Wetlands and Environmental Reserves

Nature in Development: Environmental Reserves and Other Planning Tools for Environmental Preservation

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Environmental Considerations in Land Development

Prepared By:
Jason M. Unger
Environmental Law Centre
Edmonton, Alberta

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Social, environmental, and economic costs and benefits are realized when we develop a landscape. This reality and a broader recognition of environmental costs have led to more and more tools being used to minimize or mitigate the impacts of development. Specifically, preservation of natural areas and wetlands has become a more integrated part of our built landscape. In many respects preserving these areas makes good environmental and economic sense, by minimizing infrastructure costs and enhancing aesthetics. The preservation tools themselves are likely to increase transaction costs of development, but with Albertans displaying an interest in land and water preservation these increased costs are likely to continue to be part of the development process. This paper serves to outline the tools and approaches that can be taken in relation to preserving the natural environment and the implications these tools have for developing a built landscape.

The focus of this article is on municipal powers during subdivision to dedicate lands as environmental reserves, municipal and provincial wetland policies, and other tools that may be used (today and in the future). The article concludes with matters to be considered when determining which preservation tools may be most appropriate in a given circumstance.

I. ENVIRONMENTAL RESERVE

Environmental reserve (ER) is land that is transferred from the landowner to the municipality (or the Crown) through the subdivision process. [1] The transfer of environmental reserve is part of the municipality's planning power and does not give rise to compensation.[2] The area of environmental reserve may be significant and is in addition to other lands that may be transferred for municipal reserve and public utilities. Land taken for public utilities may not exceed 30% of the area of the parcel.[3] Land required for municipal reserve (MR) may not exceed 10% of the parcel.[4]

What Land Can be Taken as ER

The subdivision authority has broad discretion under section 664 of the Municipal Government Act (MGA) to require ER where the land 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

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[1] See Division 8, Part 17 of the *Municipal Government Act*, R.S.A. 2000, c. M-26.
[2] *Ibid*. at s. 661. It should be noted that the question of whether an ER would in fact be taken is relevant to questions of assessed value in the event of an expropriation. Specifically, the Court in *Thompson v. Alberta (Minister of Environment)*, 2006 ABQB 510, observed that the potential of an ER designation to a wetland that sat on lands that were part of an expropriation proceeding, must lead to a level of discounting of the valuation. http://www.albertacourts.ab.ca/jdb%5C2003-%5Cqb%5Ccivil%5C2006%5C2006abqb0510.cor1.pdf
[3] *Ibid*. at s. 662(2).
[4] Ibid.at s. 666(2).

(c) a strip of land, not less than 6 metres in width, abutting the bed and shore of any lake, river, stream or other body of water for the purpose of

(i) preventing pollution, or

(ii) providing public access to and beside the bed and shore.

Most notable are restrictions that can be placed on floodplains and subsection (c), which sets a minimum width of an ER that may be dedicated for pollution prevention and public access, but not a maximum. The maximum width is likely limited to the reasonable interpretation of what is needed for "preventing pollution" or "providing public access". If one looks to scientific literature on this point it is likely that a 30 metre buffer would be easily justified, although it may vary depending on the nature of the soil and slope in an area.[5]

Public access may be limited to ER lands. In practice other rights may be relied upon to gain public access to water bodies but this does not equate to access to the entire area of the municipally owned ER.[6]

It is also worthwhile noting that nothing in these ER dedications include provision of wildlife habitat. However, as noted by legal scholar Fred Laux, Q.C., in *Planning Law and Practice in Alberta*,[7]

> given that a subdivision authority can in most cases articulate numerous reasons why a subdivision application as presented ought to be rejected on legitimate planning grounds, subdivision applicants are often at the mercy of the decision-maker in practice. Thus, such reserves are frequently taken for purposes that go well beyond the objectives of s.664.

Use and Restrictions on Use

The use of municipal ER lands is statutorily limited to being used as a public park or must otherwise be left in its "natural state".[8] Public access may be permitted or limited, the latter of is more likely where the nature of the lands has a level of increased liability for the municipality. What constitutes the "natural state" is not defined in the MGA nor has it attracted judicial scrutiny. It is reasonable to conclude that the municipal use of the lands is significantly curtailed by the MGA, insofar as any significant alteration of the natural flora and fauna or a use that alters the

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[5] For example see U.S. Environmental Protection Agency, *Riparian Buffer Width, Vegetative Cover, and Nitrogen Removal Effectiveness: A Review of Current Science and Regulations*, (Cincinnati: U.S. EPA, 2005), online: U.S. EPA <http://www.epa.gov/nrmrl/pubs/600R05118/600R05118.pdf>.

[6] Public access rights to water bodies may arise by accessing the "bed and shore" of a permanent water body under the Alberta *Public Lands Act* or through historic common law rights to access navigable waters.

[7] Frederick A. Laux, Q.C. (3rd Ed.) (Looseleaf) (Edmonton: Juriliber Limited, 2010) at 14-9.

[8] *Supra* note 1 at s. 671.

natural landscape in the area at the time of the ER dedication may be open to challenge.

The Environmental Reserve Easement Alternative to ER

An alternative to transferring title to environmentally sensitive lands identified by the subdivision authority is the environmental reserve easement (ERE).[9] This tool is a voluntary alternative to an ER and is not as narrowly construed as the environmental reserve, insofar as its stated purpose is "for the protection and enhancement of the environment".[10] An ERE is registered on the land (in favour of the municipality) and runs with the land.[11]

The ERE must also require that the easement lands "remain in a natural state" as if it were owned by the municipality.[12] A violation of the easement agreement may be enforced by the municipality and the easement does not lapse due to non-enforcement or change of land use.[13]

Subdivisions That Don't Require the Granting of ER

An environmental reserve may not be required:[14]

1. When it is the first parcel subdivided from a quarter section;
2. Where the land is subdivided into lots of greater than 16 hectares and is solely for agricultural use;
3. For land 0.8 hectares or less; and
4. Where reserve land, an ERE or money was provided in relation to the land previously under Part 17 of the Municipal Government Act or predecessor legislation.

The Interplay of ER With Municipal Reserve and Land for Public Ut ilities

As mentioned earlier, the amount of municipal reserve and public utilities is limited to 30% of a parcel. This is exclusive of ER that may be required by the subdivision authority. Further, the subdivision authority has significant discretion in discerning how much municipal reserve lands or public utility lands must be granted (up to the maximum).[15]

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[9] *Ibid*. at ss. 664(2)-(9).
[10] *Ibid*. at s. 664(2).
[11] *Ibid*. at ss. 664(3)-(9).
[12] *Ibid*. at 664(3)(b).
[13] *Ibid*. at ss. 664(3)-(4).
[14] *Ibid*. at s. 663
[15] See *Canada Lands Company CLC Limited v. Edmonton (City of),* 2005 ABCA 218, online: Alberta Courts http://www.albertacourts.ab.ca/jdb%5C2003-%5Cca%5Ccivil%5C2005%5C2005abca0218.pdf , where the court found that the subdivision authority has broad discretion to determine the amount of land that was "sufficient" for specified purposes. In this case the challenge related to a 5.7 metre setback for a road way which was challenged by the developer.