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Barristers and Solicitors

MEMORANDUM

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FROM:	Don Lidstone, KC and Alex Lidstone (Articling Student)
DATE:	August 06, 2025
RE:	Legal Review of Regulatory Pathways
FILE:	20282-101

Contents

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I. Introduction

You have asked us to provide a legal review as part of a research project focused on local government regulatory levers for decarbonizing buildings and transportation.

This memo discusses the available legal regulatory pathways for local governments to implement a variety of objectives to reduce GHG emissions in mobility and buildings. This memo is applicable to municipalities and regional districts in British Columbia. This memo is intended to illustrate the different pathways that are available and to apply those tools to a variety of objectives that local governments could use. It is not possible to provide concrete legal advice on a specific bylaw in a specific local government, for example, in the absence of the specific facts and bylaw related to that scenario. As such, this memo is not intended to constitute legal advice. It is intended to illustrate the possible objectives and explain the regulatory pathways that are available to local governments in BC. This memo begins with a description of the pathways that could be employed for each of the objectives. Then, for each regulatory lever, it discusses the legal tools that are available for local governments and how they apply to that lever.

II. Legal Tools

A. Bylaws

A local government bylaw is essentially a local law. The effect of a local government bylaw is parallel to the effect of provincial legislation. Under Section 1 of the *Interpretation Act,*[1] a bylaw is a "regulation enacted in execution of a power conferred under an Act". "Enactment" is defined as an Act or a regulation. Accordingly, a bylaw is a form of regulation that, like an Act, is an enactment.

Certain powers delegated to local governments must be exercised by bylaw. Section 122(1) of the *Community Charter*[2] states that if an enactment provides that a council is required or empowered to exercise a power by bylaw, that power may only be exercised by bylaw. If an act can be carried out by resolution, it may be carried out by resolution or by bylaw.[3] Section 122 of the *Community Charter* applies to regional districts through section 226(2) of the *Local Government Act.*[4]

[1] RSBC 1996, c. 238.
[2] SBC 2003, c 26 [*Community Charter*].
[3] *Ibid*, s 122(3).
[4] RSBC 2015, c 1 [*LGA*].

A court can set a bylaw aside if it is invalid, and there are several requirements for a valid bylaw. One requirement is that the bylaw must only contain matters that fall within the powers and authority delegated to the local government under the enabling legislation. The *LGA* and the *Community Charter* are examples of provincial enactments that provide powers under which municipalities and regional districts may enact bylaws.

Community Charter Powers

The powers that the *Community Charter* delegates to municipalities in Part 2 are based on the "spheres of jurisdiction" model under which local governments are empowered to regulate, require, or prohibit. Section 4(1) of the *Community Charter* provides that powers conferred must be interpreted in accordance with the municipal purposes. The purposes of local government are to provide "good government", the services, facilities, and things that the local government considers are necessary or desirable for all or part of its community, and stewardship of municipal assets.[5] Section 8 and the other general powers set out in the rest of Part 2 of the *Community Charter* replaced over one hundred express, prescriptive sections of the *Local Government Act* with respect to regulatory authority. The *Community Charter* provides for broader authority instead of detailed, prescribed powers. Section 8(3) creates spheres within which a council may by bylaw regulate, prohibit, or impose requirements (e.g., "animals").

The *Community Charter* gives municipalities a general authority to "require" by bylaw. This would empower a council, for example, to require persons to undertake work or incur expenses as provided in the bylaw (e.g., clear ice and snow from sidewalks in front of business premises). It also includes the power to require persons to use a municipal service (e.g., to connect to a sewer system) or to have insurance if providing a service on behalf of or in lieu of the municipality. Councils could impose requirements in relation to regulating, prohibiting, or providing a service, or they could impose bare requirements.

At common law, the power to "regulate" does not include the power to prohibit. Under the *Community Charter*, the provincial legislature has distinguished between regulating, prohibiting, and imposing requirements. Section 8(3) provides that a council may, by bylaw, regulate, prohibit and impose requirements in relation to the matters enumerated in that subsection. Accordingly, the powers to regulate, prohibit, and impose requirements are now separate powers that may be exercised independently of one another. "Regulate" is defined in the schedule to the *Community Charter* as including to "authorize, control, inspect, limit, and restrict, including by establishing rules respecting what must or must not be done, in relation to the persons, properties, activities, things, or other matters being regulated." Section 8(8) provides that, by way of example, the power to regulate includes the power to provide that persons may engage in a regulated activity only in accordance with the rules established by bylaw. An example of a regulation under Section 8

[5] *Ibid*, s 7.

would be the imposition of hours of operation in relation to commercial businesses under Section 8(6).

The power to prohibit is authorized under sections 8(3) and (5) in relation to the spheres of jurisdiction listed in those subsections. The power to prohibit includes the power to prohibit persons from doing things with their property.[6] An example of a prohibition by bylaw under Section 8 of the *Community Charter* would be the deposit of paint solvents in a community storm system under Section 8(3)(a). The power to impose requirements includes the power to require persons to do things with their property, to do things at their expense, and to provide security for fulfilling a requirement.[7]

Section 8 lists all matters that a municipality can regulate by bylaw. The powers that are relevant to this legal review include the following:

> **Fundamental powers**
> **8(3)** A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:
> g) the health, safety or protection of persons or property in relation to matters referred to in section 63 [*protection of persons and property];*
> h) the protection and enhancement of the well-being of its community in relation to the matters referred to in section 64 [*nuisances, disturbances and other objectionable situations*][8];
> i) public health;
> j) protection of the natural environment;
> […]
> l) buildings and other structures;
>
> (6) A council may, by bylaw, regulate in relation to business.

Section 9(1) of the *Charter* assigns certain matters under section 8 as "spheres of concurrent authority" with the provincial government. Specifically, section 8(3)(i) [*public health*] and section 8(3)(j) [*protection of the natural environment*] are listed under section 9(1), and as such require that municipal councils receive consent of the provincial minister before enacting a bylaw under those enumerated powers. If a bylaw's 'dominant purpose' falls under a concurrent sphere, it cannot be validly enacted without provincial consultation, even if it contains a different purpose that would otherwise be a valid enactment under a non-concurrent sphere.[9] This means, if the dominant effect of a bylaw is listed under section 9, then the municipality must receive the consent of the provincial minister before enacting the bylaw, *even*

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[6] *ibid*, s 8(8).
[7] *ibid*, s 8(8)(c).
[8] S. 64 includes: (a) nuisances; (b) noise, vibration, odour, dust, illumination or any other matter that is liable to disturb the quiet, peace, rest, enjoyment, comfort or convenience of individuals or the public; and (c) the emission of smoke, dust, gas, sparks, ash, soot, cinders, fumes or other effluvia that is liable to foul or contaminate the atmosphere.
[9] *Canadian Plastic Bag Association v Victoria (City)*, 2019 BCCA 254 [*Canadian Plastic Bag Association*].

if another purpose of that bylaw is a valid non-concurrent sphere of authority under section 8(3).

Since section 9(1) includes the matters of 'protection of the natural environment' and 'public health', a bylaw that has a dominant effect of regulating either of these two matters cannot be validly enacted without ministerial approval. Section 4 of *Community Charter* provides that the substance of bylaw must prevail over form. This means that the court will look to the actual purpose of the bylaw, not just the purported purpose when determining if it falls within the concurrent spheres of authority as dictated by section 9(1). This is illustrated by *Canadian Plastic Bag Association*, where the BC Court of Appeal held that a Victoria bylaw prohibiting the sale of plastic bags by businesses was aimed at environmental protection, which is a sphere of concurrent authority, even though the bylaw was phrased and represented as being aimed at managing businesses, a sphere of non-concurrent authority.

The *LGA* specifies which powers in the *Community Charter* apply to regional districts as well as municipalities.

Local Government Act Powers

The *LGA* also gives powers to both regional districts and municipalities. The *LGA* allocates specific powers rather than spheres of authority like the *Community Charter*. The *LGA* specifies which sections apply to regional districts and which sections apply to municipalities.

Bylaw Enforcement

There are several options for local governments to pursue bylaw enforcement. The first option to enforce a bylaw contravention is a warning letter from the local government, which can be followed by a warning letter from a lawyer. This can be a cost-effective way to get the person to do something. The letter should set out what the local government will do if the person is still in contravention of the bylaw by a certain date.

The second option is to issue a bylaw enforcement notice. Under section 415 of the *LGA* for Regional Districts and section 260(2)(b.1) of the *Community Charter* for municipalities, local governments may enforce a bylaw with a bylaw enforcement notice under the *Local Government Bylaw Notice Enforcement Act.*[10] Under section 4 of the *Local Government Bylaw Notice Enforcement Act*, local governments may designate bylaw contraventions which may be dealt with by notice. A bylaw enforcement notice proceeding may be commenced by a bylaw enforcement officer issuing the notice. A bylaw notice can be delivered either in person or by mail to the last known address of the named person.[11] Under section 7(2) of the *Bylaw Notice Act*, a bylaw is presumed to be received after the 7th day of mailing. This option is simple to initiate, since it can begin with a bylaw enforcement officer issuing the

[10] SBC 2003, c 60 [*Bylaw Notice Act*].
[11] *ibid*, s 7(1)(a) and (b).

notice, and it benefits from less stringent service requirements compared to some of the other bylaw enforcement options.

A third option is a municipal ticket information system. Section 264 of the *Community Charter* for municipalities and section 414 of the *LGA* for regional districts allow local government councils to, by bylaw, designate bylaws that can be dealt with by means of a ticket. A person who receives the ticket may dispute it within 14 days. Local governments can impose a maximum daily fine of $1000 through this system. A bylaw enforcement officer must serve a ticket on the person in breach of a bylaw either immediately after the contravention or in the same manner as a summons may be served under the *Offence Act*, which is by leaving it at the person's last or usual residence with a person who appears to be at least 16 years of age.[12]

A fourth option is for local governments to seek a court injunction ordering a person to cease contravening a bylaw pursuant to section 274 of the *Community Charter* for municipalities or section 420 of the *LGA* for regional districts.[13] The timeline to receive an injunction is usually about 4 to 6 months, but it could be shorter if the matter is urgent or simple. Once the injunction has been issued, a breach of the order could result in contempt of court, fines, or jail time. It should be noted that injunctive relief is discretionary. Where a local government is seeking an injunction to enforce a statute, courts will often grant the injunction.[14] However, the court can be unpredictable, so there is no guarantee the injunction will be granted.

B. Development Permit Areas

Under section 488(1)(h) and (j) of the *LGA*, a local government, through their official community plan ("**OCP**"), may designate a development permit area ("**DPA**") to promote energy conservation and the reduction of greenhouse gas ("**GHG**") emissions. Local governments can designate the whole local government as an energy conservation and GHG reduction DPA. The local government must include in their OCP the special conditions or objectives that justify the designation and "guidelines" concerning how the special conditions or objectives will be addressed.[15]

> **488** (1)An official community plan may designate development permit areas for one or more of the following purposes:
>
> > …
> > (h)establishment of objectives to promote energy conservation;
> > …
> > (j)establishment of objectives to promote the reduction of greenhouse gas emissions;
>
> (2)With respect to areas designated under subsection (1), the official community plan must

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[12] *Community Charter*, *supra* note 1 at s. 266(3).
[13] *GVRD v Stainsby*, 2007 BCSC 585 at para 60.
[14] *Vancouver (City) v Maurice,* 2005 BCCA 37 at para 34.
[15] *Ibid*, s 488(2).

> (a)describe the special conditions or objectives that justify the designation, and
> (b)specify guidelines respecting the manner by which the special conditions or objectives will be addressed.
>
> (3)As an exception to subsection (2) (b), the guidelines referred to in that subsection may be specified by zoning bylaw but, in this case, the designation is not effective until the zoning bylaw has been adopted.
>
> (4)If an official community plan designates areas under subsection (1), the plan or a zoning bylaw may, with respect to those areas, specify conditions under which a development permit under section 489 would not be required.

Under section 491(9) of the *LGA*, an energy conservation or GHG reduction DPA may prescribe requirements in relation to: (a) landscaping; (b) siting of buildings and other structures; (c) form and exterior design of buildings and other structures; (d) specific features in the development; and (e) machinery, equipment and systems external to buildings and other structures. Section 491(9) of the *LGA* does not provide authority to impose internal building requirements such as plumbing, appliances, insulation, heating, air conditioning, and lighting.

> 491(9)For land within a development permit area designated under section 488 (1) (h), (i) or (j) *[energy conservation, water conservation, greenhouse gas reduction]*, a development permit may include requirements respecting the following in order to provide for energy and water conservation and the reduction of greenhouse gas emissions:
>
> (a)landscaping;
> (b)siting of buildings and other structures;
> (c)form and exterior design of buildings and other structures;
> (d)specific features in the development;
> (e)machinery, equipment and systems external to buildings and other structures.

Within a DPA, owners of land must obtain a development permit before they can construct, add to, or alter a building or other structure.[16] Local governments must exercise their authority to issue a development permit in accordance with the guidelines.[17]

C. Section 219 Covenants

Covenants can be used to create rights enforceable by one landowner against another. Strictly speaking, a covenant is a promise under seal. At common law, the law of equity allows covenants to run with the land. That means, when the land changes hands, if the new owner of the land is aware of the covenant, they are also subject to it.[18]

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[16] *Ibid*, s 489(b).
[17] *Ibid*, s 490(2); *0742848 B.C. Ltd. v Squamish (District)*, 2011 BCSC 747 at paras 13-15.
[18] *Tulk v Moxhay*, (1848) 2 Ph. 774.

For a covenant to run with the land at common law, it must meet the following four requirements:

> (1) it must be negative in substance, which means, a person has to do nothing to comply with the covenant;
> (2) the burden of the covenant must have intended to run with the land;
> (3) the covenant must benefit the dominant lands; and
> (4) since this is an equitable remedy, the limitations on the availability of equitable remedies apply.

Under s. 219 of the *Land Title Act*,[19] covenants that are free from these common law restrictions can be created in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, a local trust committee under the *Islands Trust Act*, the South Coast British Columbia Transportation Authority, or any person designated by the Surveyor General "on terms and conditions he or she thinks proper." Two things that s. 219 covenants can do that common law covenants cannot do are (1) they can be positive in nature, meaning they can make someone do something, and (2) they do not need a dominant tenement, which is a parcel of land that benefits from the covenant. Section 219 covenants are registered with the Land Title Office, and they create a negative or a positive obligation on the property owner.

A covenant may provide for the following:

- the use of land, or the use of a building on or to be erected on land;
- that land be built on in accordance with the covenant, or not built on except in accordance with the covenant, or not built on;
- that land not be subdivided except in accordance with the covenant, or not be subdivided;
- that parcels of land designated in the covenant and registered under one or more indefeasible titles not be sold or otherwise transferred separately; and
- that land or a specified amenity in relation to it be protected, preserved, conserved, or kept in its natural state in accordance with the covenant and to the extent the covenant provides. "Amenity" is defined in s. 219(5) of the *LTA*.

> 219(2) A covenant registrable under subsection (1) may be of <u>a negative or positive nature</u> and may include one or more of the following provisions:
> (a)provisions in respect of
> (i)the use of land, or
> (ii)the use of a building on or to be erected on land;
> (b)that land
> (i)is to be built on in accordance with the covenant,

[19] RSBC 1996, c 250 [*LTA*].

(ii)is not to be built on except in accordance with the covenant, or
(iii)is not to be built on;
(c)that land
(i)is not to be subdivided except in accordance with the covenant, or
(ii)is not to be subdivided;
(d)that parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately.

The phrase "in respect of" is broad and can include a wide range of provisions, as long as they are in some way functionally connected to the use of land or the use of a building.

Triggers for a s. 219 covenant

A local government could obtain a s. 219 covenant alongside the following discretionary council or board decisions.

Rezoning

A local government cannot directly enter into an agreement under which the local government will rezone property in exchange for a covenant.[20] In *Vancouver (City) v Vancouver Land Title District,*[21] The City of Vancouver entered into a covenant with a developer, and in clause 11 of the covenant, the City promised to rezone the land in question. The Court held the covenant was invalid because the City bound itself to the rezoning, regardless of any objections to the rezoning. The Court said, Council has statutory discretion to find a balance between the competing interests of property owners who will be impacted by the rezoning, and a covenant under which the City promises a developer that they will rezone a property impairs that discretion. The Court said, "[Council] cannot lawfully agree to disregard that duty."[22]

If a developer offers a covenant, a council or board may consider that offer as a factor in their decision to rezone.[23] Additionally, a council, board, or local government department can raise concerns to someone who is applying for rezoning, and they can suggest a s. 219 covenant as part of a way that the applicant can address those concerns.[24] A council or board may also, between third reading of a zoning bylaw and adoption, request a covenant to address issues that were raised at a public hearing.[25] Generally, local governments will require the covenant to be registered before the rezoning.

Subdivision

[20] *Vancouver (City) v Vancouver Land Title District*, 1955 CanLII 275 (BC CA) [*Vancouver*].
[21] *Ibid.*
[22] *Ibid*, at p. 713.
[23] *Burnaby (City) v Racanelli*, 1998 CanLII 3833 (BC SC) [*Racanelli*].
[24] *Burnaby (City) v Marando*, 2003 BCCA 400 [*Marando*].
[25] *Jones Delta (District),*1992 CanLII 4037 (BC CA).

The Approving Officer (the "**AO**") has authority to approve or deny subdivisions under section 85-87 of the *LTA*. Under section 86, the AO may have concerns about the subdivision and may be inclined to refuse approval because of access problems, drainage problems, concerns about stability of the land, or the impact a proposed subdivision may have on the environment. Under section 86(1)(d) of the *LTA*, if an approving officer reasonably expects that the land could be exposed to flooding, land slip, or avalanche, they may require that the developer could provide a s. 219 covenant for the parcels that are being created by the subdivision.

In *Abbeyview Enterprises Ltd. v Matsqui (District)*,[26] the AO told a developer they would not approve a subdivision unless the developer purchased the property next to it because the development would affect the property value of that property. The Court said the AO has a statutory power to refuse subdivision approval, and he did so in good faith and without discrimination. That part of the plaintiff's claim was rejected.

Other Development Approvals

Local governments often obtain s. 219 covenants during discretionary development approvals such as development permits, or development variance permits. Local governments could also obtain s. 219 covenants pursuant to phased development agreements under section 516 of the *LGA*. Phased development agreements are discussed in more detail below.

Issuing a Building Permit

Under section 56 of the *Community Charter*, if a municipality has a bylaw regulating construction of buildings, and a building inspector considers that construction would be on land that is or is likely subject to flooding, mud flows, debris flows, debris torrents, erosion, land slip, rockfalls, subsidence or avalanche, the building inspector may require a geotechnical report from a qualified professional that says the land can be used safely before issuing a building permit. Under section 56(4) and (5), a building inspector may issue a building permit if the qualified professional says the land can be used safely for the intended use, and if the owner of the land provides a s. 219 covenant that they will only use the land in the manner that was certified by the qualified professional.

<u>Enforcement of Covenants</u>

A covenant is a contract, so the usual remedies for breach of contract will be available if a covenant is breached. For example, in *Merritt (City) v Valnicola Motor Hotel*,[27] the Court granted a declaration that the defendant was in breach of its obligation and an order for specific performance that the defendant comply with the covenant within four months of the date of the order of the court. Another remedy available for s. 219 covenants is a rent charge. Section 219 allows covenants to

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[26] 1980 CanLII 638 (BC SC).
[27] 1994 CanLII 2027 (BC SC).

include a rent charge, which is payable by the covenantor to the covenantee if they breach the covenant.

D. Amenity Cost Charges

Under section 570.2 of the *LGA*, Local governments may, by bylaw, impose amenity cost charges ("**ACCs**") at the time of subdivision approval or issuance of building permits. ACCs can only be used for amenities, which are defined as a facility or feature that provides social, cultural, heritage, recreational, or environmental benefits to a community.[28] Some examples of amenities include, a payment towards all or part of the cost of public open space, parkland, moving or planting trees, and the installation of a solar or wind farm that is owned or operated by the local government. The amenity must be owned by the local government or owned and operated by a person who has entered into a partnering agreement with the local government in respect of the amenity.[29] The ACC must be paid at the time of subdivision approval or issuance of the building permit.

E. Transportation Demand Management Measures

Under section 527.1 of the *LGA*, a local government may, by bylaw, advance transportation demand management for the development land. "Transportation demand management" is defined as, "improving the movement of people and goods, reducing motor vehicle dependence and increasing sustainable transportation."[30] Section 527.1(1) says, transportation demand management measures include electric vehicle charging stations, end-of-trip facilities, secure bicycle parking facilities, and any other measure that is prescribed by regulation. To advance transportation demand management, the local government may require owners to provide transportation demand management measures and establish design standards for transportation demand management measures. Local governments may allow owners to opt for the payment of money ("cash in lieu") instead. There are no pre-adoption consultation or financial analysis requirements for these bylaws. There is a requirement for annual reporting on any reserve fund established for the purpose of collecting cash in lieu, assuming the bylaw authorizes such payments in the first place.[31]

F. Phased Development Agreements

Under section 516(1) of the *LGA*, a local government may enter a phased development agreement with an owner of land by bylaw. In these agreements, the developers will provide certain amenities, services, and other promises, and in exchange, the local government has authority to agree that changes to any of the zoning bylaw provisions that are in the agreement will not affect the development. Effectively, a phased development agreement secures amenities in exchange for "freezing" specified zoning and subdivision servicing regulations. This can be valuable for developers pursuing long-term projects.

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[28] *LGA*, *supra* note 4, s 570.1.
[29] *Ibid*, s 570.2.
[30] *LGA*, *supra* note 4, s 527.1(1).
[31] *ibid*, s 527.1(10).

Under section 516(3), a phased development agreement may include terms and conditions agreed to by the local government and the developer, including but not limited to, terms and conditions respecting the inclusion of specific features in the development, the provision of amenities, the phasing and timing of the development, and other matters that the agreement covers. We note that the content in a phased development agreement must be negotiated, and the local government cannot unilaterally impose it. That being said, it can contain any conditions whatsoever agreed by the owner, for example, it could include requirements for geothermal energy, no natural gas, or heat pumps.

There are certain requirements that must be complied with for local governments to enter into a phased development agreement. Firstly, local governments must hold a public hearing before they can enter a phased development agreement. Secondly, the term of a phased development agreement is limited to 10 years, but it could be increased to 20 years if the inspector of municipalities approves. Thirdly, the agreement must provide for minor amendments, which can be deal with by council resolution and agreement of the owner. Amendments that are not minor require a bylaw that is adopted by public hearing. Section 519(3) of the *LGA* lists matters that may not be dealt with as minor amendments. Finally, the agreement must be authorized by bylaw.

G. Franchise Agreements

Under section 22 of the *Community Charter*, a council may, by bylaw adopted with the approval of the electors, enter into an agreement that grants the exclusive right to a utility to provide services to the municipality through a franchise agreement. The municipality charges the distribution company a franchise fee for the exclusive right to serve utilities. Franchises may only be granted for public transportation systems, water supply systems, sewage disposal systems, and gas, electrical, or other energy supply systems, and the maximum term is 21 years.

> **Agreements granting exclusive or limited franchises**
> **22** (1)A council may, by bylaw adopted with the approval of the electors, enter into an agreement that grants an exclusive or limited franchise for the provision of one or more of the following in accordance with the agreement:
>
> (a)a public transportation system;
> (b)water through a water supply system;
> (c)sewage disposal through a sewage system;
> (d)gas, electrical or other energy supply system.
>
> (2)The maximum term of an initial agreement or a renewal agreement under this section is 21 years.

H. Nuisance Bylaws

Under section 8(3)(h) of the *Community Charter*, municipalities have the authority to regulate, prohibit, and impose requirements in relation to the enhancement of well-being of its community in relation to nuisances, disturbances, and other objectionable situations, which are the matters listed in section 64.

> 8(3)A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:
>
> (h)the protection and enhancement of the well-being of its community in relation to the matters referred to in section 64 *[nuisances, disturbances and other objectionable situations]*;

Section 64 of the *Community Charter* says, municipalities may use their section 8(3)(h) powers to regulate, prohibit, and impose requirements in relation to the following:

> (a)nuisances;
> (b)noise, vibration, odour, dust, illumination or any other matter that is liable to disturb the quiet, peace, rest, enjoyment, comfort or convenience of individuals or the public;
> (c)the emission of smoke, dust, gas, sparks, ash, soot, cinders, fumes or other effluvia that is liable to foul or contaminate the atmosphere;
> (d)refuse, garbage or other material that is noxious, offensive or unwholesome;
> (e)the use of waste disposal and recycling services;
> (f)the accumulation of water on property;
> (g)unsanitary conditions on property;
> (h)drains, cesspools, septic tanks and outhouses;
> (i)trees, weeds or other growths that council considers should be removed, cut down or trimmed;
> (j)the carrying on of a noxious or offensive business activity;
> (k)graffiti and unsightly conditions on property;
> (l)indecency and profane, blasphemous or grossly insulting language.

Regional districts have a similar power under section 325 of the *LGA*.

> **325** The board may, by bylaw, do one or more of the following:
>
> (g)in relation to the emission of smoke, dust, gas, sparks, ash, soot, cinders, fumes or other effluvia,
>
> (i)require the owners or occupiers of real property, or their agents, to eliminate or reduce the fouling or contaminating of the atmosphere through those emissions,
> (ii)establish measures and precautions to be taken for the purpose of subparagraph (i), and
> (iii)establish limits not to be exceeded for those emissions;

I. Local Government-owned Land

If local governments own land, they have certain powers to require how the land will be used. The local government can retain ownership and control of the land, in which case it would have control over any development. Aside from the local government maintaining full control of the land, it could grant another party a lease or license, transfer ownership to another party while retaining some control of the land, or transfer ownership without retaining control over the lands other than its regulatory powers applicable to all lands in the local government. We will discuss the options of lease and sale while retaining some control in more detail.

Lease or license local government-owned land

Under section 8(1) of the *Community Charter*, municipalities have the full powers of a natural person. That means, a municipality can enter into agreements and contracts in the same way that a natural person can. Regional districts also have a broad range of corporate powers, which are listed in section 263 of the *LGA*. With these powers, local governments can enter into agreements under which they lease or license some of their land to someone else.

When land is leased, a landlord confers exclusive occupation on a tenant. During the period of the lease, the landlord retains a reversionary interest in the land. While a lease is a grant of exclusive possession, a license is permission to do something on the land which would otherwise be a trespass, and a license does not grant exclusive occupation of the land. The obligations of each party will generally be set out in the lease or license agreement. Since the local government owns the land, they can negotiate the terms of the lease or license agreement with the lessee or licensee. The lessee or licensee would then operate and maintain the land in accordance with the terms of the lease or license agreement.

Section 35 of the *Community Charter* vests the soil and freehold of every highway in a municipality to the municipality. Section 35(11) of the *Community Charter* allows municipalities to grant a license or allow an encroachment onto a municipally owned highway. A highway includes a public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, any other public way or any other land or improvement that has become a highway under the *Transportation Act*.[32] Together, these provisions mean that section 35 confers upon municipalities the power to grant licences for the use of highways that are in the municipality.[33] This means, if the land is a highway, municipalities only have the power to grant a license to that land, and they do not have authority to grant a lease without first raising title.

Local government transfers ownership while retaining some control

A local government can transfer land that they own to a third party at arm's length who assumes ownership and control of the lands. The local government retains some control over the lands using any or a combination of the following tools:

a. Section 219 covenant which imposes certain requirements on the transferee in respect of the lands, and which includes a rent charge to virtually ensure compliance with the covenant;

[32] SBC 2004, c 44, s 1.
[33] *FortisBC Energy Inc. v Surrey (City)*, 2013 BCSC 2382, at para 261.

b. Option to Purchase or Right of First Refusal held by the local government whereby the local government is granted the right to reacquire the lands if certain conditions are met;

c. Reverter under s. 10 of the *Property Law Act*[34] whereby the lands revert to the local government if certain conditions are no longer met. A transfer of land with a possibility of reverter is essentially a transfer that is less than absolute ownership. The local government transfers the land with the right to have the interest in land revert to the local government on the occurrence of a specified event, which may or may not occur.[35]

J. Local Service Area

Under section 210 of the *Community Charter*, a municipality can establish a local service, which is paid for in whole or in part by a local service tax. The services provided must be either services that the council considers provide a particular benefit to the municipality, or business improvement area services. Under section 211, a municipality must adopt a local area service by bylaw. A municipality may only adopt such a bylaw if the service and its cost recovery methods have been proposed by a petition or by council initiative, or the bylaw has received assent of the electors. The bylaw that establishes the local area service must do the following:

(a)describe the service,
(b)define the boundaries of the local service area,
(c)identify the methods of cost recovery for the service, including the form of local service tax and the portion of the costs of the service that are to be recovered by the local service tax, and
(d)if applicable, identify the portion of the costs of the service that are to be recovered by a general property tax.

A petition for a local area service is described in section 212 of the *Community Charter*, and it can be brought by owners of parcels that would be subject to the local service tax for the service. The petition must be signed by owners of at least 50% of the parcels that would be subject to the local service tax, and the owners signing must be the owners that represent at least 50% of the assessed value of land and improvements that would be subject to the local service tax. A local service area can include one lot, a group of contiguous lots, or scattered lots that are not contiguous.

A council can also propose to take on a local area service on its own initiative. It must give notice in accordance with section 94 to the owners who would be subject to the local service tax. The notice must include the information that would be required for a petition. If council is proposing all or some of the costs would be waived or reduced, the notice must include the amount the property owner will be required to pay and a statement indicating that council may proceed with the service

[34] RSBC 1996, c 377.
[35] *Re Tilbury West Public School Board and Hastie*, [1966] 2 O.R. 20, 55 D.L.R. (2d) 407 (O.N.S.C.) [*Tilbury*].

unless a petition against is presented within 30 days after notice has been given. Council may proceed with the local area service in accordance with the notice unless it receives a sufficient petition against.

Under section 214, council could also undertake a local area service If the bylaw establishing the service is adopted with the assent of the electors in the local service area.

K. Zoning Bylaws

Under section 479 of the *LGA*, a local government zoning bylaw may regulate:

1. the use of land, buildings, and structures;
2. the density of the use of land, buildings, and structures;
3. the siting, size, and dimensions of buildings, structures, and uses that are permitted on the land; and
4. the location of uses on the land and within buildings and structures.

Section 479 expressly authorizes local governments to prohibit any use or uses in a zone. This means, a local government is not obligated to provide for a particular land use in at least one zone within its boundaries.[36] A local government may prevent a particular use or class of uses from being established anywhere within its jurisdiction, either by an express prohibition or by excluding the use or uses when specifying permitted uses.

Amenity Zoning

Under section 482(1) of the *LGA*, a zoning bylaw may establish different density rules for a zone, one which generally applies, and a second rule that applies if requirements that a local government establishes in the bylaw are met. Some examples of amenities include a payment towards all or part of the cost of public open space, parkland, moving or planting trees, and the installation of a solar or wind farm that is owned or operated by the local government. If the land is in a transit-oriented area, a person following the second rule must not be entitled to a density that is less than or equal to the density of use and the density corresponding to the size and dimensions of the building set out in the regulations related to transit-oriented areas. Also, a person following the second rule must not be entitled to a density that is less than or equal to any higher density that is provided to the development under an affordable and special needs housing zoning bylaw.

482(2) provides, the following are conditions that a local government may include:

(a) subject to subsection (2.1), conditions relating to the conservation or provision of amenities, including the number, kind and extent of amenities;
(b) conditions relating to the provision of affordable and special needs housing units;

[36] *Common Exchange Ltd. v Langley (City)*, 2000 BCSC 1724.

(c) a condition that the owner enters a housing agreement before the issuance of a building permit.

It should be noted that a zoning bylaw must not establish conditions relating to the conservation or provision of an amenity that is specified in an ACC bylaw under section 570.7(1)(b).[37] This means that local governments cannot use their bonus density power to require the same things that are in their ACC bylaw. The local government must choose one or the other.

Bonus Density

Local governments have discretion whether to enact zoning or rezoning bylaws. As such, they may consider certain benefits or amenities that a developer offers in their decision whether to rezone property to allow for increased density from that which is permitted in the zoning bylaw. The local government will often secure the benefit or amenity with a s, 219 covenant.

A local government cannot directly enter into an agreement under which the local government will rezone property in exchange for a covenant.[38] Council has statutory discretion to find a balance between the competing interests of property owners who will be impacted by the rezoning, and a covenant under which the City promises a developer that they will rezone a property impairs that discretion. If a developer offers a covenant, a council or board may consider that offer as a factor in their decision to rezone.[39] Additionally, a council, board, or local government department can raise concerns to someone who is applying for rezoning, and they can suggest a s. 219 covenant as part of a way that the applicant can address those concerns.[40] A council or board may also, between third reading of a zoning bylaw and adoption, request a covenant to address issues that were raised at a public hearing.[41] Generally, local governments will require the covenant to be registered before the rezoning.

L. Restrictions on Local Government Authority in Relation to Buildings

Section 5 of the *Building Act* limits local governments authority to regulate buildings. Section 5(3) states:

> 5(3) Subject to subsection (4), a local building requirement, other than a local building requirement contemplated under section 3(2)(j), has no effect to the extent that it relates to a matter that is:
>
> > (a) subject to a requirement, in respect of building activities, of a building regulation, or
> > (b) prescribed by regulation as a restricted matter.

[37] *Ibid,* s 482(2).
[38] *Vancouver*, supra note 20.
[39] *Racanelli*, *supra* note 23.
[40] *Marando*, *supra* note 24.
[41] *Jones Delta (District),*1992 CanLII 4037 (BC CA).

> (4)(3) does not apply in relation to a matter that is prescribed by regulation as an unrestricted matter.
>
> (5) A local authority must ensure that a local building requirement in relation to a matter that is prescribed by regulation as an unrestricted matter and a local building requirement contemplated under section 3 (2) (j) comply with the enactment listed in subsection (2) under which it is made.

This means, only the province can set technical building requirements for building activities. "Building activities" means the construction of new buildings and the alteration, repair, or demolition of existing buildings. Technical requirements are the requirements for construction that define the methods, materials, and other matters, and includes the performance to be achieved when building. A "building matter" is a topic, subject, or theme addressed in the BC Building Code.

In the provincial publication "*Changes for Local Governments Under Section 5 of the Building Act*[42] the Province specifies that the section 5 restrictions do not affect local governments' authority to establish administrative requirements, by bylaw, that regulate building construction or requirements for the enforcement of provincial building regulations. The Province gives the example of a requirement for backflow preventer testing after construction is complete as an administrative requirement that would not be affected by section 5. Local governments are also able to regulate in relation to matters that are out of scope of the *Building Act*.[43] An example of a matter that is outside the scope of the *Building Act* is EV chargers. Finally, local governments may regulate on matters that are listed in a regulation as unrestricted.[44]

The *Building Act General Regulation* designates the form and exterior design of buildings and other structures and any matter relating to machinery, equipment, and systems external to a building as unrestricted matters.[45]

III. Analysis

A. Requirements for EV Charging and Curbside Charging

A requirement for EV chargers or EV readiness means that parking stalls in a new development are either equipped with an EV charger, or they have the wiring such that a level 2 EV charger could be installed. This is particularly important for new buildings with underground parking, because it is significantly more expensive to install the required wiring for EV charging after the parking garage has been completed.

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[42] British Columbia, Office of Housing and Construction Standards, *Changes for Local Governments Under Section 5 of the Building Act,* 2020 reissue, < https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/construction-industry/building-codes-and-standards/guides/section_b_appendix_dec_2020_update.pdf>.
[43] *Ibid*, at p. 13.
[44] *Ibid*, at p. 6.
[45] *Building Act General Regulation*, *supra* note 33, s. 2(e).

Curbside charging consists of EV charging stations that are accessible and available to the public. They are typically located in a public right-of-way. They can also be strategically located near multi-family buildings or high-density neighbourhoods.

(1) Transportation Demand Management

Local governments can likely require EV chargers, EV readiness, or curbside charging, by bylaw, as transportation demand management under section 527.1 of the *LGA*. Pursuant to section 527.1, local governments may pass a bylaw that requires owners to provide transportation demand management measures. Section 527.1 explicitly includes electric vehicle charging stations as a transportation demand management measure, which means local governments could likely enact a bylaw that requires EV chargers, EV readiness, curbside charging, or any combination thereof. Section 127.1(2)(b) permits the local government to, by bylaw, establish design standards for transportation demand management measures. Section 127.1(2)(c) enables local governments to allow the owner to opt for a payment of money to the local government instead of providing the measure. The local government should ensure that the bylaw specifies that it is requiring EV readiness, EV chargers, curbside chargers or any combination thereof. The bylaw should also specify the level of charger.

This is likely the best option for local governments to pursue EV charging requirements in new developments. This is a relatively new power that was enacted in 2024, and it provides clear authority for local governments to require EV charging by bylaw.

(2) Section 219 Covenant

A local government could likely obtain a s. 219 covenant from an owner or developer that requires the developer to provide EV readiness. As long as the provisions of the covenant are in some way connected to the use of the land, the construction of buildings, the subdivision of land, or the protection of an amenity, the registrar at the Land Title Office will accept it. The covenant could be a promise from the developer that the development they are building will include 100% EV ready parking stalls, EV chargers at a certain percentage of parking stalls, curbside chargers available to the public, or any arrangement to which the developer agrees. The council could obtain a s. 219 covenant at the time of rezoning, on application for a subdivision approval, for development permit or development variance permit applications, or as part of a phased development agreement.

The local government receiving the covenant should ensure that the covenant is clearly and concisely written to articulate the exact promise the developer or owner is making. It should specify the percentage of EV ready parking stalls or chargers that the developer or owner is going to provide, the number of curbside or public chargers the developer or owner will provide, and the level of charger.

(3) Amenity Zoning

A local government could likely require EV chargers, EV ready parking stalls, or curbside chargers as a condition for additional density under section 482(1) of the *LGA*. Section 482(1) allows local governments to establish two different density rules within a zone. The second rule allows for increased density if the developer meets certain conditions that are established in the zoning bylaw. A condition could relate to the conservation or provision of amenities. EV chargers, EV readiness, and curbside charging would all likely constitute amenities that the zoning bylaw could require. The local government should ensure the zoning bylaw clearly specifies the percentage of EV chargers or EV ready parking stalls and the level of charger that is required for the developer to access additional density. If the local government is also requiring curbside chargers, it should ensure the zoning bylaw also specifies the number and level of charge that is required for the curbside chargers.

(4) Phased Development Agreements

A local government could likely require a developer to provide EV chargers, EV readiness, or curbside charging in a phased development agreement under section 516 of the *LGA*. In a phased development agreement, the developer can provide certain amenities or features in the development, and in exchange, the local government agrees to "freezing" certain zoning bylaw provisions that are identified in the agreement. EV chargers, EV readiness, and curbside charging could all likely constitute amenities or features that a developer could agree to provide in a development. For a local government to enter into a phased development agreement, they are required to pass a bylaw and hold a public hearing. Local governments should ensure that the agreement clearly articulates the percentage of EV readiness or EV chargers the developer will provide and the level of charger that is required. If the developer is going to provide curbside chargers, the agreement should also specify the number and level of charger that is required.

B. Curbside Charging

(1) License or Lease

Municipalities can likely use their natural person powers under section 8(1) of the *Community Charter* and regional districts can likely use their corporate powers under section 263 of the *LGA* to lease local government-owned land to an EV charging provider to provide public or curbside charging. The terms of the lease would be set out in the agreement between the local government and the service provider.

For land that is a highway in a municipality, which could include sidewalks, boulevards, lanes, or other public passageways that have become a highway under the *Transportation Act*, the municipality can likely grant a license to an EV charging provider to provide public or curbside charging on the highway under section 35(11) of the *Community Charter*. The license would allow the EV charging provider to use that land, but it does not give them exclusive occupation of the land. The terms of the license would be set out in the agreement granting the license between the municipality and the service provider.

C. Require Developers to Provide Car Sharing

Car sharing is a car rental service that allows people to use vehicles for short periods of time, often by the hour. It can be an economical and eco-friendly option for those who only need occasional access to a vehicle.

(1) s. 219 Covenant

A local government could likely obtain a s. 219 covenant from an owner or developer that requires the owner or developer to provide parking stalls that are allocated to car sharing. As long as the provisions of the covenant are in some way connected to the use of the land, the construction of buildings, the subdivision of land, or the protection of an amenity, the registrar at the Land Title Office will accept it. The covenant could be used to secure the parking stalls and for the building owner to maintain them. Then a car share company can contract with the developer or owner to use the stalls as part of its business. The developer or owner could also contract with a car share company to deliver an incentive to new occupants of the building.

D. Require Energy Benchmarking and Energy and Emissions Reporting for New Part 3 Buildings and for Existing Part 3 and Part 9 Buildings

Benchmarking is the practice of measuring and comparing the energy performance of a building to itself and a comparison control group to improve performance and take resulting steps to save money. Whether required by law or voluntary, energy benchmarking measures performance of a single building over time relative to itself and other similar buildings. A building's performance can also be measured in relation to modelled simulations (such as an energy code).

Energy (and water) benchmarking includes internal and external data. Internal includes historical consumption to identify issues and patterns that signal items to be addressed and options for better scores. External factors consider consumption patterns and historical data in relation to buildings of similar classes (e.g., in relation to land use, building size, energy source, etc.).

(1) Bylaw

Municipalities can likely use their power to regulate in relation to buildings and other structures to require energy benchmarking for new and existing buildings. The *Community Charter* provides broad heads of authority for local governments. Section 8(3)(l) of the *Community Charter* provides that a council may, by bylaw, regulate, prohibit and impose requirements in relation to "buildings and other structures". The authority to regulate or impose requirements has been held by the BC courts to afford councils with a broad scope of authority and an extraordinary breadth of jurisdiction. This power has also been held to apply to existing buildings.[46]

Council's must choose which subsection they are using as authority to enact their bylaw carefully, and evidence must support that choice. If the dominant purpose of the bylaw falls under a power that is listed in section 9 as being a sphere of concurrent jurisdiction with the province, the municipality will need to obtain

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[46] *Bowen Island (Municipality) v Haxby*, 2022 BCSC 2069, at para 23.

ministerial approval before enacting the bylaw. This as illustrated in *Canadian Plastic Bag Association*, where Victoria enacted a plastic bag bylaw under the "business regulation" power. All the evidence showed that the council intended to enact an environmental protection bylaw, which is a sphere of concurrent jurisdiction and would have required ministerial approval, so the bylaw was held to be invalid. As well, the bylaw provisions must be reasonable, in good faith, and non-discriminatory.

In addition to the broad spheres of jurisdiction, BC municipalities have the unique power (only in BC) to impose requirements in relation to the exercise of a power under the spheres. Accordingly, councils may impose reasonable requirements in relation to "buildings" under section 8(3)(l), if no other enactment has prohibited or restricted that authority. Nothing in section 9 or 10 limits this authority. Section 53 does limit section 8, but the result is positive for energy conservation and greenhouse gas emissions:

> **53** (2) A council may only exercise its authority under section 8(3)(l) *[spheres of authority — buildings and other structures]* or this Division for the following:
>
> (a)the provision of access to a building or other structure, or to part of a building or other structure, for a person with disabilities;
>
> (b)the conservation of energy or water;
>
> (c)the reduction of greenhouse gas emissions;
>
> (d)the health, safety or protection of persons or property.

The only other enactment that could have an impact on the municipal buildings power is section 5 of the *Building Act*. Section 5(3) of the *Building Act* states, a local building requirement is of no effect to the extent that it is:

> (a) subject to a requirement, in respect of building activities, of a building regulation, or
>
> (b) prescribed by regulation as a restricted matter.

Section 5(4) says 5(3) does not apply if the matter is prescribed by regulation as an unrestricted matter.

Energy benchmarking is not subject to a requirement of any existing building regulation (such as the BC Building Code or any regulations under the *Building Act*) and is not a restricted matter. Even if energy benchmarking were to be subject to a requirement of an existing building regulation, section 2.2 of the *Building Act General Regulation* provides, the conservation of energy and the reduction of GHG emissions are unrestricted matters. The *Building Act General Regulation* adds two conditions to the local government authority to regulate in the matters of energy conservation and the reduction of GHG emissions in that the local regulation must not require buildings to be constructed except in conformance with a step in the step code, and the local building requirement may not modify a requirement of, or impose requirements in addition to those set out in the step code.[47]

> (2) Subject to subsection (3) of this section, the following matters are unrestricted for the purposes of section 5 (4) *[restrictions on local authority jurisdiction]* of the Act:
>
> (a) the conservation of energy;
> (b) the reduction of greenhouse gas emissions.
>
> (3) A local authority may enact, to the extent permitted by its local authority legislation, a local building requirement with respect to a matter referred to in subsection (2) subject to both of the following conditions:
>
> (a) the local building requirement may not require buildings within the jurisdiction of the local authority to be constructed except in conformance with a Step described in Article 9.36.6.3. or 10.2.3.3. of Division B of the building code [i.e., under the Step Code];
>
> (b) the local building requirement may not modify a requirement of, or impose requirements in addition to those set out in, Subsection 9.36.6. or 10.2.3. of Division B of the building code.
>
> (c) subject to subsection (4), require buildings within the jurisdiction of the local authority to be constructed except in conformance with a step described in Subsection 9.36.6. of Division B of the building code.

Energy benchmarking involves the conservation of energy and the reduction of GHG emissions, so it would likely constitute an unrestricted matter. Energy benchmarking requirements do not require buildings to be constructed differently from a step in the energy step code, and they do not modify a requirement or impose a requirement in addition to the energy step code. This means, energy benchmarking would likely constitute an unrestricted matter, and a municipality would be permitted to enact a bylaw requiring energy benchmarking, if the bylaw is reasonable and if it does not govern the construction of a building. For the bylaw to be reasonable, the municipality would likely be required to consult with affected building owners, occupiers, and managers as well as informed consultant/industry and staff reports to the council. The evidence must show the bylaw is enacted clearly in relation to buildings, and not just the environment.

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[47] *Building Act General Regulation, supra* note 33, s 2.2(2).

We note that section 8(3)(l) only applies to municipalities, and regional districts do not have a corresponding authority that authorizes them to enact a bylaw that requires energy benchmarking.

E. Require Commissioning of New Buildings

Modern buildings combine a variety of sophisticated systems – from heating, ventilation and air-conditioning to water distribution. Commissioning is the ongoing process of tuning and calibrating these systems to make sure buildings are performing as efficiently as possible. Like any sophisticated system, a building must be tuned regularly to ensure optimal performance. Commissioning begins at the design stage and continues through construction and occupancy. A commissioning agent monitors building plans, tests and documents all systems, and arranges training for building occupants on proper operation and maintenance.

(1) s. 219 Covenant

A local government could likely obtain a s. 219 covenant from an owner or developer that requires the owner or developer to conduct commissioning of a new building. As long as the provisions of the covenant are in some way connected to the use of the land, the construction of buildings, the subdivision of land, or the protection of an amenity, the registrar at the Land Title Office will accept it. The covenant could be a promise from the developer that they will conduct commissioning of the building's systems at key points in the development process. The council could obtain a s. 219 covenant at the time of rezoning, on application for a subdivision approval, or for development permit or development variance permit applications. The local government council or board should ensure that the covenant clearly articulates the processes the developer is required to follow and any documentation or evidence to show this requirement has been met.

(2) Local government-owned land

If a Local Government owns land, they have certain powers to require how the land will be used, and they could likely use those powers to require developers or building owners to conduct building commissioning. Firstly, if a local government owns land and they develop the land themselves, they would be able to conduct their own building commissioning, and they could use that land as a leading example of building commissioning. Secondly, if the local government grants a third party a lease or license on local government land for the third party to develop, the local government could include requirements for building commissioning in the lease or license agreement. The lessee or licensee would then need to operate the land in accordance with the lease or license agreement.

Thirdly, the local government could transfer the land to a third party, while retaining some control over the land. The local government could do this by including certain mechanisms in the purchase and sale agreement for the land. One option is the local government could require the third party to grant the local government a s. 219 covenant that imposes requirements on the third party to conduct building commissioning. Another option is the local government could have an option to purchase or a right of first refusal where the local government has the right to reacquire the land if certain conditions are met, for example if the third party does not conduct building commissioning. A final option is the purchase and sale agreement could include a reverter under section 10 of the *Property Law Act* where the lands revert to the local government if certain conditions are met or on the occurrence of a specified event, which may or may not occur. For example, the lands could revert to the local government if the third party fails to conduct building commissioning.

(2) Bylaw

Municipalities can likely require commissioning of new buildings by enacting a bylaw under section 8(3)(l) of the *Community Charter*. Section 8(3)(l) of the *Community Charter* provides that a council may, by bylaw, regulate, prohibit, and impose requirements in relation to "buildings and other structures". This section is limited by section 53 of the *Community Charter*, which says a municipality may only exercise its authority under section 8(3)(l) for the following:

> (a)the provision of access to a building or other structure, or to part of a building or other structure, for a person with disabilities;
>
> (b)<u>the conservation of energy or water</u>;
>
> (c)<u>the reduction of greenhouse gas emissions</u>;
>
> (d)the health, safety or protection of persons or property.

Since requiring building commissioning constitutes the reduction of GHG emissions and the conservation of energy or water, section 53 would likely permit a bylaw that requires building commissioning.

Section 5 of the *Building Act* would likely limit a municipality's section 8(3)(l) power to enact a bylaw that requires building commissioning. Section 5(3) of the *Building Act* states, a local building requirement is of no effect to the extent that it is:

> (a) subject to a requirement, in respect of building activities, of a building regulation, or
> (b) prescribed by regulation as a restricted matter.

Section 5(4) says 5(3) does not apply if the matter is prescribed by regulation as an unrestricted matter.

Building commissioning is not currently subject to a requirement of any existing building regulation (such as the BC Building Code or any regulations under the *Building Act*) and is not a restricted matter. Section 2.2 of the *Building Act General Regulation* provides, the conservation of energy and the reduction of GHG emissions are unrestricted matters. The *Building Act General Regulation* adds two conditions to the local government authority to regulate in the matters of energy conservation and the reduction of GHG emissions in that the local regulation must not require buildings to be constructed except in conformance with a step in the step code, and the local building requirement may not modify a requirement of, or impose requirements in addition to those set out in the step code.[48]

> (2) Subject to subsection (3) of this section, the following matters are unrestricted for the purposes of section 5 (4) *[restrictions on local authority jurisdiction]* of the Act:
>
> (a) the conservation of energy;
> (b) the reduction of greenhouse gas emissions.
>
> (3) A local authority may enact, to the extent permitted by its local authority legislation, a local building requirement with respect to a matter referred to in subsection (2) subject to both of the following conditions:
>
> (a) the local building requirement may not require buildings within the jurisdiction of the local authority to be constructed except in conformance with a Step described in Article 9.36.6.3. or 10.2.3.3. of Division B of the building code [i.e., under the Step Code];
>
> (b) the local building requirement may not modify a requirement of, or impose requirements in addition to those set out in, Subsection 9.36.6. or 10.2.3. of Division B of the building code.
>
> (c) subject to subsection (4), require buildings within the jurisdiction of the local authority to be constructed except in conformance with a step described in Subsection 9.36.6. of Division B of the building code.

Since building commissioning is for the purpose of conserving energy and reducing GHG emissions, it would likely constitute an unrestricted matter; however, the condition that unrestricted matters do not impose additional requirements to the step code would likely be problematic. Since building commissioning requires a developer or builder to do work in addition to building the building in accordance with the step code, municipalities likely do not have authority to implement a bylaw that requires building commissioning on their own.

Section 7(1) of the *Building Act* allows one or more local authorities to make a request to the minister to make a building regulation in respect of the local authority or authorities making the request. Thus, it is possible that a municipality could make a request to the minister for a regulation that requires building commissioning.

F. Limits on new natural gas servicing and connections

[48] *Building Act General Regulation, supra* note 33, s 2.2(2).

Regulatory pathways that limit natural gas servicing and connections favour all electric power or on-site renewable energy over natural gas.

(1) Development Permit Area Authority

Local governments could likely use DPAs to limit natural gas servicing and connections. Section 488(1)(h) and (j) of the *LGA* allows local governments, through their official community plan, to designate a DPA to promote energy conservation and the reduction of GHG emissions. Under section 491(9) of the *LGA*, an energy conservation or GHG reduction DPA may prescribe requirements in relation to (a) landscaping; (b) siting of buildings and other structures; (c) form and exterior design of buildings and other structures; (d) specific features in the development; and (e) machinery, equipment and systems external to buildings and other structures.

Section 5 of the *Building Act* significantly constrains the ability for local governments to regulate buildings: a local government cannot impose its own building standards for any building activities subject to the *Building Act* and its accompanying regulations, including the BC Building Code, 2024, apart from prescribed “unrestricted matters”. This means, local governments can only impose DPA guidelines that may be construed as building regulations for unrestricted matters. For buildings located in a designated energy conservation or reduction of greenhouse gas emissions DPA, the *Building Act General Regulation* designates the form and exterior design of buildings and other structures and any matter relating to machinery, equipment, and systems external to a building as unrestricted matters. This aligns with the authority in section 491(9) of the *LGA*.

In *511784 BC Ltd. et al v Salmon Arm,*[49] the court defined building “form” as referring to shape and it defined “exterior design” as relating to the external façade and walls in the sense of their appearance, such as colour and materials.[50] This was established in the context of considering the scope of the commercial, industrial or multi-family residential form and character DPA under s. 488(8) of the *LGA*. This decision provides an idea of how courts may approach the interpretation of what constitutes “form” or “exterior design” in this context.

There is no case law that specifically addresses local government's authority under section 491(9); however, this authority likely allows a local government to adopt guidelines with respect to exterior equipment such as water cisterns, solar collectors, and wind turbines, even though they may be connected to mechanical systems in the building. Further, the authority to impose requirements respecting specific features in the development, including machinery, systems, and equipment external to buildings, likely allows for the compulsory connection to district energy systems, municipal electricity services, heat pumps, solar panels, geothermal heating apparatus, irrigation systems using recycled water, and other energy efficient systems.

(3) s. 219 Covenant

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[49] 2001 BCSC 245.
[50] *Ibid*, at para 60.

A local government could likely obtain a s. 219 covenant from an owner or developer that regulates the use of fossil fuels in a new building. As long as the provisions of the covenant are in some way connected to the use of the land, the construction of buildings, the subdivision of land, or the protection of an amenity, the registrar at the Land Title Office will accept it. The covenant could be a promise from the developer that they will not use natural gas in the building, or it could be that the developer will use heat pumps as the buildings main heat source. The council could obtain a s. 219 covenant at the time of rezoning, on application for a subdivision approval, or for development permit or development variance permit applications.

G. Zoning Bylaws to Regulate Fossil Fuels

This regulatory pathway considers the ways local governments can use their zoning bylaws to regulate fossil fuels.

(1) Zoning Bylaws to Regulate the Use of Land

Under section 479(1)(c)(i) of the *LGA*, local governments can enact zoning bylaws to regulate the use of the land, and this includes the power to prohibit uses. For example, a bylaw could exclude the use of vacation homes in a residentially zoned area.[51] A zoning bylaw may discriminate between existing and future uses and lawfully "downzone" or reduce the permitted uses of land.[52]

In *Petro-Canada v North Vancouver (District of)*,[53] the Court upheld a zoning bylaw that divided gas stations into 2 types, one with a service bay and one without. The zoning bylaw then only permitted gas stations without a service bay in one type of zone in the municipality. This was upheld because the municipality was lawfully regulating the use of the land. Following *Petro-Canada*, local governments could likely regulate or prohibit a use of land that amounts to refinement, processing, or sale of fossil fuels, since this type of regulation would constitute a regulation of the use of land.

(2) s. 219 Covenant at the Time of Rezoning

If a developer or owner of a property applies for rezoning, a local government could consider a s. 219 covenant from the developer or owner in their decision whether to rezone the property. The local government is not permitted to promise that it will rezone the property in exchange for the s. 219 covenant,[54] but the council or planning staff are permitted to raise concerns about rezoning the property with a developer or owner and suggest a s. 219 covenant as a way of alleviating those concerns.[55] Since a s. 219 covenant is effectively a contractual promise between the owner of the land and the local government, it could include anything the owner agrees to, including limitations on fossil fuel use in the development. We note that

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[51] *Nanaimo (Regional District) v Saccomani*, 2018 BCSC 752.
[52] *Wall & Redekop Ltd. v Vancouver* (1974), 16 N.R. 435 (S.C.C.).
[53] 2001 BCCA 203 [*Petro-Canada*].
[54] *Vancouver*, *supra* note 19.
[55] *Racanelli*, *supra* note 22; *Marando*, *supra* note 23.

with the passing of Bill 44, this tool will likely only be useful in areas that are not zoned as transit-oriented areas or for small scale multi-unit housing.

H. Require Home Oil Tank Removal

Regulatory pathways to require home oil tank removal would require homeowners with home oil tanks as a heat source to remove them and replace them with an alternative heat source with fewer GHG emissions. Ideally, a home oil tank is replaced with an electric heat pump.

(1) DPA Powers

Local governments can designate energy conservation and GHG reduction DPAs under section 488(1)(h) and (j) of the *LGA* through their OCP. Under section 488(2) of the *LGA*, local governments are required to include in their OCP the special conditions or objectives that justify the designation and “guidelines” concerning how the special conditions or objectives will be addressed.

Under section 491(9) of the *LGA*, an energy conservation or GHG reduction DPA may prescribe requirements in relation to: (a) landscaping; (b) siting of buildings and other structures; (c) form and exterior design of buildings and other structures; (d) specific features in the development; and (e) machinery, equipment, and systems external to buildings and other structures. Section 491(9) of the *LGA* does not provide authority to impose internal building requirements such as plumbing, appliances, insulation, heating, air conditioning, and lighting.

Section 5 of the *Building Act* constrains the ability for local governments to regulate buildings. Under section 5, a local government cannot impose its own building standards for any building activities subject to the *Building Act* and its accompanying regulations, including the BC Building Code, apart from prescribed “unrestricted matters”. The *Building Act General Regulation* designates the form and exterior design of buildings and other structures and any matter relating to machinery, equipment, and systems external to a building as unrestricted matters for buildings located in energy conservation or GHG reduction DPAs. These unrestricted matters coincide with local government's authority in section 491(9)(c) to (e).

There has been no judicial consideration that specifically considers the scope of authority granted under s. 491(9). Despite the lack of judicial consideration, this authority likely permits a local government to adopt guidelines with respect to exterior equipment such as water cisterns, solar collectors, and wind turbines, even though they may be connected to mechanical systems in the building. The authority to impose requirements respecting specific features in the development, including machinery, systems, and equipment external to buildings, likely allows for the compulsory connection to district energy systems, municipal electricity services, heat pumps, solar panels, geothermal heating apparatus, irrigation systems using recycled water, and other energy efficient systems. Local governments could likely use this authority to impose requirements that the home is connected to a heat source other than a home oil tank.

For property within a DPA, owners must obtain a development permit from the local government prior to constructing, adding to, or altering a building or structure. Local governments are required to exercise their authority to issue development permits in accordance with their guidelines. This means that for this requirement to require the removal of a home oil tank, the homeowner or developer would need to require a development permit for an alteration or addition to the building.

(2) Local Service Area

Municipalities can likely run a home oil tank replacement program that lends money to homeowners using grants or loans from the Federation of Canadian Municipalities ("FCM") or from the province through a local service area to assist homeowners in replacing home oil tanks.

A local service area must be established based on the petitions of a majority of owners, an alternative approval process or assent/referendum. Once the local government receives approval in one of these three ways, it can adopt the local service area bylaw and provide the service. Typically, the municipality or its agency would identify a body of approved contractors to do the oil tank replacement for the "members" of the local service area in accordance with conditions set out in the bylaw (e.g., defining clean energy).

The municipality could pay for the home oil tank replacement as "assistance" to owners using borrowed monies or loans from reserves and spreading the repayments by the lot owners over 10 or 15 years. The municipality could collect these repayments as parcel taxes at the same time as utility charges for garbage, water, etc. Municipalities would need to use a grant or loan from FCM or the province to cover the costs of the home oil tank replacement. The parcel taxes could be collected in the same manner as property taxes in the event of default by a taxpayer. We note that the Province of BC is studying the PACE program.

(4) Bylaw

If a municipality gets ministerial approval, they can likely enact a bylaw requiring home oil tank removal with the concurrent authority of the *Community Charter* section 8(3)(i) protection of the natural environment or section 8(3)(j) public health. Since these are listed in section 9 as spheres of concurrent authority, a municipality cannot enact a bylaw under these authorities without ministerial approval. In the case of home oil tanks, if the municipality can show the minister, with evidence, that home oil tanks are leaking into the ground, and they are causing an environmental or public health risk, the minister may approve a bylaw requiring home oil tank removal. With that ministerial approval, a local government could likely require home oil tank removal by bylaw.

In addition, the municipality may incentivize oil tank removal with a program analogous to a "PACE" program by providing loans or grants for removal of the oil tanks plus installation of heat pumps. Several municipalities in British Columbia have undertaken such programs, including District of Saanich and District of Central Saanich.

I. Retrofitting Existing Buildings

Retrofitting existing buildings means upgrading buildings for improved energy efficiency and to decrease operating emissions. Some examples of building energy retrofits include updating windows, insulation, installing a heat pump, or installing solar panels.

(1) Local Service Area

Municipalities can likely run a home retrofit program that lends money to homeowners using grants or loans from the Federation of Canadian Municipalities ("FCM") or from the province through a local service area.

A local service area must be established based on the petitions of a majority of owners, an alternative approval process or assent/referendum. Once the local government receives approval in one of these three ways, it can adopt the local service area bylaw and provide the service. Typically, the municipality or its agency would identify a body of approved contractors to do the retrofitting for the "members" of the local service area in accordance with retrofitting conditions set out in the bylaw (e.g., defining clean energy).

The municipality could pay for the work as "assistance" to owners using borrowed monies or loans from reserves and spreading the repayments by the lot owners over 10 or 15 years. The municipality could collect these repayments as parcel taxes at the same time as utility charges for garbage, water, etc. Municipalities would need to use a grant or loan from FCM or the province to cover the costs of the retrofits. The parcel taxes could be collected in the same manner as property taxes in the event of default by a taxpayer.

J. Cooling requirements

Cooling requirements are requirements that a building must be capable of keeping the indoor temperature of a building or a room below a certain temperature.

(1) BC Building Code Requirements

Section 9.33.3(2) of the Building Code requires residential buildings with use in the summer months to have at least one room with facilities that are capable of maintaining the indoor air temperature of 26 degrees Celsius or less. This requirement likely only applies to new buildings. The 2024 Building Code standards generally do not apply to existing buildings that were built to standards in earlier building codes. When an existing building requires a building permit, local governments can, by bylaw or regulation, require the existing building to comply with 2024 Building Code safety or performance standards. A cooling requirement would likely be considered a safety standard, so local governments could likely, by bylaw or regulation, require existing buildings that need a building permit to comply with this cooling requirement in the 2024 Building Code.

(2) Bylaw

Local governments could likely enact a bylaw requiring cooling for rental units and rental properties. Municipalities have authority under section 8(3)(g) of the *Community Charter* to regulate, prohibit, and impose requirements in relation to the heath, safety, or protection of persons or property relating to matters in section 63.

(3)A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:

> (g)the health, safety or protection of persons or property in relation to matters referred to in section 63 *[protection of persons and property]*;

Under section 63, municipalities may exercise this authority in relation to rental units and residential property that are subject to a tenancy agreement.

63 The authority of a council under section 8 (3) (g) *[spheres of authority — protection of persons and property]* may be exercised in relation to the following:

> (f)rental units and residential property, as those are defined in the *Residential Tenancy Act*, that are subject to a tenancy agreement, as defined in that Act;

Regional districts also have this power under section 298(1)(n) of the *LGA*.

298(1)Subject to the *Public Health Act*, the *Drinking Water Protection Act*, the *Fire Safety Act* and the regulations under those Acts, the board may, for the purposes described in subsection (2), by bylaw, do one or more of the following:

> (n)require the maintenance of "rental units" and "residential property", as defined in the *Residential Tenancy Act*, that are subject to a "tenancy agreement" as defined in that Act, in accordance with the standards specified in the bylaw;

The purposes in section 298(2) include “the health, safety or protection of persons or property.”

This power was interpreted in *1193652 B.C. Ltd. v New Westminster (City)*,[56] when New Westminster used their power under section 8(3)(g) to enact a bylaw to protect renters from evictions. In holding that this bylaw was within the City’s 8(3)(g) power, the court said, “there is no express limitation in s. 8(3)(g) as to the permissible object of a bylaw aimed at the "protection" of tenants of rental units.”[57] Since this power has been interpreted broad enough to protect tenants from evictions, it likely could also be used to protect tenants from the dangers of extreme heat. As such, local governments can likely enact bylaws requiring cooling in rental properties or requiring landlords to allow renters to use their own mobile cooling units to rental properties. We recommend that the bylaw clearly shows that it is for the purpose of protecting renters from the dangers of prolonged exposure to extreme heat so that

[56] 2020 BCSC 163, affirmed in 2021 BCCA 176.
[57] *Ibid*, at para 58.

it cannot be interpreted as falling under a different municipal power under section 8(3) of the *Community Charter* that has additional restrictions.