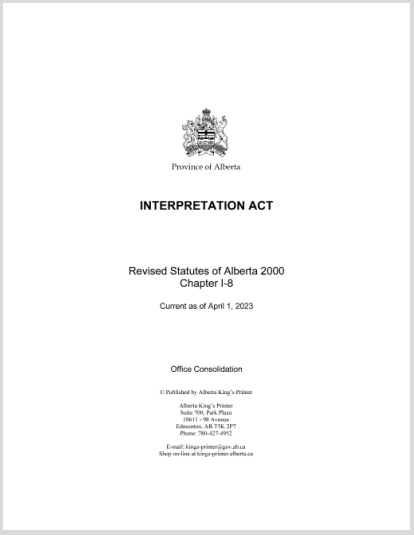
Provincial:

Gravel pits, confined feeding operations, oil and gas, power plants, irrigation, highways, powerlines, universities, provincial recreation development, etc.

Federal:

Airports, railways, ports of entry, telecommunications, navigable waters, military bases, etc.

***Note: This is not a comprehensive list of every exemption but a general list for quick reference only.**


Province of Alberta

INTERPRETATION ACT

Revised Statutes of Alberta 2000
Chapter I-8

Current as of April 1, 2023

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Interpretation Act Revised Statutes of Alberta 2000 Chapter I-8 Section 14 Crown not Bound

No enactment is binding on His Majesty or affects His Majesty or His Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds His Majesty.

Municipal Government Act

620 Conditions prevail

A condition of a licence, permit, approval or other authorization granted pursuant to an enactment by the Lieutenant Governor in Council, a Minister, a Provincial agency or Crown-controlled organization as defined in the Financial Administration Act or a delegated person as defined in Schedule 10 to the Government Organization Act prevails over any condition of a development permit that conflicts with it.

Rules on overlapping jurisdiction for feedlots can be found in the ORRSC Spring 2022 Periodical

exempts other developments such as hydro transmission and electric distribution lines and irrigation works undertaken by an irrigation district from the planning provisions.

Under Section 619 of the MGA, where a licence, permit, approval or other authorization is required by the NRCB, ERCB, AER, AEUB, or AUC, these boards have jurisdiction over the decision. But municipalities may have some jurisdiction over a portion of the approval. If there is no direct conflict with provincial legislation, local bylaws can establish rules to address development matters not dealt with by the provincial entity and the two enactments can stand together.

Land Use Context

In the land use application of the exemption sections, each legislated entity must be understood as to whether it allows municipal participation in the approval process. Often the project gives an indication of how the interaction between the federal or provincial governments will be approached. Is the work being driven by the municipality (or one of its citizens) or is the project being driven by the government entity? Where the work is driven by and is directly related to the primary business of the government entity like railways, airports, irrigation districts, transmission lines, pipelines, and provincial highways, no direct local approval will be sought or is legally required. A cursory notice may be sent by the entity beginning the work or they may seek municipal approval for impacts to roads, but no land use process will be triggered.

Where the process is being put forward via a landowner or proponent (on behalf of a landowner) for uses such as telecommunication towers (federal), feedlots (NRCB), power plants (AUC), or major recreational developments (NRCB), overlapping jurisdiction may be applicable. For example, telecommunication tower processing occurs under Innovation, Science and Economic Development Canada who prefer municipalities follow their *CPC-2-0-03 — Radiocommunication and Broadcasting Antenna Systems* protocol (or a locally devised version of the protocol). The process allows for a municipality to put forward rational planning reasons to oppose a proposal, but the reasons or approval are to take the form of a letter of concurrence or non-concurrence and not a municipal permit. Ultimately, the ISED can override the local preference and issue the tower proponent an approval.

Similarly, guidance is provided for processes involving land use planning under the legislative protections provided by MGA s. 619 and interactions with the AUC, NRCB, AER and ERCB. This guidance simply limits a municipality to processing development permits only where those government agencies under s. 619 have not taken a stance or where their legislation defines the local permit parameters. For example, under the AUC approvals for solar or wind power plants, the agency concedes setback from roadways and lot lines to the municipality who include the rule as conditions to a municipal permit. Lately, it is a struggle for the municipality to be heard and have its jurisdiction recognized by proponents. These local requirements end up being fodder in the AUC appeal process.

Since the adoption of the South Saskatchewan Regional Plan as an overarching plan which both the municipalities and the government agencies listed under s.618 and s.619 must abide, no real challenge has been put forward to question how an entity like the AUC is meeting the balance of shared outcomes for all in the region.

Case Law

In one leading case establishing the limit of the legal status of Crown exemptions, the Application of Hours of Work Act (British Columbia) to Employees of the Canadian Pacific Railway in Empress Hotel, Victoria (City) in 1948 concluded that generally, any activity undertaken by a federal railway company on its lands that cannot be characterized as an integral part of its railway operation in a functional or business sense, is likely subject to provincial planning legislation. This position has been supported in municipal interactions with all kinds of federal and provincial entities ever since. For example, it is not uncommon for rural municipalities to be involved in pipeline installations or electrical substations where the development has aspects that are outside the exemption. Laydown yards, work camps, and offices are uses not directly related to the conveyance of energy and therefore require municipal development permits.

Another wrinkle to the extension of the Crown immunity from Part 17 is the question of whether a lessee of provincial or federal land is shielded from local planning requirements. Simply stated yes, it is in the federal instance, unless the Crown has specifically stated in the lease agreement, that the lessee is not immune from local approvals. In the provincial scenario the lessee is not immune from Part 17 unless the provincial crown remains part of the development and extends its exemption power to cover the lessee.

The MD of Pincher Creek has development approval examples of this through leases at Beauvais Lake and Castle View Ridge (on the Oldman River Dam) where the lessee of Crown recreation land must obtain local approval for development permits. The Crown has done so for both planning and building code reasons citing their lack of capacity to run the processes. This is the opposite of the Crown lease land at Castle Mountain Resort where the Crown has full approval authority of all the ski slope development and the MD only has jurisdiction over the private land at the base of the mountain. Here the sensitivity of the surrounding environment warrants Alberta Environment and Parks oversight out of the Crowsnest Pass provincial office.

Local Impacts

The impact on municipalities is physical, permanent and tangible. Once established the Crown impositions remain locked into the landscape and for many citizens hard to forgive. The City of Brooks recently had a CPKC Rail building erected at the end of their main commercial core adjacent to the Town hall and its associated park. By the time CPKC had decided in its corporate offices that a building was to be added to their operation, the City's

Example of s.619 Paramountcy in Lethbridge County

In 2018, Acestes Ventures Ltd, applied to construct and operate a 22-megawatt solar power plant designated as the Coaldale Solar Project in Lethbridge County. Acestes was advised at the time by Lethbridge County that a re-designation of the land was required because the project did not comply with the County's land use bylaw, as the bylaw of the day prohibited a commercial solar facility on good quality irrigated agricultural lands.

County Council denied Acestes' land re-designation application, stating that it made the protection of high-quality agricultural lands a priority and that irrigated land is a limited resource that it strives to protect from non-agricultural developments.

Despite the County's rezoning refusal, the AUC approved the Acestes project in 2019. The AUC concluded that the project was in the public interest - seemingly putting more weight on the project's close proximity to a substation against the loss of irrigated agricultural land. After the rendering of the AUC decision, Lethbridge County approved a follow-up rezoning application in accordance with s.619(2) & (3) of the MGA.

Example of Planning Exemption Regulation in Vulcan County

The Regulation allows for "exclusive use areas" pursuant to Section 50 of the Condominium Property Act to be established without the requirement for subdivision approval. The intent of this provision was put to test on Travers Reservoir in Vulcan County where the proponent of a simple building condominium (which does not require subdivision approval) attempted to establish hundreds of exclusive use areas for campground sites. The building condo plan was registered but ultimately removed by the Land Titles Office after the fact. Land Titles in there response to cancellation of the registered plan wrote:

"...this letter [is issued] pursuant to s. 187 of the Land Titles Act to inform you that the plan fails to meet the requirements under s.76(1) of the Land Titles Act. Specifically, the plan is in substance a subdivision that requires the approval of a competent authority. Subdivision approval is required for the Plan..."

In this example the stop gap protection for the municipality was excercised by a government department.

Province of Alberta

MUNICIPAL GOVERNMENT ACT

PLANNING EXEMPTION REGULATION

Alberta Regulation 223/2000

With amendments up to and including Alberta Regulation 54/2024
Current as of March 27, 2024

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ability to cite concerns would legally be set aside and a period of adjustment would begin. Resultant discussion has brought about landscaping, fencing and murals to address the mistake. But imagine if CPKC had simply asked about siting the building prior to giving the orders to do so...the municipality would have suggested an alternative location which, given the land holdings of the company, could surely have been accommodated. Good land use planning is aways about weighing options and being sensitive to those that are adjacent.

An example of a process where collaboration resulted in a positive planning outcome occurred in the MD of Pincher Creek where the Alberta Energy Systems Operator (AESO) inquired with the municipality as to where the MD had major planning policies that would be contrary to electrical transmission line development. The MD identified an Area Structure Plan around the Oldman River Reservoir which planned for residential development on the north side of the dam and potential for wind power development on the south side. The AESO needed to be educated on why the MD would prefer transmission development away from residential development but once understood they were able to guide Altalink to not traverse the residential planning area with their infrastructure. Collaboration resulting in recognition of the decades of local planning efforts helped both parties move forward without being fully at odds with each other.

Other situations remain inconsistent and within a grey area of collaboration and varying outcomes. Irrigation districts have the power to create subdivisions for their irrigation works without local approval processes. Often the irrigation districts would proceed with a subdivision and create remnant parcels which would be sold to private landowners. The landowner would then seek to develop a house only to find they had no access or a parcel that failed to meet the minimum standards. Upon denial by the municipality, the complaint of the landowner to the irrigation district would be to either fix the issue or to reimburse them. Irrigation districts have become more open to collaboration where the subdivisions result may be questionable but not always.

Municipalities are encouraged to nurture their relationships with each entity that has exemption legislation. If you have a contact that works collaboratively with a municipality it is well worth the effort to have periodic meetings to discuss and update each other on your individual goings on. This is especially important where the timing of federal and provincial processing and procedures is not readily understood at the local level. Discussion with officials on timely responses in their procedures prove to keep the municipality's involvement relevant rather that being told that a timeline was missed and the response cannot be accepted.

Concluding Remarks

Local land use planning by legal order must understand its place in federal and provincial power structures. Canada is a young country and is continuing to build its infrastructure and federal provincial jurisdiction allows for decision making for the whole to be undertaken on behalf of democratic society. Laux, Frederick A. and Stewart-Palmer, Gwendolyn

Planning Law and Practice in Alberta, Juriliber Limited 2019, concludes their discussion on this topic as follows:

Finally, the proposition can be advanced that, in this day and age, the doctrine of Crown immunity is an anachronism. At a time when equality before the law is entrenched in the Canadian Charter of Rights and Freedoms, R.S.C. 1985, App. II, No. 44, it seems paradoxical that any entity, government or otherwise, should be regarded as being above the law. The doctrine of Crown immunity effects a derogation from the rule of law. Thus, simply stated, every development project ought to meet the requirements of the planning regime, whether public, quasi-public or private. It is hardly an answer to say that to subject the government to its own rules is to unduly impair the government in its operations and, therefore, none of the rules should apply. Indeed, as mentioned previously, as a matter of practice government agencies frequently voluntarily abide by the planning rules. if it can be done voluntarily, should it not be legally required to ensure that all are equal under the law?

Practically, municipalities desire to be included in decisions where subdivision and development processes are overseen by higher levels of government because of the local impacts that these decisions can have regardless of the decision making body. Being heard can provide local insight not attainable from the head offices of governing bodies and their proponents. Nevertheless, it is important that the myriad of exemptions and exclusions to the local planning process are understood by municipalities.

For more information on this topic contact admin@orrsc.com or visit our website at orrsc.com.

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