BRIEFING NOTE:

HOW LAND USE ISSUES FACTOR INTO AUC REVIEWS OF RENEWABLE ENERGY POWER PLANTS

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I. Introduction[1]

In August 2023, the Government of Alberta (GoA) put temporary brakes on further expansion of the province's booming renewable energy power industry. This boom had been good news not only for the renewables industry, but for municipal tax bases, and for citizens and groups interested in decarbonizing the Alberta grid and enabling the grid to meet the likely future growth in electricity demand. Decarbonization and grid electrification are themselves outgrowths of efforts to reduce greenhouse gas emissions, in the face of the increasingly common and severe impacts of climate change.[2]

The GoA carried out this "pause" or moratorium by issuing a new regulation directing the Alberta Utilities Commission to hold off granting any approvals for renewable electric power plants over one megawatt (and hydro power developments) until February 29, 2024.[3] According to the GoA, this pause was justified because the "rapid growth" in renewable electricity production in Alberta had "created issues relating to land use, electricity system reliability and concerns from rural municipalities and landowners."[4] To better address these issues and concerns, the GoA directed the Commission to conduct an inquiry on five topics and to issue a report with "findings" or "observations or considerations for options," as the Commission "deems appropriate," with respect to these five topics.[5]

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[1] Thanks to Prof. Nigel Bankes for his review and comments.

[2] See generally, e.g. Pembina Institute, *Factsheet – Investment Impact of Alberta's Renewable Energy Moratorium*, online: https://www.pembina.org/reports/2023-08-24-albertas-renewable-energy-moratorium-factsheet.pdf; and Pembina Institute, *Energy policy leadership in Alberta* (March 2019), online: https://www.pembina.org/pub/energy-policy-leadership-alberta.

[3] See Order in Council 108/2023 (Aug. 3, 2023), enacting the *Generation Approvals Pause Regulation*, under the *Alberta Utilities Commission Act* (AUCA), SA 2007, c. A-37.2. Section 2 of that regulation provides for a pause in Commission approvals "during the period in which" the regulation is "in force". Under section 4, the regulation expires on February 29, 2024.

[4] GoA, *Backgrounder: AUC pause and inquiry* (Aug. 3, 2023), online: https://www.alberta.ca/external/news/2023-08-02-auc-pause-backgrounder.pdf; see also GoA, *News Release – Creating certainty for renewable projects* (Aug. 3, 2023), online: https://www.alberta.ca/release.cfm?xID=887605547987E-EABF-5E23-DFF2C9F72DB845E6.

[5] Order in Council 171/2023 (Aug. 2, 2023), Schedule – Terms of Reference, ss 1 and 3(a). In more general terms, the GoA instructed the Commission to "review policies and procedures for

The timing and critiques of the moratorium

Numerous commentators have criticized the moratorium on several grounds, including fairness. The GoA has not imposed similar moratoria on other industries in the face of similar or more deep-seated concerns about those industries' impacts.[6] Another criticism is that the moratorium will place a significant chill on renewable power investors and developers' willingness to participate in Alberta's energy market.[7]

This chill may be exacerbated by uncertainty about how long the moratorium will last. Section 3(b) of the inquiry's Terms of Reference directs the Commission to submit its report to the Minister of Affordability and Utilities by March 29, 2024. Presumably, the Minister (and provincial cabinet) will then need substantial more time to absorb the report's findings, decide which of the report's recommendations to adopt, and develop and implement them and any other policies that government deems to be necessary. This process will presumably take months, which raises the question whether the GoA expects—but is not being transparent about its intent—to extend the moratorium past the above-noted official end date of February 29, 2024.

Even if the GoA is really committed to ending the moratorium on February 29, 2024, the government's motive for adopting the moratorium may still leave a lingering chill during the remaining months of policymaking.[8]

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the development of renewable electricity generation"[5] and to "identify criteria for a reasonable, robust regulatory framework that is efficient and predictable while being protective of the long-term public interest of all Albertans." *Backgrounder*, *supra* note 3.

[6] See, e.g. Rob Breakenridge, "Alberta's pause on renewables makes no sense," Calgary Herald (Oct. 2, 2023), p. A2; Nigel Bankes and Martin Olszynski, "An Incredibly Ill-Advised and Unnecessary Decision," (9 August 2023), online: ABlawg, http://ablawg.ca/wp-content/uploads/2023/08/Blog_NB_MO_Ill-Advised_Decision.pdf; Don Braid, "With green energy halt, UCP declares a moratorium on Alberta's reputation," National Post (Aug. 4, 2023), online: https://nationalpost.com/opinion/columnists/braid-with-green-energy-halt-ucp-declares-a-moratorium-on-albertas-reputation/wcm/ed569a84-b6c3-4fc4-83bd-68d4ef902a69#:~:text=When%20did%20an%20Alberta%20conservative,wind%20turbines%20and%20solar%20panels.

[7] See, e.g. Jason Wang and Will Noel, *Factsheet – Investment Impact of Alberta's Renewable Energy Moratorium* (Pembina Institute, Aug. 24, 2023), online: https://www.pembina.org/reports/2023-08-24-albertas-renewable-energy-moratorium-factsheet.pdf.

[8] Commentators have questioned the GoA's true motives for imposing the moratorium. See, e.g. Drew Anderson, "Danielle Smith's government made false statements about reasons for Alberta

The Commission's Inquiry

As noted above, the GoA directed the Commission to consider five topics in its inquiry. As set out in the inquiry's Terms of Reference, three of the five topics are:

> Considerations on development of power plants on specific types or classes of agricultural or environmental land
>
> Considerations of the impact of power plant development on Alberta's pristine viewscapes
>
> Considerations for development of power plants on lands held by the Crown in Right of Alberta

For brevity, this paper refers to these three topics collectively as the "land use issues."

The other two topics listed in the inquiry's Terms of Reference are:

> Considerations of implementing mandatory reclamation security requirements for power plants
>
> Considerations of the impact the increasing growth of renewables has to both generation supply mix and electricity system reliability

In response to the Terms of Reference, the Commission decided to set up an inquiry proceeding with two modules. "Module A" will address the three land use issues and the reclamation security issue noted above. "Module B" will address the fifth topic, relating to the effect of renewables growth on the grid's reliability and supply mix.[9]

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renewables pause: documents," The Narwhal (Nov. 9, 2023), online: https://thenarwhal.ca/alberta-renewables-pause-documents; Emma Graney, "Alberta renewable energy pause leaves companies bewildered, angry, according to hundreds of letters sent to utility agency," The Globe and Mail (Sept. 7, 2023), online: https://www.theglobeandmail.com/business/article-alberta-renewable-energy-pause-leaves-companies-bewildered-angry/; Bankes and Olszynski*, supra* note 5.

[9] AUC Bulletin 2023-06 (Sept. 11, 2023).

The paper's focus and methodology

This paper provides an overview of the Commission's *current* approach to addressing the three land use issues in the inquiry.[10] Understanding the status quo is a logical first step in considering whether new policies, legislation or other tools are needed to improve Alberta's management of these land use issues.

The paper's assessment of the Commission's current approach is based primarily on a review of many approval decisions issued by the Commission, from the numerous renewable energy power plant approval proceedings the Commission has conducted over the last several years. (The decisions chosen were drawn from lists of decisions obtained from various records searches using the Commission's online *eFiling* system.[11])

The Commission's current approach is based on (or, in other words, stems from) the underlying legislative framework for power plant development. To understand the Commission's current approach, it is useful to also understand that underlying legislative framework. Therefore, this paper also covers the underlying legislative framework.

This paper is mostly descriptive. It does not opine on whether the current approach is satisfactory or on how to fix any perceived flaws.

Part I below addresses the Commission's overall "public interest" determinations for power plant applications under the *Hydro and Electric Energy Act* (HEEA), RSA 2000, c. H-16. Part II summarizes municipal land use planning and development permitting. Part III summarizes regional planning under the *Alberta Land Stewardship Act* (ALSA), SA 2009, c. A-26.8. And Part IV summarizes the Commission's application requirements and recent Commission decisions on the land use planning issues.

II. The basic legal framework for the Commission's approval decisions for power plants

The Commission's authority with respect to power plants is rooted in section 11 of the HEEA, which prohibits the construction and operation of a power plant except pursuant

[10] This paper is a companion to the accompanying Ecojustice Briefing Note, *Re: Considerations for implementing mandatory reclamation security requirements on renewable energy power plants* (Nov. 17, 2023).

[11] Online: https://www2.auc.ab.ca/_layouts/15/auc.efiling.portal/login.aspx.

to a Commission order approving the plant's construction and operation.[12] The Commission has broad discretion to include terms and conditions in power plant approvals, including discretion to change a proposed plant's designs or plans and to change its location.[13]

A. The public interest test

The Commission's power plant approval decisions are based on a broad "public interest" test.[14] The Commission has stated repeatedly that, in its view, this public interest test will be "largely met" if an application "complies with existing regulatory standards, and the project's public benefits outweigh its negative impacts."[15]

The Commission has also explained that, when the costs and benefits of a project will not be "evenly allocated across various stakeholder groups," the Commission must "carefully scrutinize" the costs to see if they have been minimized or mitigated to an "acceptable degree"; when costs cannot be completely mitigated, the Commission must decide whether the benefits outweigh the costs.[16]

Factors included in the "public interest" calculation

The public interest is a paramount principle because, by its plain meaning, the public interest implicitly subsumes all other legislative principles and provides for a balancing of those principles when they are in conflict. The public interest also subsumes all

[12] Under section 1(1)(k) of HEEA, "power plant" means the "facilities for the generation and gathering of electric energy from any source." The approval requirement in section 11 of the HEEA does not apply to a "small power plant" (less than 1 MW) connected to a transmission line or electric distribution system, if the plant has no environmental impacts, does not directly and adversely affect anyone, and meets the noise control requirements in Commission Rule 012. *Hydro and Electric Energy Regulation*, Alta Reg 409/1983, s 18.1.

[13] HEEA, s 19.

[14] AUCA, s 17(1). See, e.g. *Capital Power Corporation v Alberta Utilities Commission*, 2018 ABCA 437 at para 52 (in a decision denying a leave to appeal application, noting that the Commission's "first and foremost mandate is to make decisions which are in the public interest").

[15] E.g. *Creekside Solar,* AUC 27652 at para 12; see also *Sollair Solar*, AUC 27582 at para 108 (adding that "negative impacts" include "those [impacts] experienced by more discrete members of the public"). Appendix A attached has full citations to all Commission decisions referenced in this paper.

[16] *Buffalo Plains Wind Farm*, AUC Decision 26214 at paras 351-352.

relevant factors. The scope of relevant factors is itself broad, though not unlimited. As the Alberta Court of Appeal has explained,

> [g]iven the amorphous nature of the standard, the public interest will vary with the circumstances and the context in which it arises.... In addition, the shape and contour of the public interest standard is necessarily dependent on the legislative framework in effect.[17]

The relevant "circumstances and context" arguably include the Government of Alberta's legislative policies with respect to climate change and environmental protection in general. The latter are referenced in the broad purpose statements of the *Environmental Protection and Enhancement Act* (EPEA), RSA 2000, c. E-12.[18]

These legislative policies also include the Government's "deep and well established commitment to protect Alberta's environment for future generations through proactive and responsible stewardship of the environment," and the Government's "recogni[tion] that the management of emissions of" greenhouse gases "will serve to protect the Alberta environment." These policies are expressed in the preamble of the province's *Emissions Management and Climate Resilience Act* (EMCRA), SA 2002, c. E-7.8.

Section 3(1) of that Act includes a target to reduce GHG emissions, by December 31, 2020, to 50% below 1990 levels (relative to gross domestic product). This is a *standalone* target in the sense that, by its plain terms, it is not contingent on or linked to the implementation of specific emissions reductions programs. The Commission itself seems to have recognized that this target is relevant to the Commission's planning, beyond the target's connection to the renewable energy program.[19]

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[17] *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215 at para 134. *Ibid*. at para 141 (noting that the public interest is "redefined to comport with the context in which the interest arises"). See also, e.g. *AltaLink/SNC*, AUC 2014 at para 58 (noting that the public interest is a "multi-faceted concept that will necessarily mean different things in different contexts").

[18] Section 2 of that Act starts by stating the Act's aim to "support and promote the protection, enhancement and wise use of the environment while recognizing" several factors listed in that section.

[19] See AUC, *Alberta Electric Distribution System-Connected Generation Inquiry – Final Report* (Dec. 29, 2017) at pp 40, 49-55, 84, 100, and 118.

The HEEA and at least two, and possibly three, other electricity-related statutes provide three more legislative guides to the Commission's choice of relevant "public interest" factors.

- First, the AUCA makes it clear that the Commission's consideration of the overall public interest must "hav[e] regard to" the plant's "social and economic effects" and its "effects … on the environment."[20]

- Second, because the Commission's approval authority stems from section 11 of the HEEA, the Commission's approval decisions are implicitly and necessarily guided by that Act's purposes.[21] Under section 2, the HEEA's purposes, with respect to electric energy generation in Alberta, include to provide for the "economic, orderly and efficient development and operation, in the public interest," to "secure the observance of safe and efficient practices in the public interest," and to "assist the Government in controlling pollution and ensuring environment conservation".

  Several other electricity-related statutes are also part of an overall legislative scheme for Alberta's electricity system. The Commission's power plant approval decisions under the HEEA arguably must be guided by that scheme's collective purposes, rather than just by the HEEA's purposes.[22] These other purposes include the aim of the *Renewable Electricity Act* (REA), S.A. 2016, c. R-16.5, to "promote" the growth of renewable energy in Alberta, and that Act's "target" of achieving at least 30% of Alberta's annual electric energy production from renewable energy sources.[23]

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[20] AUCA, s17(1).

[21] *Pattern Wind*, AUC 22736 at para 8. See also, e.g. *Canada v Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 at para 29 (majority opinion noting that "all statutes … must be interpreted by conducting a 'textual, contextual and *purposive* analysis to find a meaning that is harmonious with the Act as a whole'" (emphasis added; citation omitted)).

[22] E.g. *Shaw v Alberta (Utilities Commission)*, 2012 ABCA 378 at para 32 (noting that the electricity statutes must be read together because statutes "dealing with the same subject matter should be interpreted in a manner that ensures harmony, coherence and consistency among them"); *ibid* at 10 (¶ 38) (noting that, in a "complex legislative scheme such as this one, it is necessary to have regard to the entire scheme in order to ascertain legislative intent.").

[23] REA, Preamble and s 2(1). *Buffalo Trail Wind*, AUC 27240 at para 26 (citing section 2 of the REA and noting that the public interest in the renewable nature of a power plant is "consistent

In fact, the HEEA makes it clear that the Commission's public interest considerations must also be guided by the purposes of the *Electric Utilities Act* (EUA), SA 2003, c. E-5.1.[24] Those purposes are essentially to provide for an efficient and competitive electricity market.[25]

- Third, the Commission's power plant approval decisions must be "in accordance with" any applicable regional plan adopted under ALSA.[26] (Part IV.C below discusses how the Commission has addressed the South Saskatchewan Regional Plan in its renewable power plant decisions.)

Viewed collectively, these three items define factors that the Commission must include in its overall public interest assessment, for power plant approval decisions. However, there are also several factors that the Commission is expressly *precluded* from considering. For the parts of power plants that are "generating units," the Commission shall ***not*** consider:

- Whether the unit is an "economic source" of electric energy in Alberta

- Whether there is a "need" for the produced electric energy in terms of meeting energy demand within or outside of Alberta

- Whether the unit is covered by a "renewable energy support agreement" (RESA) under the REA.[27]

with the broader legislative scheme in Alberta that promotes the development of renewable electricity generation").

[24] HEEA, s 3(1)(d).

[25] EUA, s 5.

[26] AUCA, s 8.1 (cross-referencing an "ALSA regional plan") and *Interpretation Act*, RSA 2000, c. I-8, s 28(1)(b.3) (defining an "ALSA regional plan" as a regional plan adopted under ALSA). The Commission may order a person to comply with an ALSA regional plan and the Commission may make rules regarding compliance with and enforcement of an ALSA regional plan. AUCA, ss 23(1)(c) and 76(1)(i).

[27] HEEA, ss 3(1)(a), (c), and (c.1). HEEA section 3(1)(a) refers to "generating units" as defined in the EUA. Under section 1(u) of the EUA, a "generating unit" is essentially the part of a power plant the produces electric energy and ancillary services.

The first two of these three exclusions help ensure that energy market risks fall on electricity producers. The third exclusion ensures that there is no automatic pass for a project that has a RESA.

B. Other applicable requirements (excluding municipal requirements)

The Commission's broad, over-arching public interest focus, in its power plant approval decisions, might suggest that those decisions should be the final word on whether power plants can be developed. However, this is not really the case, because the Commission's issuance of an approval "does not relieve" a power plant owner from the need to obtain any other authorization the owner is "required to obtain under any other Act or regulation under any other Act".[28]

In other words, if a power plant is prohibited under another Act or regulation, a Commission approval does not override that prohibition.

Other relevant Acts requiring approvals may include EPEA, and the *Water Act*, RSA 2000, c. W-3, *Historical Resources Act*, RSA 2000, c. H-9, and *Public Lands Act*, RSA 2000, c. P-40.

In addition, municipal approvals are also needed under the *Municipal Government Act* (MGA), RSA 2000, c. M-26. However, as discussed in part III.B below, these MGA requirements do not enable municipalities to veto power plants approved by the Commission.

III. Municipal requirements under the MGA

Under the Canadian Constitution, municipalities are created by provincial legislatures and therefore can exercise only the powers granted to them by those legislatures.[29] The MGA is a lengthy, complex Act that provides for a multi-layered set of tools for Alberta municipalities to regulate land uses within their borders. Chief among these tools are land use plans and land use bylaws, and development permitting. Part III.A below

[28] HEEA, s 40.

[29] *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s 92(8). See also, e.g. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),*) 2001 SCC 40 at para 49; and Dr. Judy Stewart, *Do Recent Amendments to Alberta's Municipal Government Act Enable Management of Surface Water Resources and Air Quality* – CIRL Occasional Paper #62 (Dec. 2017) at 5-6 [Stewart, *Recent Amendments]*.

summarizes each of these tools; part III.B then discuses how they relate to the Commission's power plant approval decisions under the HEEA.[30]

A. Municipal planning and permitting

Division 4 of Part 17 of the MGA provides for municipalities' adoption of different kinds of land use plans, known collectively as "statutory plans". Chief among these are "municipal development plans" (MDP), which are required in every municipality.[31] Other "statutory plans" are inter-municipal development plans, area structure plans, and area redevelopment plans.[32]

Under the Act, an MDP generally must address "future land use" and the "manner of and the proposals for future development" in the municipality. An MDP also must "contain policies respecting the protection of agricultural operations".[33]

The MGA also requires municipalities to adopt land use bylaws (LUBs). Under the Act, LUBs "may prohibit or regulate and control the use and development of land and buildings … including … by … providing for the protection of agricultural land…."[34]

LUBs must designate land use "districts." For each district, a LUB must list categories of land uses that are "permitted" in the district (with or without prescribed conditions) and that *may* be permitted "at the discretion" of the municipality's development authority (again, with or without conditions).[35] Some LUBs also list categories of land uses that are "prohibited" in a district. (For brevity, this paper refers to these LUB functions as "zoning".)

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[30] For more detailed discussions of municipalities' authorities under the MGA, see, e.g. Dr. Judy Stewart, *A Guide to the Basics and What's New in Alberta's Municipal Legislation for Environmental Management* – CIRL Occasional Paper #80 (March 31, 2023); and Environmental Law Centre, *Agricultural Lands – Law and Policy in Alberta* (Nov. 2019) at 48-60.

[31] MGA, s 632(1).

[32] *Ibid* ss 631, and 633-635. The Act also provides a hierarchy of authority in case of any inconsistency among these statutory plans. *Ibid* s 638.

[33] *Ibid* s 632(3)(a)(i) and (ii), and (f).

[34] *Ibid* s 640(1.1)(d).

[35] *Ibid* ss 640(2)(b) and 642.

Finally, the MGA prohibits "developments" without a development permit issued by a municipal development authority (except as provided in a LUB).[36] Under the Act, LUBs must provide for a "method" and process for making decisions on development permits, including setting out permit conditions that must or may be included, and the development authority's scope of discretion in deciding whether to grant a permit application.[37]

Under the MGA, development permit decisions (including the permitting authority's failure to decide within a prescribed time) can generally be appealed to a municipal "subdivision development and appeal board". However, in certain specific circumstances, appeals must be brought before Alberta's Land and Property Rights Tribunal. One of these circumstances is where a development has received an approval from the Alberta Utilities Commission.[38] In either case, the appellate board's decision in an appeal "must comply with any applicable statutory plans" and, subject to a limited exception, with the land use bylaw.[39]

As noted above, MDPs must include policies for protecting agricultural operations and LUBs may provide for agricultural land protection. (The MGA also gives municipalities tools to incentivize developments to avoid locating on agricultural lands.) As noted by the Environmental Law Centre, the MGA confers "extensive planning and development powers" on municipalities and this gives them "significant control over urban encroachment onto agricultural lands."[40] As discussed in part III.B below, municipalities also have control over power plants' use of agricultural lands, but that control is subject to the Commission's approval authority.

B. The hierarchy between municipal requirements and Commission approvals

As noted in part II.B above, section 40 of the HEEA makes it clear that the Commission's issuance of an approval "does not relieve" a power plant owner from the

[36] *Ibid* s 683. The MGA defines "development" broadly, including "buildings" and changes in the use of land or of a building. "Building" in turn is "anything constructed or placed on, in, over or under land," other than a road or highway. *Ibid* ss 616(a.1) and (b).

[37] *Ibid* ss 640(2)(c) – (6).

[38] *Ibid* s 685(2.1)(a)(i)(C).

[39] *Ibid* s 687(3)(a.2) and (a.3). The exception is where a development "conforms" with the land's designated use under the LUB but does not meet another LUB requirement and would essentially have minimal impacts on its neighbours. *Ibid s* 687(3)(d).

[40] ELC, *Agricultural Lands – Law and Policy in Alberta*, *supra* note 30 at 105.

need to obtain any other authorization the owner is "required to obtain under any other Act or regulation under any other Act". However, three other sections of the MGA effectively alter the municipal/provincial regulatory dynamic for power plants approved by the Commission under the HEEA, by allowing Commission decisions to trump municipal land use decisions to the extent of any inconsistency.

Section 619 – Commission decisions prevail

Section 619 is arguably the most significant of these three MGA sections. Under section 619(1), an approval issued by any of several specified provincial tribunals, including the Commission, "prevails" over any "statutory plan, land use bylaw, subdivision decision or development decision … or any other authorization" under the Planning and Development provisions (in Part 17) of the MGA. Similarly, under section 619(2), if the Commission has already approved a power plant, a municipality "must" also approve that plant (via a development permit or statutory plan amendment) if the proposed plant is "consistent" with the Commission approval and "to the extent that" the proposed plant "complies" with the Commission approval.[41]

These provisions mean that a Commission approval, and approval conditions, "take precedence" over municipal requirements that conflict with or would frustrate the Commission's approval. [42] In more practical terms, this means that a municipality cannot in effect veto or block a power plant approved by the Commission. [43]

The Alberta Court of Appeal recently noted that the purpose of section 619 is to "'reduce regulatory burdens and increase administrative efficiency and consistency … by granting paramountcy to decisions of certain provincial bodies, to ensure projects are not blocked at the municipal level for issues already considered and approved at the provincial level'".[44]

[41] In *Canmore (Town of) v Three Sisters Mountain Village Properties Ltd* [*Canmore v Three Sisters*], the Alberta Court of Appeal noted that the term "consistency" in section 619(2) should be read "broadly and purposively"; it is "not intended to be an exacting standard, but rather approached wholistically and with regard to what was considered and approved at the provincial level to ensure the legislation's purpose is achieved." 2023 ABCA 278 at para 88.

[42] *Creekside Solar Inc.*, AUC 27652 at paras 130-133.

[43] *Canmore v Three Sisters*, 2023 ABCA 278 at para 89.

[44] *Ibid* at para 74 (citing *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192 at para 22).

Under the "paramountcy" principle in section 619, municipalities are not only unable to block a Commission-approved power plant, they also apparently cannot impose *more stringent* conditions than those imposed in a Commission approval. This outcome is implicit in section 619(4) of the MGA, which states that municipal "hearings" on development applications "may not" even "address matters already decided by" the Commission "except as necessary to determine whether an amendment to a statutory plan or land use bylaw is required."[45]

However, this rule may be hard to apply if the Commission has not clearly stated which matters it has and has not addressed and the Commission has not adopted an approval condition relating to the matter.

In addition, it is uncertain whether this same rule applies when the more stringent municipal conditions are in a permit the municipality issued *before* the Commission issued a power plant approval. (Section 619 is silent with respect to the chronological order of Commission and municipal decision making with respect to a given power plant.[46])

As noted above, the Land and Property Rights Tribunal (LPRT) (formerly, the Municipal Government Board) can hear appeals of municipal decisions that are alleged to violate section 619.[47] Unlike municipal permitting staff, the LPRT can consider matters that were addressed by the Commission, but the LPRT's decision must be "consistent" with the Commission's approval.[48]

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[45] But see *Fitzpatrick v Starland County*, 2021 ABLPRT 789 at paras 48-51 (Alberta Land and Property Rights Tribunal decision concluding that a Commission decision requiring a reclamation plan doesn't preclude the municipality from adopting its own reclamation requirement in a development permit).

[46] *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192 at paras 25-30.

[47] MGA, ss 619(5-8) and 685(1)-(2.1).

[48] *Canmore v Three Sisters*, 2023 ABCA 278 at para 37. In one such appeal, the LPRT considered a municipality's denial of development permits for a wind farm approved by the Commission. The LPRT concluded that municipal setbacks to neighbouring properties were inconsistent with the Commission's approval, so the development permits should be issued despite the wind farm's infringement of those setbacks. However, the LPRT accepted the municipality's proposed conditions relating to electrical lines, road use, safety codes, runoff, garbage, and debris control, weed mitigation, and decommissioning and reclamation. *Buffalo Atlee I Wind LP v Special Areas No. 2*, 2021 ABLPRT 764.

The Commission may be able to avoid a paramountcy showdown under section 619 by:

- Incorporating a municipal condition in the Commission's approval (or including an approval condition requiring a power plant owner to comply with those municipal conditions)
- Stating in its approval decision that it is deferring to a municipality to decide what if any conditions are needed on a given topic, and to enforce those conditions through a development permit[49]
- Stating in its decision that the municipality is welcome to adopt more stringent conditions on the same subject as those adopted by the Commission.[50]

[49] In one proceeding, a County asked the Commission to either impose numerous conditions requested by the County or make it clear that the specific matters addressed in those conditions "is deferred to be addressed in any County approval." *Creekside Solar*, AUC 27652 at para 129. The Commission's decision appears to provide the requested list of matters deferred to the County. *Ibid* at paras 134-140. According to the Commission, when the Commission believes that a municipality can "sufficiently address issues within its planning authority," the Commission "may defer those issues to the municipality". *Ibid* at para 133.

[50] The Alberta Court of Appeals' recent decision in *Canmore v Three Sisters* may preclude this last option. In that case, the court held that a Natural Resources Conservation Board approval of a recreation and tourism development precluded the municipality from denying the developer's requests for area structure plans allowing the same development, even though the provincial board had acknowledged that its approval was "'not finally determinative'" of whether the project could proceed, because the town could withhold its approval for "'more detailed plans for development….'" 2023 ABCA 278 at paras 11-12, 69, 74-76, and 89 (citation to NRCB decision omitted).

Section 620 – Commission conditions prevail over municipal conditions

Under section 620 of the MGA, a condition of various types of authorizations granted under provincial legislation, including Commission approvals under the HEEA, "prevails over any condition of a development permit that conflicts with it".[51] This section seems to echo the paramountcy principle in section 619. However, section 620 by itself does not appear to preclude a municipality from denying a development permit altogether, for a power plant that has been approved by the Commission.[52] Section 620 also does not appear to preclude a municipality from issuing a development permit with a more stringent condition than that in a Commission approval.[53]

Section 13 – Municipal bylaw consistency with provincial and federal laws

Under section 13 of the MGA, municipal bylaws must be "consistent" with provincial (and federal) "enactments". (Section 1(1)(j) of the MGA defines "enactments" as provincial "Acts"—that is, statutes—and regulations.) Section 13 is essentially a legislative statement of the constitutional limit on municipal authority.[54] In this context, there is a two-part test for consistency: (1) can a person comply with the bylaw and the provincial or federal law at the same time; and (2) does the bylaw frustrate the purpose of the provincial or federal law?[55]

Under the first part of this test, a bylaw requirement that is *more stringent* than a provincial (or federal) legislative requirement can still be consistent with the latter if the developer can meet both requirements at the same time. For example, if a bylaw has a setback that is longer than a setback in provincial legislation, the bylaw setback is consistent with the provincial setback because the development will meet the provincial setback if it meets the bylaw setback. Presumably, the more stringent bylaw setback would also pass the second part of the consistency test, because the bylaw setback would not frustrate the purpose of

[51] See, e.g. *Capstone Corp.,* AUC 25100 at para 35 (applying MGA section 620 to Commission approval decisions).

[52] *Northland Material Handling Inc. v Parkland (County)*, 2012 ABQB 407 at para 57 (section 620 does not preclude a municipal council from denying a permit to extend a sand extraction and dry land fill operation even though that operation was permitted by Alberta Environment).

[53] *Ibid* at paras 47-49 and 57-58.

[54] Stewart, *Recent Amendments*, *supra* note 28 at 6-7.

[55] E.g. *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 69-73; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 40 at para 38.

the provincial setback in protecting the relevant land use or natural resource from which the setback is measured.

However, a different conclusion might result if the provincial setback's purpose is re-characterized as intending to allow all developments beyond the setback distance. Given the challenges in defining legislative purposes, the application of the second part of the consistency test is hardly certain.[56]

As noted above, the consistency requirement in section 13 applies between a municipal bylaw and a provincial statute or regulation. Presumably, this section also applies by implication to decisions—like municipal and Commission decisions on development permit and approval applications, respectively—that are made *under* (that is, pursuant to authority granted by) a bylaw and provincial statute or regulation. However, the paramountcy provisions of sections 619 and 620 discussed above are likely more restrictive of municipal powers than the consistency requirement in section 13.

C. The Commission's consideration of municipal planning and zoning in power plant approvals

Consistent with the MGA, the Commission maintains that its approval authority generally "prevails" over municipal authority, and its approval conditions "take precedence" over conflicting municipal requirements.[57] However, the Commission also recognizes that sections 619 and 620 of the MGA "do not … displace a municipality's planning and development decision-making authority." Rather, municipal authority remains when it does not "frustrate or conflict with" a Commission decision.[58]

How the Commission considers municipal views in the Commission's overall public interest assessments

While generally maintaining the paramountcy of its decisions over those of municipalities, the Commission also generally maintains that municipal "land use authority and planning instruments are factors" that the Commission "must … conside[r]" in deciding whether a power plant application is in the public interest.[59]

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[56] But see *Orphan Well Assn v Grant Thornton*, 2019 SCC 5 at para 111 (noting that a "theoretical possibility" that a provincial law would frustrate the purpose of a federal law does not impugn the former under the constitutional paramountcy principle).

[57] E.g. *Creekside Solar*, AUC 27652 at paras 130-131.

[58] E.g. *ibid* at para 133.

[59] *Ibid* at para 130.

However, Commission decisions do not routinely describe the municipal planning, zoning, or permitting factors, let alone discuss how the Commission weighed them in its public interest assessment. For example, in some proceedings where the local municipalities apparently did not object to the application, the Commission's decisions either did not mention the municipality at all or did not address the planning or zoning status of the project site.[60]

The Commission has also referred to site suitability relative to other nearby land uses, or addressed neighbours' concerns about lowered property values, without discussing whether the proposed plant was consistent with local planning or zoning provisions.[61]

In other files, the local municipality did not officially object to the application but still asked the Commission to "consider" the municipality's planning and zoning provisions. However, the Commission's decisions were silent on those provisions.[62]

In some files there is an apparent conflict with the local planning or zoning provisions. However, even here the Commission's decision did not address the conflict or simply left it to the municipality to resolve the conflict.[63]

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[60] See, e.g. *Solar Krafte Utilities (Brooks Solar),* AUC 26435; and *C&B (Jenner Solar)*, AUC 22499. See also, e.g. *Aura Power*, AUC 27918 (Commission approval of a 22.5 MW solar power plant on 130 acres of private, cultivated land near the Town of Provost; applicant's public consultation report notes no objection from the MD of Provost); *Greengate Power (Travers Solar)*, AUC 24502 at paras 1-3, 6 and 10 (noting only that the proponent would apply for a Vulcan County development permit after obtaining a Commission approval and that the County didn't object to that process); *SunEEarth Solar (Yellow Lake)*, AUC 22422 at para 17 (noting that the applicant was in the process of obtaining a municipal development permit);

[61] E.g. *Elemental Energy (Brooks Solar II)*, AUC 24573 at paras 76-81 and 93-95.

[62] E.g. *Acestes Power (Tilley Solar)*, AUC 27319 at paras 8 and 35. But see, e.g. *Solar Krafte Utilities (Strathmore Solar)*, AUC 25346 at paras 53 and 67 (approving a solar power plant that appeared to be consistent with the Town of Strathmore's land use bylaw, but inconsistent with its municipal development plan, based on Town's apparent support for the project including its issuance of a development permit).

[63] In *Capstone Corp.*, AUC 25100, the Commission approved a wind farm notwithstanding evidence that the project was within a municipal setback to neighbouring property lines. The Commission sidestepped this problem by noting that neither the municipality nor the concerned neighbour provided evidence showing how the setback violation would affect them. *Ibid* at paras 17, 33 and 36. However, the Commission's decision then states that it is "entirely" within the municipality's authority to decide whether to grant development permits given this setback infringement. *Ibid* at para 34. (The municipality later denied the requested permits due

The uncertain functional linkages between Commission approvals and municipal permitting decisions

Other than giving Commission decisions precedence over municipal authority, the MGA is silent as to the functional relationship between Commission and municipal decision-making. The Commission has not adopted a Rule or other generic tool to clarify this relationship, but its past decisions provide some guidance.

First, the Commission has stated that, when it believes a municipality can "sufficiently address issues within its planning authority," the Commission "may defer those issues to the municipality."[64]

Second, the Commission generally declines municipalities' requests to include a condition it its approval requiring the applicant to comply with local planning and zoning or to obtain a municipal development permit.[65] However, the Commission may

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to the setback infringement, but the LPRT overruled that denial, in part, because of the paramountcy of the Commission's approval decision. *Buffalo Atlee 1 Wind LP v Special Areas No 2,* 2021 ABLPRT 764 at paras 6 and 49-56.) See also *Moon Lake Solar*, AUC 27433 at paras 8 and 11-12, and Exhibits 27433_X0019, X0037, and X0043 (concluding that the proposed solar plant was in the public interest notwithstanding evidence of at least uncertainty as to whether the project was allowed under the County's land use bylaw); *Buffalo Plains Wind Farm*, AUC 26214 at paras 290-294 (concluding that a proposed wind farm was in the public interest notwithstanding that two of its turbines were not an allowable land use in the relevant zoning district, and noting the applicant's intent to "work with" the county to re-zone the land); *Elemental Energy (Brooks Solar II)*, AUC 24573 at paras 107 and 114 (referring to the site's "fringe" zoning status but without addressing project's apparent inconsistency with that status). See also *East Strathmore Solar*, AUC 24266 at pp. 10-12 and 57-69 (concluding that a solar plant is in the public interest notwithstanding the project's apparent non-compliance with residential property line setback in county's land use bylaw).

[64] *Creekside Solar*, AUC 27652 at paras 130-133.

[65] For example, in *Rocktree Solar Inc.*, the Commission rejected a county's request, in its statement of intent to participate, that the Commission condition its approval on compliance with the land use bylaw. AUC 27445 at paras 12-13. The Commission found that this condition was "not necessary" based, in part, on the applicant's statement that it "has or will file" a development permit application and on the Commission's conclusion the county was in the "best position" to work with the applicant to "ensure" the applicant satisfies the land use bylaw. *Ibid*. See also, e.g. *Moon Lake Solar*, AUC 27433 at paras 11-12 (noting that the County is in the "best position" to work with the applicant, through the development permit process, to ensure that the applicant complies with the county's land use bylaw, so the Commission did not need to adopt a condition requiring the applicant to meet all land use bylaw requirements).

address and enforce compliance with local emergency response, noise, road use, and road or residence setback requirements.[66]

Fourth, in some instances, the Commission may also allow the municipality to impose requirements with respect to subjects considered by the Commission.[67]

And finally, in other files, the Commission has simply noted that the municipality has directed the applicant to apply for a development permit after it has received a Commission approval,[68] or that the applicant is not required to apply for a development permit before obtaining a Commission approval.[69]

These decisions suggest that the Commission generally takes a flexible, ad hoc approach toward functionally integrating its approval decisions with municipal decisions. (The Commission's practice of declining to include generic approval conditions requiring compliance with all municipal requirements, is an exception to this flexible, ad hoc approach.)

This flexible approach may be useful for dealing with file specific constraints, but it may be problematic if a Commission's decision is not clear as to which topics are left for municipal regulation.

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[66] E.g. *Capital Power (Halkirk 2 Wind)*, AUC 27691at para 213 (in considering visual impacts of proposed wind farm re-design, noting applicant's commitment to comply with municipal setbacks for wind turbines); *Creekside Solar*, AUC 27652 at para 40 (noting applicant's commitment to follow the county's noise bylaw and adding conditions to limit noise); *Solar Krafte Utilities (Brooks Solar)*, AUC 26435 at paras 10-11, 120, 148, and 159 (not discussing Newell County's planning and zoning provisions, but requiring the proponent to uphold its commitment to comply with local emergency response requirements and road use agreement with the County); *Sollair Solar*, AUC 27582 at paras 97 (noise). See also *Solar Krafte Utilities (Vauxhall Solar)*, AUC 27077 at paras 42, 45-52, and 53-58 (rejecting a municipal district's request that the Commission impose a security condition in a solar power plant approval, based in part on the lack of a security requirement in the land use bylaw and the municipality's issuance of a development permit without a security requirement).

[67] E.g. *Creekside Solar*, AUC 27652 at paras 137 (security), 138-39 (road use), and 140 (landscaping).

[68] *C&B (Jenner Solar)*, AUC 22499 at para 16.

[69] *Greengate Power (Travers Solar)*, AUC 24502 at para 10 (noting applicant's intent to apply for a development permit after obtaining a Commission approval).

Municipalities' standing to participate in the Commission's approval proceedings

Under section 9(2) of the AUCA, the Commission is required to hold a hearing on a power plant application, if it "appears" to the Commission that its decision on the application "may directly and adversely affect the rights of a person".[70] The Commission has clarified that, to qualify for standing under this section, a person's "rights" have to be "recognized by law." This type of "right" includes "property rights, constitutional rights or other legally recognized rights, claims or interests."[71]

Municipalities have a bevy of legal interests under the MGA, including powers to set land use priorities (through land use planning), to designate and choose appropriate land uses in different land use districts, and to regulate and manage activities through development permitting. These powers are not absolute, as discussed above, but they are still significant.

One would think that, given these municipal interests under the MGA, the Commission would routinely find that municipalities have passed the AUCA section 9(2) standing test, at least, in instances where municipalities' concerns are linked to their governmental interests under the MGA. However, this does not appear to be the case.

In at least some renewable energy power plant proceedings, the Commission has denied the local municipality standing to participate in a power plant proceeding, on the ground that the municipality has failed to identify any legal rights that may be adversely affected.[72] However, in these instances, the Commission has still allowed the

[70] Under section 9(3) of the AUCA, the Commission is not required to hold a hearing if either no one requests a hearing or if the Commission is satisfied that the applicant has met the Commission's rules "respecting" each landowner who may be directly and adversely affected by the application.

[71] *Solar Krafte Utilities (Vauxhall Solar),* Ruling on Standing (May 12, 2022), Exhibit 27077-X0044 at para 11.

[72] *Nova Solar and AML*, AUC 27589 at para 18; *Rocktree Solar*, AUC 27445 at paras 7-8; *Solar Krafte Utilities (Vauxhall Solar)*, AUC 27077 at paras 12-13; *Moon Lake Solar*, AUC 27433 at paras 6-7. In contrast with these decisions, the Commission found that Foothills County passed the AUCA section 9(2) standing test, in a proceeding involving an application for a solar farm in that county. The Commission's standing decision "note[d]" that the county owned land within 800 metres of the proposed power plant, but the decision is not clear as to whether that was the basis for the county's standing. *Foothills Solar*, Ruling on standing (Sept. 16, 2022), Exhibit 27486_X0106 at para 18.

municipality to provide a submission addressing its concerns. And in at least one file the Commission granted the municipality full participation rights.[73]

IV. ALSA regional planning

A. The Land Use Framework – ALSA's policy predecessor

The province's 2008 "Land-Use Framework" (LUF) acknowledged the needs for cumulative effects management and regional planning and laid the policy groundwork for the Legislature's later adoption of ALSA.

The LUF states that local planning and decision-making is "often criticized for not reflecting higher level provincial policy directions and regional interests."[74] The LUF explains that an

> effective land management system recognizes that planning and decision-making must take place at different levels and be integrated between levels.
>
> Alberta has a strong tradition of local government control that recognizes the diversity across the province. However, in the face of increasing pressures and conflicts, the Government of Alberta needs to ensure that provincial interests are addressed at a local scale.[75]

The LUF also addresses each of the land use topics of concern in this inquiry. As for Crown land, the LUF states that "[d]irection under regional plans will be defined and delivered on provincial Crown land through integrated land and resource management plans…."[76] At another point, the LUF states that public lands will continue to be managed "for a variety of purposes and values," including "conserve[ing] sensitive

[73] E.g. *Creekside Solar*, AUC 27652 at para 8 and Exhibit 27652_X0056, Nov. 21, 2022 Ruling on Standing at paras 4 and 13-14.

[74] GoA, "Land-Use Framework" (December 2008) at 26.

[75] *Ibid*.

[76] *Ibid*. See also *ibid* at 27 (noting that the GoA will be "moving forward … with the Integrated Land Management Program on provincial Crown land")

lands and natural resources" through a "regulatory framework" and possibly also market-based incentives.[77]

The LUF views agricultural land loss and fragmentation as a major issue. (There do not appear to be any other province-wide policies addressing conservation of agricultural land.) The LUF notes that the total amount of land used for agriculture had been "relatively stable" but that such land had been "increasingly divided into parcels too small to farm or ranch (i.e. fragmentation)."[78]

Among its list of priority actions, the LUF includes a provincial government commitment to filling policy gaps in several areas, including: "Reducing the fragmentation and conversion of agricultural land." According to the LUF, the province may develop "more effective mechanisms and approaches, such as market-based incentives, transfer of development credits, agricultural and conservation easements, and smart growth planning tools designed to reduce the fragmentation and conversion of agricultural land to other uses."[79] In other words, the LUF does not contemplate using negative restrictions or limits to protect privately owned agricultural land.[80]

The LUF also briefly addresses pristine viewscapes. In discussing the need for a South Saskatchewan regional plan, the LUF notes that the

> breathtaking beauty of the landscapes for which southern Alberta is famous—especially along Highway 22, the "Cowboy Trail"—is also at risk from new oil and gas development, new power lines and pipelines, the demand for more acreages and country residential housing, and the fragmentation of traditional ranch and farm properties.[81]

[77] *Ibid* at 34. See also *ibid* at 20 (referring to market-based tools as "policy instruments" to government will develop to "encourage stewardship and conservation" on both private and public lands).

[78] *Ibid* at 13.

[79] *Ibid* at 45.

[80] Other parts of the LUF echoed this non-regulatory approach. *Ibid* at 33 (referring to market-based mechanisms, and provincial funding of municipal programs, to incentivize private landowners to conserve their agricultural land) and 44 (noting that the LUF's "immediate priorities" included providing "support for higher-density infill development across the [Calgary and Edmonton] region[s] which … conserves agricultural land").

[81] *Ibid* at 44.

Finally, the LUF lists "immediate priorities" for its implementation, including adopting a legislative framework for regional planning.[82] The central part of that framework is the *Alberta Land Stewardship Act* (ALSA).

B. ALSA's Purposes

As set out in section 1(2), ALSA has several broad purposes, including:

- Enabling the GoA to "give direction and provide leadership" in identifying provincial "objectives" including "economic, environmental and social objectives"

- Providing a means to "plan for the future," including meeting the "reasonably foreseeable needs of current and future generations of Albertans"

- Providing for the "co-ordination of decisions" regarding "land, species, human settlement, natural resources and the environment"

- Accounting for and responding to the "cumulative effect of human endeavor and other events"

ALSA also states that, in carrying out these purposes, the GoA must "respect" private property rights and not infringe on those rights "except with due process of law and to the extent necessary for the overall greater public interest".[83]

C. Regional planning under ALSA

ALSA's provisions for regional planning are the primary means for achieving the act's broad objectives.

The primacy of ALSA regional plans

Regional plans are expressions of provincial "public policy" and are "legislative instruments" in the nature of "regulations."[84] Regional plans are binding on the Crown, local government bodies, and "decision-makers"—that is, people and bodies (like the

[82] *Ibid* at 43.

[83] ALSA, s 1(1).

[84] *Ibid s* 13(1) and (2).

Commission) who have legislative authority to grant a statutory consent.[85] In particular, when deciding whether to approve a power plant, the Commission "shall act in accordance with any applicable ALSA regional plan."[86]

While generally binding, regional plans may define which of its parts are legally enforceable and which are non-binding statements of public policy.[87]

To the extent of any conflict or inconsistency: ALSA takes precedence over other acts; regional plans trump regulations and other regulatory instruments; and other Acts and regulations trump regional plans.[88]

The content of regional plans

Under ALSA, regional plans must include certain components and may have other components listed in the act. The mandatory elements include: a vision for the planning region, and planning objectives. Discretionary elements of regional plans include policies, thresholds, indicators, actions, and exemptions.[89]

Regional plans can exert a broad range of regulatory powers[90] and can include conservation "directives" to "permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values…."[91] (Landowners subject to a conservation directive have a "right" to apply for compensation.[92])

[85] *Ibid* ss 2(1)(e) and 15(1).

[86] AUCA, s 8.1. See also *Interpretation Act*, s 28(1)(b.3) (defining an "ALSA regional plan" as a regional plan adopted under the Alberta Land Stewardship Act); AUC Rule 007 at 28 (noting that all power plants "must be compliant with any applicable regional land use plans adopted under" ALSA).

[87] ALSA, s 13(2.1).

[88] *Ibid* s 17.

[89] *Ibid* ss 8(1) and (2).

[90] *Ibid* ss 9-11.

[91] *Ibid* s 37(1).

[92] *Ibid* s 36.

The status of regional planning

The GoA has divided Alberta up into seven regions, for regional planning purposes under ALSA. The GoA adopted the first regional plan, for the Lower Athabasca Region, in 2012. That plan is currently undergoing a ten-year review.

Alberta adopted its second regional plan, the South Saskatchewan Regional Plan (SSRP), in 2018. The ten-year review for that plan is set to start in September 2024.

Plans have not yet been developed for the Red Deer, Upper and Lower Peace, North Saskatchewan, and Upper Athabasca regions.[93]

The South Saskatchewan Regional Plan (SSRP)

The SSRP has non-binding Strategic and Implementation Plan sections, and a binding Regulatory Details section.[94] The Strategic and Implementation Plan sections are a grab bag or kitchen sink approach supporting a wide variety of activities and objectives including promoting renewable energy development, scenic landscapes, and conservation of native prairie and cultivated land.[95]

The Commission has acknowledged the SSRP's mixed objectives in at least one decision.[96] (In other decisions, the Commission has acknowledged the proponent's submission that the project is SSRP-compliant, but then not made any specific findings about the SSRP.[97])

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[93] Government of Alberta, *Land Use Framework – Regional Plans*, online: https://landuse.alberta.ca/REGIONALPLANS/Pages/default.aspx.

[94] For a more detailed description and critiques of the SSRP, see, e.g. Sara L. Jaremko, *A Critical Exploration of the South Saskatchewan Regional Plan in Alberta* – CIRL Occasional Paper # 54 (March 2016).

[95] SSRP at 11-13, 15-16, 25, 38, 40, and 47-48.

[96] See *Elemental Energy (Brooks Solar II)*, AUC 24573 at para 115 (in decision approving solar power plant on privately-owned agricultural land, noting that the SSRP "contains goals both to conserve agricultural land and to develop renewable energy").

[97] See *East Strathmore Solar*, AUC 24266 at paras 42 (local project opponents' claim of SSRP inconsistency), 46 (proponent's response), 49-52 (Commission findings not addressing SSRP); *Greengate Power (Travers Solar)*, AUC 24502 at paras 12 and 19-27; *SunEEarth Solar (Yellow Lake)*, AUC 22422 at paras 9 (proponent's submission) and 21-32 (Commission findings); *C&B (Jenner Solar)*, AUC 22499 at paras 8 (proponent's submission) and 20-25 (Commission findings).

The SSRP's binding Regulatory Details section includes provisions for managing air and surface water quality, limits on developments in specified protected areas (e.g., designated parks), and limits on motorized access in the Livingstone and Porcupine Hills Land Use Zones.[98]

The SSRP states that it does not change governance of private lands under the MGA and that it is not meant to "alter private property rights".[99]

D. Other tools in the provincial cabinet's toolbox under ALSA

Part III of ALSA gives Alberta's cabinet considerable authority and responsibility to further the LUF's objective of developing positive incentives to promote conservation and stewardship.

Under sections 23 and 24 of the Act, cabinet can promote "instruments, including market-based instruments," as well as "programs and other measures," that will further the purposes of the Act or of regional plans.

Under section 25, cabinet is responsible for developing "funding and cost-sharing initiatives, mechanisms and instruments to support or enhance" conservation easements, and "instruments, including market-based instruments to support, encourage or enhance" the "protection, conservation and enhancement" of the environment, "natural scenic or aesthetic values," and agricultural land.

ALSA Part III also includes numerous provisions setting out the legal parameters for several of these instruments, including conservation easements, conservation offsets, and transfers of development credits.[100]

V. The Commission's Implementation of the Legislative Framework

Part II above discuses how the Commission has interpreted and generally applied its public interest decision-making mandate. And Parts III and IV above included

[98] SSRP at 163 et seq.

[99] *Ibid* at 3; *Solar Krafte Utilities (Brooks Solar)*, AUC 26435 at paras 54-57 (denying approval to construct part of proposed solar power plant on 536 acres of privately-owned native grassland but noting that the SSRP's grassland protection provisions do not preclude that development, because those provisions only apply to public land).

[100] SSRP, Part 3, Div's. 2-5.

discussions about how the Commission has addressed the Commission-municipality dynamic in the HEEA and MGA, and how the Commission has applied ALSA, respectively. This part provides additional information on how the Commission has applied the legislative framework for its power plant approvals. Part V.A describes the Commission's application requirements in Rule 007. And part V.B discusses how the Commission has considered the land use topics in actual renewable energy power plant approval decisions.

A. The Commission's requirements in Rule 007 for power plant applications

Rule 007 has requirements for applications for various types of facilities including power plants.

The Participant Involvement Program

Rule 007 requires applicants to conduct a "participant involvement program" (PIP) before filing their applications and to report on that program in their applications.[101] Each PIP must follow guidelines set out in Appendix A of Rule 007. Under these guidelines, applicants generally must provide notice to local communities and to conduct information sessions and consultations. (The required geographic reach of notice varies depending on the size of the proposed power plant.)

The guidelines do not expressly require applicants to consult the local municipalities, but that requirement is likely implied. (In addition, as discussed below, the application forms require applicants to report on consultations with municipalities.)

The Commission's September 2023 bulletin adds to these provisions by requiring applications to describe how the applicants engaged with the local municipalities (before submitting the applications) to modify plant or mitigate potential adverse impacts to the municipalities. The bulletin also requires applications to: confirm "whether the proposed power plant complies" with applicable "municipal planning documents" including MDPs and LUBs, and other municipal by-laws; identify any non-compliance with those documents; and explain any such non-compliance.[102]

[101] AUC Rule 007, part 2.1.

[102] AUC Bulletin 2023-05 (p. 2, items 1-3)

Checklist application for small power plants (1-<10 MW)

Rule 007 requires applications for power plants whose capability is between 1-10 MW to complete a "checklist form".[103] The form requires applicants to provide the project location and legal land description but does not require applicants to identify local planning and zoning districts or local environmental special areas.

The form includes check boxes confirming that:

- There are no adversely affected persons and no outstanding objections;
- There are no adverse environmental effects; and
- The applicant will "fulfill the requirements of all other agencies with jurisdiction over the project".

Wind and solar plants (between 1-10 MW) must also include a signed "renewable energy referral report" from Alberta Environment's Fish and Wildlife Stewardship division.

Large wind and solar power plants (10 MW or greater)

The Commission has developed special application forms for solar power and wind power plants with 10 MW or more capacity.[104]

The forms have no express requirement to specify local land use planning and zoning districts and development rules within those districts. However, as noted above, Bulletin 2023-05 requires applicants to at least note any inconsistencies with municipal land use plans or bylaws.

The required contents for wind and solar applications include:

- Maps showing power plant site boundaries, "[n]eighbouring" municipalities, and "[i]mportant environmental features and sensitive areas in the local study area".[105]

[103] AUC Rule 007, part 4.2; AUC, *Checklist application for new power plants equal to or greater than one MW and less than 10 MW*.

[104] AUC, *Solar power plant application* and *Wind power plant application*. These applications' conditions will be referenced below by "SP" and "WP," respectively, followed by the condition numbers.

[105] WP6/SP6.

- An environmental evaluation (or federal evaluation, if required) describing environmental and land use conditions, expected effects, mitigation measures, and monitoring.[106]

- An environmental protection plan listing all committed mitigation measures and monitoring activities.[107]

- A conservation and reclamation plan and an "overview" of how the operator will "ensure" sufficient funds are available to cover the cost of decommissioning and reclamation.[108]

- An identification of other Acts that may apply and other approvals that may be needed and the status of these approvals.[109]

- A signed renewable energy referral report from Alberta Environment's Fish & Wildlife Stewardship.[110] AEP referral reports are based in part on compliance with various AEP guidelines and standards, including the *Wildlife Directives for Alberta Solar and Wind Energy Projects*.[111]

- A summary of the pre-application participant involvement program.[112]

- For solar plants, confirmation that the local municipality was consulted and a summary of "any outstanding objections".[113]

[106] WP15/SP15.

[107] WP17/SP17.

[108] WP18-19/SP18-19. AUC Bulletin 2023-05 (p. 3) has additional application requirements regarding reclamation security, as discussed in the accompanying Ecojustice Briefing Note on reclamation security.

[109] WP21/SP21.

[110] WP22/SP22.

[111] The solar Directive is discussed at length in part 3 of *Solar Kraft Utilities (Brooks Solar)*, AUC 26435.

[112] WP25/SP25.

[113] SP26.

- A summary of the applicant's "consultation with local jurisdictions (e.g. municipal districts, counties)".[114]

- An identification of persons who expressed concerns, the nature of the concerns, and whether the concerns were resolved.[115]

Commission Bulletin 2023-25 adds several application requirements (in addition to those already noted above), including the following:

- A list and description of "pristine viewscapes (including national parks, provincial parks, culturally significant areas, and areas used for recreation and tourism) on which the project will be imposed" and a description of measures to mitigate project impacts on the listed viewscapes.[116]

- A description of the agricultural capability of the soils intersecting the project footprint and within the project area (using specified soil inventory and rating systems); a table showing the extent of impacted area for each land rating class; a description of "potential material impacts" to soils within the project area and measures to mitigate those impacts; and a description of the "potential for co-locating agricultural activities … into the project design".[117]

- A description of all planned stripping and grading, measures to mitigate impacts to the quality, quantity, and hydrology of impacted soils, plans to protect quality of stockpiled soils, and to describe soil replacement.[118]

[114] WP28/SP29.

[115] WP31/SP30.

[116] Bulletin 2023-25 at p. 3.

[117] *Ibid* at 1-2 (items 1-5).

[118] *Ibid* at 2 (item 3).

B. The Commission's consideration of power plants on specific types of land and with respect to pristine viewsheds

Crown lands and other officially designated environmental lands (and waters)

Under section 40 of the HEEA proposed power plants located within provincial parks or other legislatively protected areas must meet the legislative requirements applicable to those areas (e.g., under the *Public Lands Act*, *Provincial Parks Act*, RSA 2000, c. P-35, and *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, RSA 2000, c. W-9). As noted in part V.A above, wind and solar power plant applications must identify these other legislative requirements and the status of any approvals needed to meet those requirements.

The Commission generally closely scrutinizes potential power plant impacts to *adjacent* or nearby environmentally sensitive areas, at least, when Alberta Environment or another government or private party raises a concern about those impacts.[119]

Privately-owned agricultural land

The Commission generally defers to a private landowner's choice to convert crop or grazing land for use by a power plant (or to reduce agricultural production by constructing and operating a renewable energy plant on agricultural land). For example, in its recent decision approving a solar power plant on 127 acres of privately owned cultivated land, the Commission concluded that, absent legal or policy restrictions on the landowner's use of the land for non-agricultural purposes, the Commission gives "significant weight" to the landowner's "discretion over land use." According to the Commission, "the initial decision to host a project is for the landowner alone."[120] However, the Commission has also cautioned that the landowner's

[119] See, e.g. *Creekside Solar*, AUC 27652 at paras 109-120 (consideration of proposed solar power plant's impact to neighbouring Conjuring Creek, which is an environmentally significant area under Leduc County's land use bylaw); *Foothills Solar*, AUC 27486 at para 85 (denying approval application for a solar power plant based in part on potential impacts to neighbouring Frank Lake Important Migratory Bird and Biodiversity Area); and *Solar Krafte Utilities (Brooks Solar)*, AUC 26435 at paras 70-76 (consideration of potential impacts to nearby wetlands).

[120] *Creekside Solar*, AUC 27652 at para 95. See also *Solar Krafte Utilities (Brooks Solar)*, AUC 26435 at para 89 (deferring to irrigation district's choice to lease 4620 acres of its grazing land for a proposed solar power plant).

discretion is "not absolute; it is still subject to potentially overriding public interest considerations."[121]

The Commission also typically does not assess loss of agricultural land from the standpoint of whether the proposed power plant is allowed under the local municipality's land use bylaw (or under a municipal land use plan).[122] In one file, the Commission concluded that a proposed solar project was in the public interest, even though the County had raised a question about whether the subject lands had Class I or II soils or were in "Prime Agricultural Areas" either of which may have precluded a power plant under the County's land use bylaw.[123]

In several recent files, the Commission considered power plant siting on cultivated land as environmentally preferrable to power plant siting on native grassland or on other undeveloped lands.[124] Likewise, the Commission has looked unfavourably on solar

[121] E.g. *East Strathmore Solar,* AUC 24266 at para 49 (noting that the Commission will not "upset" a landowner's choice to take agricultural land out of production "unless it is clearly demonstrated that the public interest requires the Commission to intervene in the [landowner's] decision"); *Elemental Energy (Brooks Solar II)*, AUC 24573 at para 115 (same).

[122] See, e.g. *Creekside Solar*, AUC 27652 at para 95; *Sollair Solar*, AUC 27582 at paras 20-23; *East Strathmore Solar*, AUC 24266 at para 49; *Solar Krafte Utilities (Brooks Solar)*, AUC 26435 at paras 86-92; *Greengate Power (Travers Solar)*, AUC 24502 at para 12; *SunEEarth Solar (Yellow Lake)*, AUC 22422 at paras 12 and 25; *C&B (Jenner Solar)*, AUC 22499 at para 22. But see *Elemental Energy (Brooks Solar II)*, AUC 24573 at para 114 (noting that the subject land is zoned fringe, not agricultural, as a factor in the overall public interest calculation).

[123] *Moon Lake Solar*, AUC 27433 at paras 8, and 11-12 (and Exhibits 27433_X0043 and X0047); see also *Ibid* paras 11-12 (refusing County's request to include a condition in the Commission approval requiring the project to satisfy all land use bylaw requirements).

[124] *Elemental Energy (Brooks Solar II)*, AUC 24573 at para 105 (noting applicant's position that siting the proposed plant on previously cultivated land "reduces environmental risk") and 116 (accepting applicant's evidence that the site selection limits environmental impacts); *East Strathmore Solar*, AUC 24266 at para 45 (noting applicant's efforts to avoid siting facilities on "native habitat" by locating them on cultivated land); *Greengate Power (Travers Solar)*, AUC 24502 at para 12 (referring to applicant's position that the project's siting on primarily cultivated land was preferable because of the land's "lower quality wildlife habitat and lower environmental constraints"); *SunEEarth Solar (Yellow Lake)*, AUC 22422 at paras 12 (noting that the project was consistent with AEP's "recommendations that the project be sited on cultivated land") and 25 (finding that the project's environmental impacts are "limited" because it is sited on cultivated land "and does not impact native prairie"); and *C&B (Jenner Solar)*, AUC 22499 at

power plant siting on native grassland.[125] The Commission has also looked favourably on applicants' efforts to continue using crop land as such with a solar power plant operating on the land.[126]

The Commission also considers concerns about the impacts of renewable power plants on neighbouring agricultural lands.[127]

Scenic viewsheds

The Commission does not appear to have ever denied a proposed wind farm based on concerns about landscape scale visual impacts. The Commission typically acknowledges concerns about those impacts but concludes that they (and other negative impacts) are outweighed by the projects' benefits.[128]

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para 22 (finding that the project's environmental impacts are "minimal because the project is located on agricultural lands").

[125] *Solar Krafte Utilities (Brooks Solar)*, AUC 26435, part 3 (approving part of proposed 400 MW solar plant but disapproving facilities proposed to be located on 217.4 hectares of native grassland).

[126] For example, in *Sollair Solar*, AUC 27582, the Commission approved a 75 MW solar power plant on 476 acres of cultivated land in Rocky View County. The applicant proposed to use an experimental "agrivoltaic" research program to fit various agricultural uses into the same site. The Commission noted that this program "could provide valuable research that may inform how agricultural crops and grazing can be incorporated into future solar project sites." *Ibid* at paras 20-23.

[127] See, e.g. *Buffalo Plains Wind Farm*, AUC 26214 (addressing proposed wind farm's restrictions on aerial spraying, weeds, crop disease, and water wells used for agriculture).

[128] *Buffalo Trail Wind*, AUC 27240 at paras 122-129 (acknowledging impacts to residents' viewscape, but noting that the viewscape is already impacted by other wind farms and industrial development, and impacts don't outweigh project benefits); *Buffalo Plains Wind Farm*, AUC 26214 at paras 132 and 347 (in considering public concern about landscape impacts on property values, acknowledging that the wind farm will "undoubtedly alter the landscape" and noting the negative public perception of the project's viewscape effects, but accepting those effects in light of the project's benefits) and paras 51-54 and 155-165 (acknowledging that large wind projects "alter the landscape" and cause "visually unattractive impacts," but concluding that these and other negative impacts are outweighed by the project's benefits); *Pattern Wind*, AUC 22736 at para 191 (acknowledging that "introducing animated objects into a rural landscape would significantly affect the viewscape" but finding that that impact is not "prohibitive in and of itself" and is outweighed by the project's benefits); *Capital Power (Halkirk 2 Wind)*, AUC 22563 at para 113 (noting that visual impacts are subjective but that the proposed

When prompted by concerned neighbours, the Commission generally conducts a rigorous assessment of a project's local or short range, visual impacts.[129]

wind turbines are large and "will change the landscape of the project area," but that the applicant has mitigated those impacts "as much as possible").

[129] E.g. *Capital Power (Halkirk 2 Wind)*, AUC 27691 at paras 210-213 (concluding that visual impacts to neighbours from proposed revised wind farm would not increase from original project design); *Creekside Solar*, AUC 27652 at paras 51 and 79 (accepting applicant's proposed measures to limit visual impacts); *Sollair Solar*, AUC Decision 27582 at paras 88-90 (including conditions to mitigate visual impacts and noting applicant's commitments to address those impacts); *Solar Krafte Utilities (Brooks Solar)*, AUC 26435 at para 141 (finding the visual impacts will be "minimal" and don't warrant additional mitigation); *Elemental Energy (Brooks Solar II)*, AUC 24573 at paras 41-43 (concluding that visual impacts to neighbours are acceptable but requiring applicant to fulfill commitment to install and maintain a vegetation buffer).

APPENDIX A – SHORTHAND CITATIONS TO AUC DECISIONS

Shorthand cites	Full AUC Decision cite
Acestes Power (Tilley Solar), AUC 27319	*Acestes Power ULC (Tilley Solar Project)*, AUC Decision 27319-D01-2022 (July 12, 2022)
AltaLink/SNC, AUC 2014	*AltaLink Investment Management Ltd. and SNC Lavalin Transmission Ltd. et al.*, AUC Decision 2014-326 (Nov. 28, 2014)
Aura Power, AUC 27918	*Aura Power Renewables Ltd. (Provost Solar Project)*, AUC Decision 27918-D01-2023 (June 14, 2023)
Buffalo Plains Wind Farm, AUC 26214	*Buffalo Plains Wind Farm Inc.*, AUC Decision 26214-D01-2022 (Feb. 10, 2022)
Buffalo Trail Wind, AUC 27240	*ENGIE Development Canada GP Inc. (Buffalo Trail Wind Power Project)*, AUC Decision 27240-D01-2023 (February 8, 2023)
Capital Power (Halkirk 2 Wind), AUC 27691	*Capital Power Generation Services Inc. (Halkirk 2 Wind Power Project Amendment)*, AUC Decision 27691-D01-2023 (July 27, 2023)
Capital Power (Halkirk 2 Wind), AUC 22563	*Capital Power Generation Services Inc. (Halkirk 2 Wind Power Project)*, AUC Decision 22563-D01-2018 (April 11, 2018)
Capstone Corp., AUC 25100	*Capstone Infrastructure Corp. (Buffalo Atlee Wind Farm)*, AUC Decision 25100-D01-2021 (June 28, 2021)
C&B (Jenner Solar), AUC 22499	*C&B Alberta Solar Development ULC (Jenner Solar Power Plant)*, AUC Decision 22499-D01-2017 (June 7, 2017)

Creekside Solar, AUC 27652	*Creekside Solar Inc.*, AUC Decision 27652-D01-2023 (July 14, 2023)
East Strathmore Solar, AUC 24266	*East Strathmore Solar Project Inc.*, AUC Decision 24266-D01-2020 (Sept. 25, 2020)
Elemental Energy (Brooks Solar II), AUC 24573	*Elemental Energy Renewables Inc. (Brooks Solar II Power Plant)*, AUC Decision 24573-D01-2020 (Jan. 16, 2020)
Foothills Solar, AUC 27486	*Foothills Solar GP Inc.*, AUC Decision 27486-D01-2023 (April 20, 2023)
Greengate Power (Travers Solar), AUC 24502	*Greengate Power Corp. (Travers Solar Project)*, AUC Decision 24502-D01-2019 (Aug. 26, 2019)
Moon Lake Solar, AUC 27433	*Moon Lake Solar Inc.*, AUC Decision 27433-D01-2022 (Nov. 18, 2022)
Nova Solar and AML, AUC 27589	*Nova Solar G.P. Inc. and AltaLink Management Ltd.*, AUC Decision 27589-D01-2023 (July 19, 2023)
Pattern Wind, AUC 22736	*Pattern Development Lanfine Wind ULC*, AUC Decision 22736-D01-2020 (January 27, 2020)
Rocktree Solar, AUC 27445	*Rocktree Solar Inc.*, AUC Decision 27445-D01-2022 (Dec. 15, 2022)
Solar Krafte Utilities (Brooks Solar), AUC 26435	*Solar Krafte Utilities Inc. (Brooks Solar Farm)*, AUC Decision 26435-D01-2022 (May 18, 2022)

Solar Krafte Utilities (Strathmore Solar), AUC 25346	*Solar Krafte Utilities Inc. (Strathmore Solar Project)*, AUC Decision 25346-D01-2020 (Nov. 27, 2020)
Solar Krafte Utilities (Vauxhall Solar), AUC 27077	*Solar Krafte Utilities Inc. (Vauxhall Solar Farm)*, AUC Decision 27077-D01-2022 (Dec. 16, 2022)
Sollair Solar, AUC 27582	*General Land & Power corp. and AltaLink Management Ltd. (Sollair Solar Energy Project and Connection)*, AUC Decision 27582-D01-2023 (May 2, 2023)
SunEEarth Solar (Yellow Lake), AUC 22422	*SunEEarth Alberta Solar Development Inc. (Yellow Lake Solar Project)*, AUC Decision 22422-D01-2017 (Sept. 26, 2017)