

MGA Review Discussion Paper

Liability and Risk Management

This technical document is part of a series of draft discussion papers created by Municipal Affairs staff and stakeholders to prepare for the Municipal Government Act Review. It does not reflect existing or potential Government of Alberta policy directions. This document is the result of a careful review of what is currently included in the Municipal Government Act (MGA) and regulations, definitions of terms and processes, changes requested by stakeholders over the last 18 years, some highlights from other jurisdictions, and identification of potential topics for discussion during the MGA Review. This information will be used to prepare consultation materials as the MGA Review proceeds.

These discussion papers have been reviewed and approved by the MGA Stakeholder Advisory Committee, comprised of representatives from major stakeholder organizations: Alberta Association of Municipal and Counties, Alberta Association of Urban Municipalities, Alberta Rural Municipal Administrators Association, Alberta Chambers of Commerce, City of Calgary, City of Edmonton, and Local Government Association of Alberta.

The Government of Alberta is asking all Albertans to directly contribute to the MGA Review during online consultation in late 2013 and consultation sessions throughout Alberta in early 2014. This technical document is not intended for gathering stakeholder feedback, but to generate thought and discussion to prepare for the upcoming consultation. Public engagement materials will be available in early 2014. To learn more about how you can join the discussion on how we can build better communities, please visit mqareview.alberta.ca/get-involved.

Preamble



The *Municipal Government Act (MGA)* provides the legislative framework to guide the operations of municipalities in Alberta. The current *MGA* empowers municipalities with the authority and flexibility to provide services in the best interests of the community. The *MGA* Review will proceed along three major themes: *governance*; *assessment and taxation*; and *planning and development*.

This paper is one of 12 discussion papers exploring aspects related to the *governance* theme. It focuses on the liability and risk management provisions in the *MGA*. The objective of each discussion paper is to

- 1) Outline the existing legislation,
- 2) Identify issues with specific aspects based on stakeholder requests
- 3) Look at how other jurisdictions are approaching these issues; and
- 4) Pose questions to help formulate future analysis of, as well as public and stakeholder engagement on the *MGA*.

Below is a list of the papers that relate to the governance theme.

- Municipal Powers
- Provincial Powers
- Municipal Structures
- Municipal Governance
- Municipal Administration
- Financial Administration
- Liability and Risk Management
- Service Provisions
- Controlled Corporations
- Regional Service Commissions
- Compliance and Accountability
- Special Areas and Improvement Districts

Liability and Risk Management

For the purposes of this paper, *liability* refers to the ability of individuals and organizations to recover costs from a municipality for damages associated with municipal decisions. The *MGA* provides statutory protection from liability for municipal councillors, officials, and boards or council committee members whose actions were done in good faith – and also specifies situations where these same entities may be found liable for their decisions, actions or inaction.

The legal concept of “negligence” is used in the *MGA* to determine when liability should be assigned.¹ The *MGA* assigns liability for, and provides protection from, negligence as follows:

- Municipal Infrastructure – The *MGA* assigns liability to municipalities that fail to keep their infrastructure (e.g., roads, public works, public spaces) in a reasonable state of repair. Exemptions are granted from this liability under a range of circumstances, such as cases in which a municipality can prove that it took reasonable steps to prevent the disrepair.
- Inspections – The *MGA* exempts municipalities from liability for damages related to the frequency of inspections or maintenance of municipal infrastructure and the systems or manner in which inspections and maintenance are performed.
- Land Values – Municipalities may be found liable if a structure related to public works or a road closure causes a permanent reduction in the appraised value of privately owned lands.
- Councillors – Municipal councillors are liable for expenditures not included in an approved budget, for voting to borrow beyond the established debt limit of the municipality, and for voting to spend borrowed or grant money for a purpose other than that for which it was intended. Councillors are not liable for anything they do (or failed to do) in the performance of their functions under the *MGA*, provided they were acting in good faith.
- Board Members – Members of business revitalization zone boards, assessment review boards, and the directors of regional services commissions are liable for expenditures not included in an approved budget.
- Individuals – Individuals are liable for compliance with municipal orders, and costs related to an emergency they have caused where the municipality must take action to respond.

For the purposes of this paper, *risk management* refers in most instances to legislative measures intended to protect a municipality against fraudulent acts or to promote public safety. The *MGA*’s setback restrictions in certain regulations, various liability provisions, and fidelity bond requirements are some examples of how the province requires municipal risk management through legislation and regulation. The *MGA* also provides municipalities with risk management tools by granting them bylaw enforcement powers.

¹ While negligence is the general standard for liability, there are other instances where good faith defenses are available or where non-negligence claims can arise.

Discussion Questions

Below are some discussion topics and questions identified during a review of requested amendments, cross jurisdictional research and issues raised by stakeholders.

The requested amendments discussed below draw upon an inventory of requests received by the Province over the past 18 years. It important to note these requests:

- i) do not include all the requests Municipal Affairs has received in the past 18 years;
- ii) do not necessarily represent the views of most Albertans;
- iii) do not necessarily apply to all municipalities; and
- iv) are categorized by policy topic, and have not been evaluated or ranked by number of requests received.

1. Liability and Protection

Background

It is generally accepted that a balance between a municipality's exposure to liability and protection from liability is needed to ensure municipalities can operate without fear of frivolous court actions, while also ensuring that individuals and organizations are able to recover losses or damages under appropriate circumstances. The current *MGA* addresses this balance, specifically with respect to municipal inspection requirements, maintenance of municipal infrastructure and public places, and liability protections for certain emergency operations and staff. Practically speaking, these provisions inform municipalities on how much operational due diligence must be performed to avoid liability.

Various provisions exist in the *MGA* and other legislation with the intent of ensuring fairness to the public and placing reasonable expectations of due diligence on municipalities. Members of the public also have a responsibility to report damages soon after the event for which they would like to make a claim; otherwise, the opportunity to recover damages from the municipality may be lost.

Cross-jurisdictional Research

- The liability legislation contained in the municipal acts of most Canadian provinces is focused primarily on limits to and protections from liability. A somewhat different approach is taken in British Columbia and Saskatchewan, where the legislation gives specific context as to when a municipality is liable for damages and the procedures for those attempting to recover the damages.

Stakeholder and Legislative Amendment Requests

- The courts have interpreted the *MGA* in a manner that provides limited protection to municipalities with respect to operational decisions made for the inspection and maintenance of roads, public places and public works (e.g., *Steele v. Burgos*, 2010 ABQB 327). Alberta municipalities have made requests for legislative provisions that would further protect municipalities from liabilities related to these types of operational decisions.

- Municipal Affairs has received complaints from citizens regarding the degree of consideration given to public safety when municipalities are prioritizing major capital projects.

2. Financial Risk Management

Background

Some sections of the *MGA* are intended to encourage risk management in matters of municipal finance by establishing requirements for municipal budgeting, auditing, investing, and borrowing. For example, municipalities are required to prepare operating and capital budgets and these must be audited. The rules in the *MGA* for investing are intended to prevent municipalities from becoming involved in relatively risky investments. The rules for borrowing are intended to limit how much debt municipalities may assume, and require any guarantees (which are potential debts) to be entered on a municipality's ledger. Councillors are liable for expenditures and borrowings made in contravention of the *MGA*'s financial precepts.

Cross-jurisdictional Research

- The provinces of British Columbia, Manitoba, and some municipalities in Saskatchewan must establish long-term capital expenditure budgets. This helps limit financial risk by budgeting for needs within the fiscal year and for future repairs and maintenance.
- Municipal budgets in New Brunswick must be approved by the province ensuring an added level of oversight into the financial risk a municipality may be exposing itself to.
- In Saskatchewan cities, and Nova Scotia municipalities, investments are not limited by statute, but rather authorized by bylaw allowing local councils to decide the level of financial risk they are comfortable with when investing public funds.

3. Planning and Development Risk Management

Background

In terms of risk management, municipalities must meet some base criteria set out in the *MGA* regarding development approvals and bylaw enforcement (e.g., landfill setbacks and issuance of stop orders). Municipalities also have the ability to create and adopt further risk management practices with respect to planning approvals, development permits and bylaw enforcement (e.g. requiring the first floor of buildings in a flood plain to be above 1 in 100 year flood levels). However, in some municipalities, these additional types of risk management practices may be underdeveloped – and there is nothing in the legislation to impede municipalities from potentially making decisions that generally serve municipal purposes but allow for unanticipated levels of risk. For example, a municipality's approval of road developments along steep slopes could leave it exposed to liability for damaged vehicles or injuries suffered in the event of a road collapse.

Stakeholder and Legislative Amendment Requests

- The Alberta courts have ruled that planning authorities may be liable for damages related to negligently issued planning approvals (e.g., In *Bowes v. Edmonton (City of)*, 2007 ABCA 347 The City of Edmonton was sued for approving the development of houses that fell down a hill. The court ruling stated the City “was under a duty, if [it] knew or ought to have known of the risk... to prevent or minimise the risk”).
- The courts have found that municipalities could be liable for damages related to natural events occurring on environmental reserve lands, such as eroding slopes (e.g., In *Krook v. Cold Lake (City)*, 2010 ABQB 2, the City of Cold Lake was sued when the slope of an environmental reserve collapsed. The plaintiff argued this collapse affected the structural integrity of a home on an adjacent lot).

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Discussion Questions

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1. *Are the current limits to and protection from liability appropriate?*
 - a) To what extent should a municipality be liable for or protected from operational decisions relating to maintenance and inspections of its roads, public places and public works?
 - b) How, if at all, should the relationship between liability and municipal priority setting be defined in the *MGA* (e.g. repairing roads and sewers vs. building recreation centres)?
 - c) To what extent should municipalities be liable for or protected from liabilities for planning decisions which gauge the safety of a potential development site or the management of municipal land?
 2. *What level of provincial oversight of municipal finances, if any, necessary to address financial risks?*
 - a) What is the appropriate balance between provincial oversight and municipal responsibility for financial risk management (e.g. provincial approval of municipal budgets, municipal investment options, or long term capital expenditures)?