

MEMORANDUM

TO: Tom Berkhout
FROM: Don Lidstone, KC and Alex Lidstone
DATE: November 10, 2025
RE: Emerging Regulatory Pathways - Phase 2
FILE: 20294-101

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I. Introduction

You have asked us to provide a legal review as part of the second phase of a research project focused on local government regulatory levers for decarbonization and increasing energy efficiency in buildings and transportation.

This memo discusses the available legal regulatory pathways for local governments in British Columbia to implement the objectives that you have identified to reduce GHG emissions in mobility and buildings. 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 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 you have asked about. Then, for each question you have asked, it discusses the legal tools that are available for local governments and how they apply to that question.

II. Legal Tools

A. Bylaws

A local government bylaw is essentially a local law, and its effect 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”. An 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 says, 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*

¹ RSBC 1996, c. 238.

² SBC 2003, c 26 [*Community Charter*].

³ *Community Charter* at s 122(3).

Charter applies to regional districts through section 226(2) of the *Local Government Act*.⁴

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 two examples of provincial enactments that provide powers under which municipalities and regional districts may enact bylaws. Other statutes grant additional powers or impose constraints on jurisdiction.⁵

(a) *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.⁶ 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 former *Municipal 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.

⁴ RSBC 2015, c 1 [*LGA*].

⁵ For example, park dedication under the *Land Title Act* or bylaw enforcement under the *Local Government Bylaw Notice Enforcement Act*.

⁶ *Community Charter* at s 7.

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 a local government may exercise 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.” By way of example, section 8(8) provides that 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 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.⁷ 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.⁸

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:
- a) municipal services;
[...]
 - c) trees;
[...]
 - 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*]⁹;

⁷ *Community Charter* at s 8(8).

⁸ *Community Charter* at s 8(8)(c).

⁹ Section 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

- 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 *Community 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.¹⁰ 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 if* another purpose of that bylaw is a valid non-concurrent sphere of authority under section 8(3). A minister can pre-approve a range of bylaws by causing enactment of a regulation or by agreement.

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 the 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.

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.

¹⁰ *Canadian Plastic Bag Association v Victoria (City)*, 2019 BCCA 254 [*Canadian Plastic Bag Association*].

(b) *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, which sections apply to municipalities, and which sections apply to both.

(c) *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 can 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*.¹¹ 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.¹² Under section 7(2) of the *Local Government Bylaw Notice Enforcement Act*, a bylaw notice 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 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 allows local government councils, by bylaw, to 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

¹¹ SBC 2003, c 60 [*Bylaw Notice Act*].

¹² *Community Charter* at ss 7(1)(a) and (b).

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.¹³

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.¹⁴ An injunction may also be granted to enforce a resolution to issue a development permit. 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.¹⁵ However, the court can be unpredictable, so there is no guarantee the injunction will be granted.

A fifth option is for local governments to enforce bylaws by way of prosecution under the *Offence Act*. See, for example, *West Vancouver v Morshedian*.¹⁶ The local government may seek fines on conviction, up to \$50,000 per day per offence.

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 area as an energy conservation and GHG reduction DPA. The local government must include in their OCP (or optionally in a zoning bylaw if the area has been designated under the OCP) the special conditions or objectives that justify the designation and “guidelines” concerning how the special conditions or objectives will be addressed.¹⁷

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;

¹³ *Community Charter* at s 266(3).

¹⁴ *GVRD v Stainsby*, 2007 BCSC 585, at para 60.

¹⁵ *Vancouver (City) v Maurice*, 2005 BCCA 37, at para 34.

¹⁶ 2017 BCSC 408.

¹⁷ *LGA* at s 488(2).

(2)With respect to areas designated under subsection (1), the official community plan must

(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.¹⁸ Local governments must exercise their authority to issue a development permit in accordance with the guidelines.¹⁹

C. Section 219 Covenants

¹⁸ *LGA* at s 489(b).

¹⁹ *LGA* at s 490(2); *0742848 B.C. Ltd. v Squamish (District)*, 2011 BCSC 747, at paras 13-15.

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.²⁰

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 section 219 of the *Land Title Act*,²¹ 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 section 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. Optimally, a covenant will define itself to be a section 219 instrument, a covenant under seal, and an agreement.

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

²⁰ *Tulk v Moxhay*, (1848) 2 Ph. 774.

²¹ RSBC 1996, c 250 [LTA].

- 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 a negative or positive nature 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,
 - (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.

(a) Triggers for a s. 219 covenant

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

(1) Rezoning

A local government cannot directly enter into an agreement under which the local government will rezone property in exchange for a covenant.²² In *Vancouver (City) v Vancouver Land Title District*,²³ The City of Vancouver entered 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

²² *Vancouver (City) v Vancouver Land Title District*, 1955 CanLII 275 (BC CA) [*Vancouver*].

²³ *Vancouver*.

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.”²⁴

If a developer offers a covenant, a council or board may consider that offer as a factor in their decision to rezone.²⁵ Additionally, a council, board, or local government department can raise concerns to someone who is applying for rezoning, and they can suggest a section 219 covenant as part of a way that the applicant can address those concerns.²⁶ 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.²⁷ A covenant can be granted by an owner as an amenity condition under an amenity zoning bylaw. Generally, local governments will require the covenant to be registered before adopting the rezoning.

(2) Subdivision

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 the developer to provide a section 219 covenant for the parcels that are being created by the subdivision.

In *Abbeyview Enterprises Ltd. v Matsqui (District)*,²⁸ 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.

(3) Other Development Approvals

Local governments often obtain section 219 covenants during discretionary development approvals such as development permits, or development

²⁴ *Vancouver* at p 713.

²⁵ *Burnaby (City) v Racanelli*, 1998 CanLII 3833 (BC SC) [*Racanelli*].

²⁶ *Burnaby (City) v Marando*, 2003 BCCA 400 [*Marando*].

²⁷ *Jones Delta (District)*, 1992 CanLII 4037 (BC CA).

²⁸ 1980 CanLII 638 (BC SC).

variance permits. Local governments could also obtain section 219 covenants pursuant to phased development agreements under section 516 of the *LGA*.

(4) 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 sections 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 section 219 covenant that they will only use the land in the manner that was certified by the qualified professional.

(5) Enforcement of Covenants

A covenant properly drafted 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*,²⁹ 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 section 219 covenants is a rent charge. Section 219 allows covenants to include a rent charge, which can be made payable by the covenantor to the covenantee if they breach the covenant, if care is taken to craft the rent charge so it is a valid charge and not a penalty.

D. 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. The *LGA* defines transportation demand management 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

²⁹ 1994 CanLII 2027 (BC SC).

³⁰ *LGA* at s 527.1(1).

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

E. 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.

(a) 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

³¹ *LGA* at s 527.1(10).

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 licenses 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.

(b) 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;
- (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

F. 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 paid only by the owners of property in the designated area. 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 of the *Community Charter*, 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,

³² SBC 2004, c 44, s 1.

³³ *FortisBC Energy Inc. v Surrey (City)*, 2013 BCSC 2382, at para 261.

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*].

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 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, from effectively more than half of the owners in the area.

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.

G. Revitalization Tax Exemption

Under section 226 of the *Community Charter*, a municipality may provide tax exemptions for land, improvements, or both to encourage revitalization. The municipality must establish a revitalization tax exemption program by bylaw that includes the following:

- (a) a description of the reasons for and the objectives of the program;

- (b) a description of how the program is intended to accomplish the objectives;
- (c) a description of the kinds of property, or related activities or circumstances, that will be eligible for tax exemptions under the program;
- (d) the extent of the tax exemptions available;
- (e) the amounts of tax exemptions that may be provided under the bylaw, by specifying amounts or by establishing formulas by which the amounts are to be determined, or both;
- (f) the maximum term of a tax exemption that may be provided under the bylaw, which may not be longer than 10 years.

For a municipality to adopt a revitalization program bylaw, they must first give notice of the proposed bylaw under section 227 of the *Community Charter*, and the council must consider the bylaw with the objectives and policies regarding the use of permissive tax exemptions in its financial plan. Once a revitalization tax exemption bylaw is in place, a municipal council may enter into an agreement with the owner of the property to provide them with a revitalization tax exemption that includes requirements they must meet for the municipality to issue an exemption certificate and the conditions on which the exemption is provided. For a particular property to have a revitalization tax exemption, the exemption must be in accordance with a revitalization tax exemption program in the bylaw, the property must have a revitalization tax exemption agreement, and the property must have a revitalization tax exemption certificate.

H. Fee Reduction or Exemption

Under section 194(1) of the *Community Charter*, a council may impose fees by bylaw for all or part of a municipal service, the use of municipal property, or the exercise of authority to regulate, prohibit, or impose requirements.

- 194 (1)A council may, by bylaw, impose a fee payable in respect of
- (a)all or part of a service of the municipality,
 - (b)the use of municipal property, or
 - (c)the exercise of authority to regulate, prohibit or impose requirements.

Under section 194(2), a fee bylaw may base the fee on any factor in the bylaw and establish different rates or levels of fees in relation to different factors.

- 194(2)Without limiting subsection (1), a bylaw under this section may do one or more of the following:

- (a) apply outside the municipality, if the bylaw is in relation to an authority that may be exercised outside the municipality;
- (b) base the fee on any factor specified in the bylaw and, in addition to the authority under section 12 (1) [variation authority], establish different rates or levels of fees in relation to different factors;
- (c) establish fees for obtaining copies of records that are available for public inspection;
- (d) establish terms and conditions for payment of a fee, including discounts, interest and penalties;
- (e) provide for the refund of a fee.

The authority in section 194(2) is in addition to the authority in section 12 of the *Community Charter*, which allows a council, in a bylaw, to make different provisions for different conditions or circumstances; establish different classes of persons, places, activities, property, or things; and make different provisions, including exceptions, for those classes.

12(1)A municipal bylaw under this Act may do one or more of the following:

- (a) make different provisions for different areas, times, conditions or circumstances as described by bylaw;
- (b) establish different classes of persons, places, activities, property or things;
- (c) make different provisions, including exceptions, for different classes established under paragraph (b).

Together, sections 194 and 12 of the *Community Charter* mean a municipality can likely, by bylaw, impose different fees, or exempt fees, based on a condition or circumstance that is prescribed by the bylaw.

One challenge with municipal fees is that the Constitution Act, 1867 (the "Constitution Act"), limits the revenue raising powers of the Provinces, and by extension, local governments to charging direct taxes or user fees (under section 92(2) of the Constitution Act) and license fees or regulatory charges (under section 92(9) of the Constitution Act). In general, the authority to raise money by any mode of system of taxation is limited to the federal government (under section 91(3) of the Constitution Act).

As a result of this division of powers between the federal and provincial levels of government, it is common for challenges to municipal fees to allege that a fee is a form of tax. Over the years, legal precedents have established three different categories into which government levies can fall: taxes, user fees,

and regulatory charges: *Westbank First Nation v British Columbia Hydro & Power Authority*.³⁶

This discussion will focus on regulatory charges, which are a type of fee, and local governments are permitted to charge them. The Court in *Westbank* developed a two-step approach to determine whether a governmental levy is connected to a regulatory scheme such that it is a regulatory charge: first there must be a regulatory scheme identified, and second there must be a relationship, or nexus, between the charge and the regulatory scheme (*Westbank* at para 44). For the first step, the indicia of a regulatory scheme include:

- a complete and detailed code of regulation;
- a specific regulatory purpose which seeks to affect the behaviour of individuals;
- actual or properly estimated costs of the regulation;
- a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation or benefits from it.

For the second step, in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GHG Pricing Reference*], the Supreme Court of Canada weighed in on whether a charge intended to incentivise behaviour qualifies as a nexus between the charge and the regulatory scheme. The Court said, when “the charge itself is a regulatory mechanism that promotes compliance with the scheme or furthers its objective, the nexus between the scheme and the levy inheres in the charge itself” (*GHG Pricing Reference* at para 216). This means, provided there is a valid regulatory scheme, a fee that is intended to incentivise behaviour as part of the regulatory scheme would constitute a fee that is related to the scheme.

I. 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

³⁶ [1999] 3 SCR 134 [*Westbank*], at paras 22-23.

- (b) prescribed by regulation as a restricted matter.
- (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*”³⁷ 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*.³⁸ 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.³⁹

The *Building Act* and the *Building Act General Regulation* provide local governments with authority to regulate buildings with respect to the conservation of energy and the reduction of GHG emissions. The *Building Act General Regulation* subjects a local government’s authority to regulate buildings in relation to energy conservation or the reduction of GHG emissions to two conditions. First, a local building requirement cannot permit buildings to be constructed *except* in conformance with the Step Code. Second, a local building requirement cannot modify or impose additional

³⁷ 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>.

³⁸ *Ibid*, at p 13.

³⁹ *Ibid*, at p 6.

requirements other than those set out in the Step Code, as provided in section 9.36.6 and 10.2.3 of the *Building Code*.

J. BC Energy and Zero Carbon Step Code

Local governments have unrestricted authority to implement the Energy Step Code and Zero Carbon Step Code. All new buildings will need to meet the standards for zero carbon by 2030 and net-zero energy by 2032, though local governments may require it sooner, and builders may decide to achieve it sooner as well.

(a) Energy Step Code

In May 2023, the BC Building Code began requiring most new buildings to meet 20%-better energy efficiency. As a result, the lower steps of the BC Energy Step Code (Steps 1 and 2 for Part 9 buildings and Step 1 for Part 3 buildings) no longer meet minimum energy efficiency requirements and are listed as “Reserved” in the BC Building Code. Local governments may still incentivize or require builders to achieve the upper steps. Builders and developers may also voluntarily choose to build to these higher steps. By 2032, the BC Building Code will require all new buildings to meet the requirements of step 5.

(b) Zero Carbon Step Code

The Zero Carbon Step Code moves toward eliminating operational emissions because it requires a zero-carbon energy source like clean electricity. A zero-carbon building emits little to no GHG during its operation, and it focuses on decarbonizing building operations such as heating, hot water heating, and sometimes cooking equipment. The Zero Carbon Step Code does not account for emissions from wood stoves, wood fireplaces, outdoor grills, heated pools, or embodied emissions. Depending on the type of the building, it may not account for gas cooking or fireplaces either.

The Zero Carbon Step Code includes four steps to zero carbon, which are called emission levels (EL). EL-1 only requires a builder to measure and report on the amount of GHG emissions the project will produce. The next three emission levels are considered “moderate,” “strong,” and “zero carbon.” A builder may follow the prescriptive or performance path for the Zero Carbon Step Code. By 2030 the BC Building Code will require all new buildings to meet the requirements of step 4.

(c) Application of the Building Code to Existing Buildings

The BC Building Code is generally designed to apply to new buildings, and the costs of the requirements in the Building Code are calculated based on

those requirements applying to new buildings. One challenge with requiring 2024 standards in an older building is that it may lead to costs that are prohibitive. The Province of BC has said it will be releasing an alterations to existing buildings code, which will likely clarify how performance standards should apply when alterations or additions occur on existing buildings. In the meantime, the BC Building Code allows some leeway for the application of building performance standards, energy efficiency standards, and safety standards in the 2024 code to existing buildings.

The Building Code applies to existing buildings when there is an alteration, rehabilitation, renovation, repair, or there is a change in occupancy of the building, or a regulated structural change. In other words, it applies when an existing building requires a building permit. When it applies, the 2024 Building Code requires that the level of safety and building performance do not decrease below a level that already exists.⁴⁰ The note to this section in the Building Code⁴¹ and the provincial bulletin *20%-Better Energy Efficiency & Zero Carbon Step Code British Columbia Building Code 2018 - Revision 5*⁴² indicate that local governments can require 2024 Building Code performance and safety standards through local regulations and bylaws when they are enforcing the building code, subject to section 5 of the *Building Act*. Local governments should keep the additional costs from requiring 2024 standards on older buildings in mind when designing local bylaws or regulations on this matter.

Regarding energy efficiency, the 2024 Building Code does require the alterations, rehabilitations, renovations, or repairs of existing buildings to comply with the energy efficiency requirements of the 2024 Building Code. For example, note A-10.2.2.2 says, "alterations, rehabilitation, renovations, and changes of occupancy to existing buildings or major occupancies that were originally designed and constructed to previous editions of the NECB or Subsection 10.2.3. [*Energy Step Code*] are to comply with the edition of the NECB referenced in this Code, or to Subsection 10.2.3 [*Energy Step Code*]." This means that when an existing building requires a building permit and it was constructed to a previous version of the Energy Step Code, the alteration, rehabilitation, renovation, or changes of occupancy must comply with the Energy Step Code requirements in the 2024 Building Code. This is significant because the lower steps of the Energy Step Code were removed from the 2024 Building Code.

⁴⁰ Building Code, s 1.1.1.2.(1).

⁴¹ Building Code, s A-1.1.1.2.(1).

⁴² Province of British Columbia, Information and Building Standards Branch, *20%-Better Energy Efficiency & Zero Carbon Step Code British Columbia Building Code 2018 - Revision 5*, May 1, 2023, online: < https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/construction-industry/building-codes-and-standards/bulletins/20_better_ee_zcsc.pdf > [*20% Better Bulletin*].

10.2.2.2 Application to Existing Buildings

1) Where a building or major occupancy designed and constructed to conform to any version of ANSI/ASHRAE/IES 90.1, “Energy Standard for Buildings Except Low-Rise Residential Buildings” is altered, rehabilitated, or renovated, or there is a change in occupancy, the energy performance of the alteration, rehabilitation, renovation, or change in occupancy shall comply with Clause 10.2.2.1.(1)(a) or (c).

2) Notwithstanding Article 1.1.1.1. of Division A of the NECB , where a building or major occupancy designed and constructed to conform to any version of the NECB is altered, rehabilitated, or renovated, or there is a change in occupancy, the energy performance of the alteration, rehabilitation, renovation or change in occupancy, shall comply with Clause 10.2.2.1.(1)(b) or (c).

3) Notwithstanding Article 1.1.1.1. of Division A of the NECB , where a building or major occupancy designed and constructed to conform to any version of Subsection 10.2.3. is altered, rehabilitated, renovated, or there is a change in occupancy, the energy performance of the alteration, rehabilitation, renovation, or change in occupancy, shall comply Clauses 10.2.2.1.(1)(b) or (c).

4) Notwithstanding Article 1.1.1.1. of Division A of the NECB , where a building or major occupancy that is not described in Sentences (1) through (3) is altered, rehabilitated, renovated, or there is a change in occupancy, the energy performance of the alteration, rehabilitation, renovation, or change in occupancy shall comply with Sentence 10.2.2.1.(1).

III. Analysis

A. **Of the areas of authority explored in the Phase 1 memo, what nuances, if any, may exist for local government authority with relation to energy efficiency and load management as opposed to climate change? Would any conclusions in the Phase 1 memo differ if the focus was energy efficiency and/or conservation instead of GHG emissions reductions?**

In our view, the main conclusions from the Phase 1 memo are unlikely to change if the focus is shifted to energy efficiency and load management from climate change or GHG reduction. We will discuss any specific nuances in turn.

(a) *EV Charging*

The EV charging pathways, particularly the transportation demand management pathway, are unlikely to change with a shift in focus because they are already quite flexible and accessible to local governments. For example, under section 527.1 of the *LGA*, a local government may, by bylaw, advance transportation demand management for development land, which allows local governments to require EV chargers. To advance transportation demand management, section 527.1 allows the local government to require owners to provide transportation demand management measures and establish design standards for transportation demand management measures. Since section 527.1 allows local governments to establish design standards, they can likely require EV chargers to include a load management system as well. Thus, this pathway likely already accommodates both energy efficiency and GHG reductions.

(b) Building Bylaw

Shifting the focus to energy efficiency rather than GHG reductions likely does not have much of an effect on the conclusions regarding the pathways for buildings either. Municipalities have the authority to require, regulate, and prohibit, by bylaw, in relation to buildings under section 8(3)(l) of the *Community Charter*. However, 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.

(4) Subsection (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”, which are 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. Local governments may regulate on matters that are outside of the scope of the BC Building Code, such as EV charging.

Local Governments can also regulate on matters that are unrestricted. 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.⁴³

This restriction limits local governments' authority to regulate in relation to buildings because many GHG reduction or energy efficiency measures would be considered a requirement in addition to the requirements in the Step Code. This restriction applies to measures for GHG reduction and energy efficiency or load management, so a shift in focus to energy efficiency likely does not affect our initial analysis. The section 5 limitations would still apply in both cases.

(c) *Development Permit Area*

Shifting the focus to energy efficiency also likely would not affect our conclusions relating to DPAs. Under section 488(1)(h) and (j) of the *LGA*, a local government, through their OCP may designate a DPA to promote energy conservation and GHG emissions reductions.

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. If the focus is on energy efficiency rather than GHG emissions, local governments are still restricted to the same matters to which they can prescribe requirements. That means, the shift in focus would likely not affect the conclusions from the phase 1 memo.

Additionally, section 5 of the *Building Act* applies to any local government building regulation, which includes DPAs. For energy conservation and GHG emissions reductions DPAs, the *Building Act General Regulation* lists form; exterior design; and any matter as it relates to machinery, equipment and systems external to the building as unrestricted matters. These unrestricted matters apply equally to DPAs for GHG reductions and for energy conservation, so shifting the focus to energy efficiency would likely not affect the conclusions regarding DPAs either.

⁴³ *Building Act General Regulation* at s 2.2(2).

B. Can local governments use revitalization tax exemptions to incentivise retrofits?

(a) Revitalization Tax Exemptions

A municipality could likely establish a revitalization tax exemption program that incentivises energy efficiency retrofits by bylaw under section 226 of the *Community Charter*. The municipality would first need to establish a revitalization tax exemption program bylaw. The council would need to give notice under section 227 and consider the bylaw with the objectives and policies regarding the use of permissive tax exemptions in its financial plan. The revitalization tax exemption program could likely offset the costs of energy retrofits to specific buildings that are clearly described in the bylaw, such as rental buildings that are three to six stories high, with at least ten rental units, and built before January 1, 2000. The bylaw would also need to specify the amount of annual property tax that the property is exempt from during the period. The municipality may include a limit on the number of buildings that can be granted a revitalization tax exemption under the specific bylaw.

Once a bylaw is in place, a municipal council may enter into an agreement with an owner of property to provide them with a revitalization tax exemption that includes requirements they must meet for the municipality to issue an exemption certificate and the conditions on which the exemption is provided. A property is eligible to receive a revitalization tax exemption if the exemption is in accordance with a revitalization tax exemption program in the bylaw, the property has a revitalization tax exemption agreement, and the property has a revitalization tax exemption certificate.

C. What options do local governments have for incentivising commercial businesses to undertake energy efficiency retrofits and/or peak load management measures?

(a) Revitalization Tax Exemption

A municipality could likely establish a revitalization tax exemption program that incentivises commercial businesses to undertake energy efficiency retrofits by bylaw under section 226 of the *Community Charter*. The municipality would first need to establish a revitalization tax exemption program bylaw. The council would need to give notice under section 227 and consider the bylaw with the objectives and policies regarding the use of permissive tax exemptions in its financial plan. The revitalization tax exemption program bylaw would need to clearly describe the properties that the program applies to, such as buildings used for commercial purposes that are a certain size and built before January 1, 2000. The bylaw would also need

to specify the amount of annual property tax that qualifying properties are exempt from during the period. The municipality may include a limit on the number of buildings that can be granted a revitalization tax exemption under the specific bylaw.

Once a bylaw is in place, a municipal council may enter into an agreement with an owner of commercial property to provide them with a revitalization tax exemption that includes requirements they must meet for the municipality to issue an exemption certificate and the conditions on which the exemption is provided. A property is eligible to receive a revitalization tax exemption if the exemption is in accordance with a revitalization tax exemption program in the bylaw, the property has a revitalization tax exemption agreement, and the property has a revitalization tax exemption certificate.

(b) Fee Reduction or Exemption

Municipalities can likely incentivise commercial businesses to undertake energy efficiency retrofits or peak load management measures through fee reductions or exemptions, particularly in relation to business license fees. Under section 194(1) of the *Community Charter*, a council may impose fees by bylaw for all or part of a municipal service, the use of municipal property, or the exercise of authority to regulate, prohibit, or impose requirements. Under section 194(2), a fee bylaw may base the fee on any factor in the bylaw and establish different rates or levels of fees in relation to different factors. The authority in section 194(2) is in addition to the authority in section 12 of the *Community Charter*, which allows a council to, in a bylaw, make different provisions for different conditions or circumstances; establish different classes of persons, places, activities, property, or things; and make different provisions, including exceptions, for those classes.

Under section 8(6) of the *Community Charter*, municipalities have the power to regulate in relation to business by bylaw. Section 15 allows municipal councils to provide for a system of licenses, permits, or approvals in regulating under the *Community Charter* or the *LGA*. Section 8(6) and 15 together allow municipalities to provide a system for business licenses and require businesses to have a valid business license. Municipal councils may also establish a fee for business licenses under their authority to impose a fee on the exercise of authority to regulate, prohibit, or impose requirements under section 194(1)(c) of the *Community Charter*. Since section 194(2) *Community Charter* allows municipalities to establish different fees based on different factors in the bylaw and section 12 allows municipalities to exempt certain people from fees based on different conditions or circumstances, a municipality could likely reduce the business license fees, or exempt businesses from the fees, if the businesses meet certain energy efficiency or demand control measures that are set out in the bylaw.

One common challenge to municipal fees is that they are beyond municipal authority due to being a tax rather than a fee. If a municipality sets their business license fees with the intention of incentivising businesses to undertake energy efficiency or demand control measures, those fees would likely be considered a regulatory charge and not a tax, and thus within municipal authority. We must apply the two-step test from *Westbank* to determine whether a governmental levy is considered a regulatory charge: first there must be a regulatory scheme identified, and second there must be a relationship, or nexus, between the charge and the regulatory scheme.⁴⁴

In applying the two-step approach from *Westbank*, the business license bylaw would likely be considered a regulatory scheme because it consists of a complete and detailed code of regulation, the business license bylaw likely seeks to affect the behaviour of individuals, the municipality would have actual or properly estimated costs of regulation, and there is a relationship between the business license bylaw and the person being regulated. At the second step, following *GHG Pricing Reference*, a fee that is intended to promote compliance with the scheme likely has the required nexus. Thus, in our view, a business licencing bylaw that includes fees to incentivise energy efficiency or demand control measures would qualify as a regulatory charge and be within municipal authority.

(c) *Local Service Area*

Municipalities can likely run a program that lends money to owners of commercial properties using grants or loans from the Federation of Canadian Municipalities ("FCM") or from the province through a local service area to assist business owners in energy efficiency and demand control measures.

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 energy efficiency or demand control measures for the "members" of the local service area in accordance with conditions set out in the bylaw (e.g., defining energy efficiency and demand control). We note that a local service area can include scattered lots that are not contiguous, so the businesses in the service area do not necessarily need to be next to each other.

The municipality could pay for the energy upgrade as "assistance" to owners using borrowed monies or loans from reserves and spreading the repayments by the lot owners over 10 or 15 years. If the arrangement constitutes

⁴⁴ *Westbank* at para 44.

“assistance” for purposes of section 25, the municipality would have to proceed by way of a partnering agreement under section 21 of the *Community Charter*. The municipality could collect these repayments as parcel taxes at the same time as utility charges for garbage, water, etc. Municipalities could use a grant or loan from FCM or the province to cover the costs of the energy efficiency upgrades. 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 Property Assessed Clean Energy program.

D. Can local governments require a performance standard to be achieved for existing buildings if that standard was consistent with one of the levels of the Energy Step Code or Zero Carbon Step Code?

(a) Provincially Approved Bylaw

Municipalities can likely require existing buildings to meet a performance standard by enacting a bylaw under section 8(3)(l) of the *Community Charter* that is approved by the Province. 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 power has also been held to apply to existing buildings.⁴⁵ 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) the conservation of energy or water;
- (c) the reduction of greenhouse gas emissions;
- (d) the health, safety or protection of persons or property.

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

Section 5 of the *Building Act* prevents local governments from requiring something in addition to the Step Code. 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.

⁴⁵ *Bowen Island (Municipality) v Haxby*, 2022 BCSC 2069 [*Haxby*], at para 23.

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

Building performance requirements are currently regulated through the BC Building Code, but section 2.2 of the *Building Act General Regulation* provides, the conservation of energy and the reduction of GHG emissions are unrestricted matters. Building performance standards would likely constitute the conservation of energy and reduction of GHG emissions, so they would fall under 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.⁴⁶

(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.

The condition that unrestricted matters do not impose additional requirements to the Step Code would likely prevent a local government from requiring building performance standards outside of implementing the Step Code. Since requiring building performance standards would be considered an addition to or a modification of the Step Code, municipalities likely do not have authority to require building performance standards on their own.

⁴⁶ *Building Act General Regulation* at s 2.2(2).

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 performance standards, but since the Step Code already exists as a tool, it is unlikely that this request would be successful.

(b) Energy Step Code or Zero Carbon Step Code

Local governments can likely incentivize or require existing buildings to meet the performance standards of a step in the Energy Step Code or the Zero Carbon Step Code when the existing building requires a building permit.

Local governments have unrestricted authority to implement the Step Code. The *Building Act* and the *Building Act General Regulation* provide local governments with authority to regulate buildings with respect to the conservation of energy and the reduction of GHG emissions. The *Building Act General Regulation* subjects a local government's authority to regulate buildings in relation to energy conservation or the reduction of GHG emissions to two conditions. First, a local building requirement cannot permit buildings to be constructed except in conformance with the Step Code. Second, a local building requirement cannot modify or impose additional requirements other than those set out in the Step Code, as provided in section 9.36.6 and 10.2.3 of the Building Code.

We note that the Zero Carbon Step Code is part of the Building Code, which generally applies to new buildings. The Building Code only applies to existing buildings when they are altered, rehabilitated, renovated or repaired, there is a change in occupancy, or there is a structural change. In other words, the Building Code applies to existing buildings when they require a building permit. When an existing building requires a building permit, the 2024 Building Code does impose energy efficiency requirements for the alteration, renovation, etc. Note A-10.2.2.2 of the Building Code says, "alterations, rehabilitation, renovations, and changes of occupancy to existing buildings or major occupancies that were originally designed and constructed to previous editions of the NECB or Subsection 10.2.3. [*Energy Step Code*] are to comply with the edition of the NECB referenced in this Code, or to Subsection 10.2.3 [*Energy Step Code*]." This means that when an existing building requires a building permit, and it was constructed to a previous version of the Energy Step Code, the alteration, rehabilitation, renovation, or changes of occupancy must comply with the Energy Step Code requirements in the 2024 Building Code. This is significant because the lower steps of the Energy Step Code were removed from the 2024 Building Code, so the existing building would be required to comply with at least 20% increased energy efficiency.

E. Can local governments require the recommissioning of existing buildings?

(a) Provincially Approved Bylaw

Municipalities can likely require recommissioning of existing buildings by enacting a bylaw under section 8(3)(l) of the *Community Charter* that is approved by the province. 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 power has also been held to apply to existing buildings.⁴⁷ 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) the conservation of energy or water;
- (c) the reduction of greenhouse gas emissions;
- (d) the health, safety or protection of persons or property.

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

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 recommissioning is not currently directly 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, but since the Building Code includes extensive energy provisions, it may cover commissioning and recommissioning. Any specific recommissioning bylaw would need to be reviewed to determine whether it is covered by an existing regulation.

⁴⁷ *Haxby* at para 23.

Proceeding on the basis that building recommissioning is covered by an existing 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.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 recommissioning 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 recommissioning requires a building owner or manager 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 recommissioning 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

⁴⁸ *Building Act General Regulation* at s 2.2(2).

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 recommissioning.

F. Can local governments impose solar and/or battery storage requirements for new and/or existing buildings?

(a) Development Permit Area

Local governments could likely use DPAs to require solar panels, battery storage, or both. Sections 488(1)(h) and (j) of the *LGA* allow local governments, through their official community plan, to designate a DPA to promote energy conservation and the reduction of GHG emissions. Within a DPA, owners of land must obtain a development permit before they can construct, add to, or alter a building or other structure.⁴⁹ 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 GHG 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*,⁵⁰ 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.⁵¹ This was established in the context of considering the scope of the commercial, industrial, or multi-family residential form and character DPA under section 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.

⁴⁹ *LGA* at s 489(b).

⁵⁰ 2001 BCSC 245 [*Salmon Arm*].

⁵¹ *Salmon Arm* at para 60.

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, heat pumps, 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 solar panels and battery storage.

(b) 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 install solar panels or use battery storage. Firstly, if a local government owns land and they develop the land themselves, they would be able to install their own solar panels and use battery storage, and they could use that land as a leading example of solar power and battery storage. 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 solar panels or battery storage 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 section 219 covenant that imposes requirements on the third party to install solar panels and use battery storage. 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 install solar panels or use battery storage. 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 install solar panels or use battery storage.

(c) Section 219 Covenant

A local government could likely obtain a section 219 covenant from an owner or developer that requires the owner or developer to install solar panels, use

battery storage, or both. If 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 likely accept it. The covenant could be a binding promise from the developer that they will use a certain number of solar panels and install a certain amount of battery storage. The council could obtain a section 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 required solar panels and/or battery storage and any documentation or evidence to show this requirement has been met.

G. Can a local government require the use of electric vehicle energy management systems?

(a) Transportation Demand Management Bylaw

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."⁵² 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 it may establish design standards for those measures. Since the local government can establish design standards for transportation demand management measures, they can likely require electric vehicle energy management systems.

(b) Section 219 Covenant

A local government could likely obtain a section 219 covenant from an owner or developer that requires the owner or developer to install EV chargers with energy management systems. If 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 binding promise from the developer that they will install a certain number of EV chargers with energy management systems. The council could obtain a section 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

⁵² *LGA* at s 527.1(1).

articulates the required number of chargers and any specifics about the energy management systems as well.

H. Can local governments require the use of a Watt/m² limitation that would restrict the total electricity connection size to a building?

(a) Provincially Approved Bylaw

Municipalities can likely require the use of a Watt/m² limitation on new construction buildings by enacting a bylaw under section 8(3)(l) of the *Community Charter* that is approved by the province. 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) the conservation of energy or water;
- (c) the reduction of greenhouse gas emissions;
- (d) the health, safety or protection of persons or property.

Since requiring a Watt/m² limiter constitutes the conservation of energy or water, section 53 would likely permit a bylaw that requires a Watt/m² limiter.

Section 5 of the *Building Act* would likely limit a municipality’s section 8(3)(l) power to enact a bylaw that requires a Watt/m² limiter. 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.

A Watt/m² limiter is an energy related requirement, so it is likely covered by the BC Building Code. 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.⁵³

(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 requiring a Watt/m² limiter 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 requiring a Watt/m² limiter imposes an additional requirement to building the building in accordance with the Step Code, municipalities likely do not have authority to implement a bylaw that requires a Watt/m² limiter 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 Watt/m² limiters.

I. Can local governments regulate equipment efficiency through business licensing or other means?

⁵³ *Building Act General Regulation* at s 2.2(2).

A local government can likely incentivise energy efficient equipment in businesses, such as heating and lighting, but it likely cannot require this. Since the *Community Charter* distinguished between regulating, prohibiting, and imposing requirements, these are now separate powers that a local government may exercise 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(6) of the *Community Charter* gives municipalities the power to regulate in relation to business, but unlike the powers in section 8(3), section 8(6) does not also give the power to prohibit or impose requirements. This means, municipalities likely cannot impose requirements for businesses—they can only regulate. As such, we have provided some pathways to achieve the goal of incentivizing equipment efficiency through business licensing or other means.

(a) *Fee Reduction or Exemption*

Municipalities can likely incentivise commercial businesses to undertake energy efficiency retrofits or peak load management measures through fee reductions or exemptions, particularly in relation to business licenses. Under section 194(1) of the *Community Charter*, a council may impose fees by bylaw for all or part of a municipal service, the use of municipal property, or the exercise of authority to regulate, prohibit, or impose requirements. Under section 194(2), a fee bylaw may base the fee on any factor in the bylaw and establish different rates or levels of fees in relation to different factors. The authority in section 194(2) is in addition to the authority in section 12 of the *Community Charter*, which allows a council to, in a bylaw, make different provisions for different conditions or circumstances, establish different classes of persons, places, activities, property, or things and make different provisions, including exceptions, for those classes.

Under section 8(6) of the *Community Charter*, municipalities have the power to regulate in relation to business by bylaw. Section 15 allows municipal councils to provide for a system of licenses, permits or approvals in regulating under the *Community Charter* or the *LGA*. Section 8(6) and 15 together allow municipalities to provide a system for business licenses and require businesses to have a valid business license. Under section 194(1), municipal councils may also establish a fee for business licenses under their authority to impose a fee on the exercise of authority to regulate, prohibit, or impose requirements. Since section 194(2) *Community Charter* allows municipalities to establish different fees based on different factors in the bylaw and section 12 allows municipalities to exempt certain people from fees based on different conditions or circumstances, a municipality could

likely reduce the business license fees, or exempt businesses from the fees, if they meet certain energy efficiency or demand control measures that are set out in the bylaw.

One common challenge to municipal fees is that they are a tax, which is outside of municipal authority rather than a fee, which would be within municipal authority. Following *GHG Pricing Reference*, if a municipality sets their business license fees with the intention of incentivising businesses to undertake energy efficiency or demand control measures, those fees would likely be considered a regulatory charge, or a type of fee, rather than a tax, and thus within municipal authority. The Court in *Westbank* developed a two-step approach to determine whether a governmental levy is a regulatory charge: first there must be a regulatory scheme identified, and second there must be a relationship, or nexus, between the charge and the regulatory scheme (*Westbank* at para 44).

In applying the two-step approach from *Westbank*, the business license bylaw would likely be considered a regulatory scheme because it consists of a complete and detailed code of regulation, the business license bylaw likely seeks to affect the behaviour of individuals, the municipality would have actual or properly estimated costs of regulation, and there is a relationship between the business license bylaw and the person being regulated. Then, following *GHG Pricing Reference*, a fee that is intended to promote compliance with the scheme has the required nexus for the second step. Thus, a business licencing bylaw that includes fees to incentivise energy efficiency or demand control measures would likely qualify as a regulatory charge.

J. Can local governments require equipment to be demand response enabled (but not dictating type or efficiency of the equipment)? For example, domestic hot water tanks can be manufactured with controls that would allow them to participate in a utility demand response program.

(a) Provincially Approved Bylaw

Municipalities can likely require equipment to be demand response enabled if they get approval for such a regulation from the Province. 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 power has also been held to apply to existing buildings.⁵⁴ 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:

⁵⁴ *Haxby* at para 23.

- (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.

Since requiring equipment to be demand response enabled constitutes the reduction of GHG emissions and the conservation of energy or water, section 53 would likely permit a bylaw that requires equipment to be demand response enabled.

Section 5 of the *Building Act* would likely limit a municipality's section 8(3)(l) power to enact a bylaw that requires equipment to be demand response enabled. 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.

Since the BC Building Code regulates equipment efficiency, requiring demand response enabled equipment is likely regulated already by an existing building regulation. This requirement could be considered energy efficiency, and therefore, an unrestricted matter; however, 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.⁵⁵ In this case, regulating equipment would likely be considered a modification of or an addition to a requirement of the Step Code, so local governments likely do not have this authority.

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. A municipality could make a request to the minister for a regulation to require equipment demand response enabled.

⁵⁵ *Building Act General Regulation* at s 2.2(2).

K. Can local governments regulate equipment efficiency through building code (stipulating that heat pumps instead of electric resistance must be used)?

(a) Provincially Approved Bylaw

Municipalities can likely regulate equipment efficiency through the building code if they get approval for such a regulation from the province. 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 power has also been held to apply to existing buildings.⁵⁶ 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) the conservation of energy or water;
- (c) the reduction of greenhouse gas emissions;
- (d) the health, safety or protection of persons or property.

Since regulating equipment efficiency constitutes the reduction of GHG emissions and the conservation of energy or water, section 53 would likely permit a bylaw that regulates equipment efficiency through the building code.

Section 5 of the *Building Act* would likely limit a municipality’s section 8(3)(l) power to enact a bylaw that regulates equipment efficiency through the building code. 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.

Since the BC Building Code regulates equipment efficiency, regulating equipment efficiency through the building code is likely considered subject to an existing building regulation. However, this could be considered energy efficiency, and therefore, an unrestricted matter, but 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

⁵⁶ *Haxby* at para 23.

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.⁵⁷ In this case, regulating equipment efficiency through the building code would likely be considered a modification of a requirement of the Step Code, so local governments likely do not have this authority.

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 bylaw that regulates equipment efficiency through the building code.

L. Can local governments require a building owner to undertake an action such as an energy audit if they have a low building performance score?

(a) Bylaw

Municipalities can likely use their power to regulate in relation to buildings and other structures to require energy audits for 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.

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 ministerial approval before enacting the bylaw.

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 GHG emissions:

⁵⁷ *Building Act General Regulation* at s 2.2(2).

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 audits are not subject to a requirement of any existing building regulation (such as the BC Building Code or any regulations under the *Building Act*) and are not a restricted matter. Even if energy audits 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.

(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 auditing involves the conservation of energy and the reduction of GHG emissions, so it would likely constitute an unrestricted matter. Energy auditing 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 auditing would likely constitute an unrestricted matter, and a municipality would be permitted to enact a bylaw requiring energy auditing, 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.

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 auditing.

M. Can local governments require a building owner to complete an energy audit within a certain window of time?

(a) Bylaw

Following the analysis from section L, a municipality can likely, by bylaw, require a building owner to complete an energy audit. If the bylaw clearly outlines time restrictions that are associated with the energy audit requirement, the municipality could also likely require a building owner to complete an energy audit within a certain window of time.

We do note that one requirement for a valid bylaw is that it does not unlawfully delegate powers. If a bylaw purports to delegate a power that a council is not entitled to delegate, then it may amount to unlawful delegation. An example of unlawful delegation is *Regina v Horback* (1967),⁵⁸ where the City of Vancouver by its Charter was authorized to enact bylaws to regulate

⁵⁸ 65 W.W.R. 129.

the safety and repair of vehicles operated on any City street. Pursuant to this power the City enacted a bylaw authorizing the Superintendent of the motor vehicle inspection station to require any vehicles to be inspected. Under the bylaw, the Superintendent enjoyed the absolute discretion to forbid the use of a vehicle if it did not satisfy safety standards he established. The Court determined this was an unlawful delegation because the empowering legislation authorized the Vancouver Council to create standards of safety, and rather than creating standards of safety, the Council delegated the whole authority to one employee.

A second example is *Regina v Sandler* (1971),⁵⁹ where the Ontario *Municipal Act* empowered the council to enact a bylaw requiring buildings to be put in a safe condition to guard against fire, authorizing appointed officers to inspect the premises and to enforce the bylaw and making such other regulations for preventing fires as the council should deem necessary. The City of Toronto enacted a bylaw under this Section empowering the fire chief “to inspect the fire protection equipment in any premises and to make such orders for the installation, repair or replacement of fire protection equipment as he deems necessary.” The Court determined this was an unlawful delegation because the Council substituted the judgement of a non-elected official in the fire department for that of the Council.

There are some exceptions to the rule against delegating authority, for example, it is valid if the enabling statute allows such delegation. Here, the enabling statute would be the *Community Charter* because a bylaw requiring building energy audits would be enacted under section 8(3)(l) of the *Community Charter*. Section 154 of the *Community Charter* allows a council to, by bylaw, delegate its powers, duties, and functions. However, section 154(2) provides that a council may not delegate the making of a bylaw.

- 154 (1)A council may, by bylaw, delegate its powers, duties and functions, including those specifically established by an enactment, to the extent provided, to
- (a) a council member or council committee,
 - (b) an officer or employee of the municipality, or
 - (c) another body established by the council.
- (2) As exceptions, a council may not delegate the following:
- (a) the making of a bylaw;
 - (b) a power or duty exercisable only by bylaw;
 - (c) a power or duty established by this or any other Act that the council give its approval or consent to, recommendations on, or acceptance of an action, decision or other matter;
 - (d) a power or duty established by an enactment that the council hear an appeal or reconsider an action, decision or other matter;

⁵⁹ 3 O.R. 614.

- (e) a power or duty to terminate the appointment of an officer;
- (f) the power to impose a remedial action requirement under Division 12 [*Remedial Action Requirements*] of Part 3.

In this case, the power to regulate, prohibit, and require in relation to buildings under section 8(3)(l) must be exercised by bylaw, and section 154(2)(a) prohibits a council from delegating the making of a bylaw. That means, any window of time within which an energy audit must be completed would need to be clearly articulated in the bylaw and not left for municipal staff to determine.

N. Are there any restrictions to local government's disclosing the energy score for commercial buildings?

The *Freedom of Information and Protection of Privacy Act* ("FIPPA") places some limits on a public body's ability to disclose certain commercial information. Section 21 says that a public body must refuse to disclose information that would reveal commercial, financial, scientific, or technical information that is supplied implicitly or explicitly in confidence and that would be reasonably expected to harm the competitive position of a third party if it was disclosed.

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

(2) The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

(3) Subsections (1) and (2) do not apply if

- (a) the third party consents to the disclosure, or
- (b) the information is in a record that is in the custody or under the control of the digital archives or museum archives of government or the archives of a public body and that has been in existence for 50 or more years.

The third party must meet all the requirements in a three-part test to stop the public body from disclosing their information and for section 21(1) to apply:⁶⁰

1. disclosing the information at issue would reveal one or more types of information listed in s. 21(1)(a);
2. the information was supplied, implicitly or explicitly, in confidence; and
3. disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).

FIPPA does not define “commercial”, “technical”, or “financial” information, but Information and Privacy Commissioner (“IPC”) orders have adopted definitions. “Technical Information” is information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts. Technical information usually involves information prepared by a professional with the relevant expertise and describes the construction, operation, or maintenance of a structure, process, equipment, or entity.⁶¹ “Commercial information” relates to a commercial enterprise but need not be proprietary in nature or have an independent market or monetary value. The information itself must be associated with the buying, selling, or exchange of the entity’s goods or services.⁶² “Financial information” is information about money and its uses, for instance, prices, expenses, hourly rates, contract amounts, budgets, cash flow, and accounts receivable or payable.⁶³

Based on the IPC definitions, information about the energy use of a commercial building could arguably be considered commercial, technical, or financial information about a third party, depending on the third party and the building itself. That means, depending on the context, a third party could likely meet the first part of the test. For the second part of the test, the information must be supplied explicitly or implicitly in confidence. For information to be supplied implicitly in confidence, there must be an objectively reasonable expectation that the information will be kept in confidence.⁶⁴ It is possible that information on a building’s energy use is

⁶⁰ *Vancouver (City) (Re)*, 2023 BCIPC 102, at para 22.

⁶¹ *Ibid*, at para 25.

⁶² *Ibid*, at para 25.

⁶³ *Ibid*, at para 25.

⁶⁴ *Ibid*, at para 34.

supplied to a local government in confidence, but it will depend on the specific facts.

For the third part of the test, the third party does not need to establish on a balance of probabilities that disclosure will actually cause harm to its business interests. It only needs to establish that there is a reasonable expectation of probable harm. The Supreme Court of Canada described this standard as “a middle ground between that which is probable and that which is merely possible.”⁶⁵ Whether this standard has been met depends on the context of each case because the unique probabilities and harms that are present in each case determine what type and amount of evidence is sufficient.⁶⁶ In this case, it is possible that a third party could show that disclosure of a commercial building’s energy use could be reasonably expected to lead to probable harm from exposed trade secrets or undue financial loss, depending on the specific circumstances. It could also result in similar information no longer being supplied to the public body.

Altogether, it is possible that a third party could meet the test to prevent a local government from disclosing information about its building’s energy use, depending on the specific facts and context. As such, we recommend that local governments get consent from the commercial businesses in the building before sharing the energy score of the building.

- O. Are there any restrictions to local governments disclosing the energy score for apartment buildings? For apartment buildings, the score would be for the entire building and not individual suites. In the case of these larger buildings, the score would be based on a combination of physical features and actual energy use.**

A local government could likely disclose the energy score for apartment buildings, as long as the score is for the entire building rather than individual apartments and it is based on a combination of physical features and actual energy use. This type of energy use information would likely not qualify as personal information under FIPPA. FIPPA defines personal information as “recorded information about an identifiable individual other than contact information.” Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.” According to the IPC decisions, information is about an identifiable individual when it is

⁶⁵ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at paras 52-54.

⁶⁶ *Vancouver (City) (Re)*, 2023 BCIPC 102, at para 51.

reasonably capable of identifying an individual, either alone or when combined with other available sources of information.⁶⁷

An energy score for an entire apartment building based on the building's features and actual use of the whole building would likely not be considered personal information because it does not disclose any information about the actual energy use and lifestyle of people living in the building. Since an apartment building's energy score likely does not constitute personal information, FIPPA likely does not prevent a local government from disclosing it.

We also note that some apartment buildings are owned by private businesses, in which case section 21 of FIPPA would apply, as discussed above.

P. Can local governments require a building owner to undertake an action such as retrofit commissioning if they have a low building performance score?

(a) Provincially Approved Bylaw

Municipalities can likely require retrofit commissioning if they get approval for such a regulation from the province. 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 power has also been held to apply to existing buildings.⁶⁸ 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) the conservation of energy or water;
- (c) the reduction of greenhouse gas emissions;
- (d) the health, safety or protection of persons or property.

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

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

⁶⁷ *Thompson Rivers University (Re)*, 2024 BCIPC 86, at para 24.

⁶⁸ *Haxby* at para 23.

- (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.

Retrofit recommissioning is not currently directly 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, but since the Building Code includes extensive energy provisions, it may cover retrofit commissioning. Any specific retrofit commissioning bylaw would need to be reviewed to determine whether it is covered by an existing regulation.

Proceeding on the basis that retrofit recommissioning is covered by an existing 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.⁶⁹

(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

⁶⁹ *Building Act General Regulation* at s 2.2(2).

conformance with a step described in Subsection 9.36.6. of Division B of the building code.

Since retrofit 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 retrofit commissioning requires a building owner or manager 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 retrofit 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 bylaw that requires retrofit commissioning.

Q. Can local governments require a building owner to install solar PV if they are undergoing a major roof retrofit?

(a) DPA Authority

It is somewhat likely that a local government could require a building owner to install solar PV if they are undergoing a major roof retrofit using their DPA authority, provided the circumstances requiring solar PV are carefully drafted in the OCP.

Sections 488(1)(h) and (j) of the *LGA* allow 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. Within a DPA, owners of land must obtain a development permit before they can construct, add to, or alter a building or other structure.⁷⁰

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

⁷⁰ *LGA* at s 489(b).

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 GHG 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 *Salmon Arm*, 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.⁷¹ This was established in the context of considering the scope of the commercial, industrial, or multi-family residential form and character DPA under section 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, heat pumps, 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 solar panels. Thus, a well drafted DPA could likely require a connection to solar panels if a building is undergoing a major roof retrofit.

R. Can local governments require a home's building energy use or score to be disclosed at time of sale and/or new tenancy?

(a) Bylaw

A municipality can likely require a homeowner to measure the building's energy use by bylaw, but, in our view, they cannot require the homeowner to share the energy use information.

The pathway to require homeowners to measure their building's energy use is the same as that to require energy benchmarking. 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

⁷¹ *Salmon Arm* at para 60.

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.

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 ministerial approval before enacting the bylaw.

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. Section 53 does limit section 8, but the result is positive for energy conservation and GHG 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.

(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.

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.

While it is likely possible for a municipality to require a homeowner to measure the energy use of their building, in our view, the municipality cannot also require the homeowner to share that information. Under the *Freedom of Information and Protection of Privacy Act*, 1996 (“FIPPA”), personal information is defined as “recorded information about an identifiable individual other than contact information.” Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.” According to the IPC decisions, information is about an identifiable individual when it is reasonably capable of identifying an individual, either alone or when combined with other available sources of information.⁷²

Energy use in a home likely shows patterns of energy use and indications of the person’s lifestyle, which would likely be considered recorded information. Alongside the other information about the homeowner or previous tenant, such as their address or potentially their name, home energy use would likely constitute recorded information about an identifiable individual, which is personal information under FIPPA. Section 25.1 of FIPPA says, a public body must not disclose personal information except as FIPPA authorizes.

25.1 An employee, officer or director of a public body or an employee or associate of a service provider must not collect, use or disclose personal information except as authorized by this Act.

Section 33 of FIPPA enumerates the circumstances under which public bodies may disclose personal information. In this case, none of the listed circumstances would apply to mandatory disclosure of home energy use. Section 33(2)(c) of FIPPA does allow a local authority to disclose personal information if the person whom the information is about consents to the disclosure in a prescribed way. That means, while a municipality likely could not require disclosure of home energy use at the time of sale or a new tenancy, the municipality could likely facilitate disclosure if the homeowner or current tenant consents. We note that section 11 of the *Freedom of Information and Protection of Privacy Regulation*⁷³ prescribes the requirements for consent.

⁷² *Thompson Rivers University (Re)*, 2024 BCIPC 86, at para 24.

⁷³ BC Reg 155/2012.

S. Can local governments require homeowners to disclose a home energy score if the score is based on modelled energy use versus actual energy use?

An example of modelled energy use is the Federal Government's EnerGuide for homes. This program produces a score that is generated based on a home's unique physical features, such as its size, type of windows, type of heating system etc. It uses a computer-generated model to estimate how much a home with these kinds of physical features should use but it does not show how much energy a home actually uses. The City of Edmonton has a disclosure program that shares EnerGuide scores for specific addresses. In Edmonton's case, it is a voluntary disclosure program.

A local government can likely require homeowners to disclose a home energy score, since this information would likely not qualify as personal information under FIPPA. FIPPA defines personal information as "recorded information about an identifiable individual other than contact information." A home energy score based on modelled energy use based on the home's features rather than actual energy use would likely not be considered personal information because it does not disclose anything about the person's actual energy use and lifestyle. Since a home's modelled energy score likely does not constitute personal information, FIPPA would not prevent a local government from requiring its disclosure.

T. Can local governments require buildings of a certain description to undertake energy efficiency retrofits?

(a) Provincially Approved Bylaw

Municipalities may be able to require certain buildings to undertake an energy efficiency retrofit if they get approval for such a regulation from the province. 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 power has also been held to apply to existing buildings.⁷⁴ 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) the conservation of energy or water;
- (c) the reduction of greenhouse gas emissions;
- (d) the health, safety or protection of persons or property.

⁷⁴ *Haxby* at para 23.

Since requiring energy efficiency retrofits constitutes the reduction of GHG emissions and the conservation of energy or water, section 53 would likely permit a bylaw that requires energy efficiency retrofits for certain buildings.

Section 5 of the *Building Act* likely prevents local governments from requiring energy retrofits. 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.

The energy efficiency measures that energy retrofits would require are likely regulated through the BC Building Code. However, section 2.2 of the *Building Act General Regulation* provides, the conservation of energy and the reduction of GHG emissions are unrestricted matters. Energy retrofits would likely be considered the conservation of energy and reduction of GHG emissions, so they would be 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.⁷⁵

(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];

⁷⁵ *Building Act General Regulation* at s 2.2(2).

- (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 unrestricted matters cannot impose additional requirements to the Step Code, a local government likely could not require energy retrofits. Energy retrofits would be something in addition to the Step Code, so municipalities likely do not have authority to require energy retrofits.

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 energy retrofits for certain types of building.

(b) Local Service Area

Municipalities can likely run a program that lends money to owners of specific types of buildings using grants or loans from the Federation of Canadian Municipalities ("FCM") or from the province through a local service area to assist property owners with energy efficiency retrofits. Since a local service area can be scattered lots that are not contiguous, the properties that it applies to do not need to be next to each other.

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 energy efficiency retrofits for the "members" of the local service area in accordance with conditions set out in the bylaw (e.g., defining energy efficiency and demand control).

The municipality could pay for the energy upgrade as "assistance" to owners using borrowed monies or loans from reserves and spreading the repayments by the lot owners over 10 or 15 years. In the case of a business owner, the assistance would require a partnering agreement under section 21 of the *Community Charter*. 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 energy efficiency retrofits. 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.

U. Can LGs require builders/developers to undertake a pre-drywall blower door test as an administrative requirement?

(a) Bylaw

A municipality can likely require builders or developers to undertake a pre-drywall blower door test by bylaw. Municipalities can likely use their power to regulate in relation to buildings and other structures to require municipalities to undertake a blower door test for new 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.

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 GHG 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.

Blower door testing appears to be a requirement as part of the Energy Step Code for part 9 buildings. Even if blower door testing is part 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.

(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.

Blower door testing involves the conservation of energy and the reduction of GHG emissions, so it would likely constitute an unrestricted matter. Blower door testing 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. Additionally, in the provincial publication "*Changes for Local Governments*

*Under Section 5 of the Building Act*⁷⁶ 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. Arguably, blower door testing is comparable to post-construction backflow preventer testing, in that it is an administrative requirement to enforce provincial building regulations.

Altogether, a requirement for re-drywall blower door testing would likely constitute an unrestricted matter, and a municipality would be permitted to enact a bylaw requiring it, 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.

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 blower door testing.

V. For a new construction project, can a local government pass a bylaw that would require new developments to hook up to a non-municipally owned district energy system?

(a) Bylaw

A municipality can likely enact a bylaw requiring new developments to connect to non-municipally owned or municipally owned district energy systems. 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 power has also been held to apply to existing buildings.⁷⁷ 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) the conservation of energy or water;

⁷⁶ 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>.

⁷⁷ *Haxby* at para 23.

- (c) the reduction of greenhouse gas emissions;
- (d) the health, safety or protection of persons or property.

Since requiring a connection to a district energy system constitutes the reduction of GHG emissions and the conservation of energy or water, section 53 would likely permit a bylaw that requires energy efficiency retrofits for certain buildings.

Another possible limitation is section 5 of the *Building Act* likely prevents municipalities from requiring connections to district energy systems. 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.

Even if a requirement to connect to a district energy system was subject to a requirement of a building regulation, “any matter as it relates to a district energy system” is listed as an unrestricted matter in section 2(f) of the *Building Act General Regulation*. That means, a municipality can likely pass a bylaw that requires new developments to connect to a district energy system. We note that this authority under section 8 of the *Community Charter* is limited to municipalities.

W. Can a local government use a DPA to require a developer to connect to a non-municipally owned district energy system?

(a) DPA Authority

A local government could likely use their DPA authority to require a developer to connect to a non-municipally owned district energy system in the same way that they would require a developer to connect to a municipally owned district energy system.

Sections 488(1)(h) and (j) of the *LGA* allow 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 GHG 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 *Salmon Arm*, 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.⁷⁸ 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 municipally owned or non-municipally owned district energy systems.

- X. **Can a DPA be used to require a new building to be “solar ready”? Solar ready would mean that the building is wired for solar PV to be added but do not require solar PV panels added to it by the developer. The benefit of this is that the future owner of the building could add solar PV post occupancy if they wanted to and wouldn't have to worry about retrofit the building's electrical system to accommodate it.**

(a) *DPA*

A local government could likely require a building to be solar ready using their DPA authority. Requiring a building to be solar ready means it must be

⁷⁸ *Salmon Arm* at para 60.

wired for solar PV to be added, but it does not require the developer to add solar PV panels. The benefit of this is that the future owner of the building could add solar PV post occupancy and would not have to worry about retrofit the building's electrical system to accommodate it.

Sections 488(1)(h) and (j) of the *LGA* allow 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 GHG 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 *Salmon Arm*, 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.⁷⁹ 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 solar collectors. Further, the authority to impose requirements respecting specific features in the development, including machinery, systems, and equipment external to buildings likely allows for a requirement that the building has solar panels or is solar ready. This authority likely includes the requirement for a building to be solar ready because the electrical wiring would be

⁷⁹*Salmon Arm* at para 60.

necessary for the requirement of solar panels, and it could also constitute a specific feature in the development.

Also, for energy conservation and GHG reduction DPAs, the *Building Act General Regulation* designates *any matter relating to* machinery, equipment, and systems external to a building as unrestricted. The wiring necessary for solar panels would likely be considered a matter relating to systems external to a building, since they would be necessary for the solar panels to be operational. Overall, a local government could likely require a building to have solar panels or be solar ready using a DPA.

- Y. If rooftop solar PV panels, or any other external equipment for that matter, are required by a DPA, does the external equipment need to be actually operational in order to be compliant with the DPA? For example, could a developer be compliant with a DPA that requires solar PV panels to be installed even if the panels installed on the building's exterior are not connected to any internal wiring that is needed to make them operate as designed? Or does the DPA by default require the specified external equipment to be operational in order for the building to be compliant with the DPA?**

A local government could likely specify that solar panels required under a DPA must be operational. Under s. 488 of the LGA, local governments have the authority to designate DPAs for the purpose of establishing objectives to promote energy conservation and GHG reduction.

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;

If a local government designates areas as a DPA, it must describe the special conditions or objectives that justify the designation and specify guidelines to address the special conditions or objectives in its OCP.

- (2) With respect to areas designated under subsection (1), the official community plan must
- (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.

Section 491(9) of the LGA specifies the requirements that a development permit may include for a development in an area that is designated as an energy conservation or GHG reduction DPA.

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.

Section 491(9) provides that a development permit in an energy conservation or GHG reduction DPA may include these requirements in order to provide for energy conservation and the reduction of GHG emissions. We have concluded earlier in this memo that, although there is not yet any case law interpreting this section, local governments likely have the authority to require solar panels through an energy conservation and GHG reduction DPA. Based on a plain reading of s. 491(9), local governments likely have this authority to require solar panels in order to provide for energy conservation and the reduction of GHG emissions. Solar panels that are not operational or connected to the necessary wiring would likely not provide for energy conservation and the reduction of GHG emissions, so local governments likely have the authority to require “operating solar panels”.

It could be argued that a local government’s requirement of solar panels in a development permit implies that the requirement is for operating solar panels. However, local governments could avoid potential disputes by specifying that the requirement is for operating solar panels and a covenant to require maintenance and operation.

- Z. If a local government includes in a Neighbourhood Plan (“NP”) energy performance requirements for new buildings (including alignment with the BC Energy Step Code and Zero Carbon Step Code) and/or renewable energy systems requirements (e.g., district energy, solar PV on homes), what additional mechanism(s), if any, does the local government need to put in place to enforce the requirements included in the NP? (e.g., building bylaw, DPA, subdivision servicing bylaw). Or is it sufficient to only include them in the NP?**

An NP is a subset of an Official Community Plan (“OCP”), so all the procedures, content, and requirements that apply to OCPs also apply to NPs. Section 478 of the *LGA* explains the effect of an OCP, which would also include an NP.

478(1) An official community plan does not commit or authorize a municipality, regional district or improvement district to proceed with any project that is specified in the plan.

(2) All bylaws enacted or works undertaken by a council, board or greater board, or by the trustees of an improvement district, after the adoption of

(a) an official community plan, or

(b) an official community plan under section 711 of the *Municipal Act*, R.S.B.C. 1979, c. 290, or an official settlement plan under section 809 of that Act, before the repeal of those sections became effective,

must be consistent with the relevant plan.

Section 478 clarifies that an OCP does not commit or authorize any of the projects in the OCP. Rather, bylaws or works undertaken in a local government must be consistent with the OCP. This means that an OCP or NP constrains Council but has no effect to directly regulate land or an owner. Although it may contain policy objectives, these are not binding on the owner. Accordingly, it will not be sufficient for a local government to only rely on an NP or an OCP to require things like energy performance in new buildings or renewable energy systems requirements. For an energy performance requirement for new buildings or renewable energy system requirements, the local government would need to enact a bylaw or use a DPA, depending on its specific objective.

(a) *Bylaw*

For an energy performance requirement for new buildings, a local government would need to enact a building bylaw that requires new buildings to align with a step in the Energy or Zero Carbon Step Code. Also, a local government could use a bylaw to require buildings to connect to a district energy system. For both objectives, a local government would need to include the requirement in its OCP or NP *and* enact a bylaw. We note that s. 478(2) of the *LGA* requires a local government’s bylaws to be consistent with content that exists in its OCP at the time of adoption of the bylaw, so the local government must ensure consistency with its OCP before enacting a bylaw on energy performance.

(b) Development Permit Area

If a local government's OCP or NP included renewable energy system requirements, the local government would likely also need to use a DPA or a bylaw to achieve that objective, depending on the specific requirement.

If using a DPA, s. 488(1) of the LGA provides that the local government's OCP may designate an area as a DPA. Section 488(2) of the LGA provides that when a local government designates areas as DPAs, its OCP must,

- (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.

Altogether, for a local government to use its DPA authority to require solar panels or a connection to a district energy system, the local government could designate the area as a DPA, describe the special conditions or objectives, and specify the guidelines within its OCP. However, an OCP without a DPA will not be sufficient.

For a renewable energy system requirement objective that requires a bylaw rather than a DPA, the local government would likely need to include the requirement in their OCP *and* enact the bylaw.

AA. Can a Subdivision Servicing Bylaw be used by a local government to do any of the following:

- (a) Require infrastructure that supports renewable energy (e.g. District Energy connections; EV conduit; solar-ready wiring)**
- (b) Require subdivisions to connect to or be compatible with district energy systems**
- (c) Specify pipe sizing, trenching and easements for future low-carbon systems**
- (d) Require underground electrical to be compatible with smart meters.**

Subdivision servicing bylaws are governed by s. 506 of the LGA.

506(1) A local government may, by bylaw, regulate and require the provision of works and services in respect of the development of land, and for that purpose may, by bylaw, do one or more of the following:

- (a) regulate and prescribe minimum standards for the dimensions, locations, alignment and gradient of highways in connection with the development of land;
- (b) require that a water distribution system, a fire hydrant system, a sewage collection system, a sewage disposal system, a drainage collection system or a drainage disposal system be provided, located and constructed in accordance with the standards established in the bylaw;
- (c) regulate and require that the following be provided, located and constructed in accordance with the standards established by the bylaw:
 - (i) highways, sidewalks, boulevards, boulevard crossings, street lighting, transit bays or underground wiring;
 - (ii) amenities, including benches, bollards, bicycle parking facilities, directional signage, parklets, street lamps, street signs, transit shelters or waste disposal and recycling containers;
 - (iii) transportation infrastructure that supports walking, bicycling, public transit or other alternative forms of transportation, including traffic calming measures;
 - (iv) sustainable design features that provide for energy and water conservation, reduction of greenhouse gas emissions and climate resilience;
 - (v) any other thing, or classes of things, prescribed by regulation.

While s. 506 of the LGA allows a local government to impose requirements, regulations, and standards for a number of matters in relation to subdivisions, we note that s. 5 of the *Building Act* would still apply to a subdivision bylaw to the extent that it constitutes a local building requirement. That means, any building requirements in a subdivision bylaw would be of no force or effect unless they are listed as an unrestricted matter in the *Building Act General Regulation*.

We will discuss each request in turn. We note that while a local government may have the authority to include some of these requirements in a subdivision servicing bylaw, imposing some of these requirements for all subdivisions could result in political issues or pushback, which is beyond the scope of this memo.

- (a) *Require infrastructure that supports renewable energy (e.g. District Energy connections; EV conduit; solar-ready wiring)*

A local government could likely require a district energy connection in a subdivision bylaw under s. 506(1)(c)(iv) of the LGA, which allows a local government to require sustainable design features that provide for energy conservation, reduction of GHGs,

and climate resilience. A requirement to connect to a district energy system would likely be considered a local building requirement that is subject to a requirement of a building regulation under s. 5 of the *Building Act*; however, s. 2(f) of the *Building Act General Regulation* prescribes “any matter as it relates to district energy systems” as an unrestricted matter. This means s. 5 of the *Building Act* would likely not render a requirement to connect to a district energy system in a subdivision bylaw of no force or effect.

A local government could likely require EV readiness or an EV conduit in a subdivision bylaw under s. 506(1)(c)(iv) of the LGA, which allows a local government to require sustainable design features that provide for energy conservation, reduction of GHGs, and climate resilience. EV chargers are not regulated in the BC Building Code, so s. 5 of the *Building Act* does not render local requirements on EV chargers of no force or effect.

A local government likely could not require a building to be equipped with solar ready wiring in a subdivision bylaw. Since solar panels or solar readiness is a requirement on the building itself, it is likely captured in the Building Code, so s. 5 of the *Building Act* would apply. While s. 2.2 of the *Building Act General Regulation* prescribes energy conservation and GHG emissions reductions as unrestricted matters, it also provides that a local building requirement may not impose requirements in addition to the Step Code. Requiring solar panels or solar readiness would likely constitute a requirement in addition to the Step Code, so s. 5 of the *Building Act* would render such a requirement of no force or effect. We note that a local government could likely require solar panels or solar readiness using a DPA instead of a subdivision bylaw. That said, it may be at least arguable that solar ready wiring that is not connected to any fixtures using the power may not offend s. 5.

(b) Require subdivisions to connect to or be compatible with district energy systems

A local government, in a subdivision servicing bylaw, can likely require subdivisions to connect with or be compatible with a district energy system under s. 506(1)(c)(iv) of the LGA, which allows a local government to require sustainable design features that provide for energy conservation, reduction of GHGs, and climate resilience. A requirement to connect to, or be compatible with, a district energy system would likely be considered a local building requirement that is subject to a requirement of a building regulation under s. 5 of the *Building Act*; however, s. 2(f) of the *Building Act General Regulation* prescribes “any matter as it relates to district energy systems” as an unrestricted matter. This means s. 5 of the *Building Act* would likely not render a requirement to connect to a district energy system in a subdivision bylaw of no force or effect.

(c) *Specify pipe sizing, trenching, and easements for future low-carbon systems*

A local government, in a subdivision servicing bylaw, can likely specify pipe sizing, trenching, and easements for future low carbon systems in a subdivision servicing bylaw, as long as these requirements do not apply to the building itself. Section 506(1)(c)(iv) of the LGA allows a local government to, by bylaw, require sustainable design features that provide for energy conservation, reduction of GHGs, and climate resilience, which would likely provide the local government with authority to specify pipe sizing, trenching, and easements for future low carbon systems in a subdivision servicing bylaw.

If these requirements apply to a building, then s. 5 of the *Building Act* would likely apply, and the requirements would be of no force or effect. Items like pipe sizing are likely regulated by the Building Code and they are not prescribed as an unrestricted matter, so s. 5 of the *Building Act* would likely render these requirements of no force or effect.

(d) *Require underground electrical to be compatible with smart meters*

A local government, in a subdivision servicing bylaw, can likely require underground electrical to be compatible with smart meters, as long as these requirements do not apply to the building itself. Section 506(1)(c)(iv) of the LGA allows a local government to, by bylaw, require sustainable design features that provide for energy conservation, reduction of GHGs, and climate resilience, which would likely provide the local government with authority to require underground electrical to be compatible with smart meters in a subdivision servicing bylaw.

If these requirements apply to a building, then s. 5 of the *Building Act* would likely apply. Electrical requirements are extensively regulated by the Building Code and they are not prescribed as an unrestricted matter, so s. 5 of the *Building Act* would likely render these requirements of no force or effect to the extent that they apply to buildings.

BB. Besides voluntary incentives (such as density bonusing and increased floor space ratios), what mechanisms, if any, could a local government use in its subdivision process to require new buildings built within the subdivision to meet energy or renewable energy requirements that are otherwise restricted under section 5 of the *Building Act* (e.g., building

commissioning, heat pumps instead of electric resistance baseboards, electricity service size limits)?

(a) Development Permit Area

If a local government has designated land as a DPA in their OCP, then a person must not subdivide that land without first obtaining a development permit. Under s. 488 of the LGA, local governments have the authority to designate DPAs for the purpose of establishing objectives to promote energy conservation and GHG reduction.

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;

If a local government designates areas as a DPA, it must describe the special conditions or objectives that justify the designation and specify guidelines to address the special conditions or objectives in its OCP.

(2) With respect to areas designated under subsection (1), the official community plan must

- (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.

Section 491(9) of the LGA specifies the requirements that a development permit may include for a development in an area that is designated as an energy conservation or GHG reduction DPA.

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.

Section 489 of the LGA provides that a person must not subdivide or alter land in an area designated as an energy conservation or a GHG reduction DPA without first obtaining a development permit.

489 If an official community plan designates areas under section 488 (1), the following prohibitions apply unless an exemption under section 488 (4) applies or the owner first obtains a development permit under this Division:

- (a) land within the area must not be subdivided;
- (b) construction of, addition to or alteration of a building or other structure must not be started;
- (c) land within an area designated under section 488 (1) (a) or (b) [*natural environment, hazardous conditions*] must not be altered;
- (d) land within an area designated under section 488 (1) (d), (h), (i) or (j) [*revitalization, energy conservation, water conservation, greenhouse gas reduction*], or a building or other structure on that land, must not be altered.

This means that subdivision is one point at which a property owner must comply with the requirements for a development permit in an energy conservation or GHG reduction DPA.

(b) Clear Policy in an OCP

It is possible that a local government could require subdivisions to comply with certain energy conservation or GHG reduction requirements through a clear policy in its OCP. Section 83(3) of the *Land Title Act* (“LTA”) provides that an approving officer may refuse to approve a subdivision plan if the approving officer considers the deposit of the plan to be against the public interest.

85(3) In considering an application for subdivision approval in respect of land, the approving officer may refuse to approve the subdivision plan if the approving officer considers that the deposit of the plan is against the public interest.

In certain cases, the approving officer may consider the local government’s OCP to determine whether the deposit of a subdivision plan would be in the public interest. However, the approving officer may only do so if the OCP reflects the local government’s actual policy and is not just a vague expression of the local government’s future hopes for development.

For example, in *Wyles v Penticton (City)*, [1995] B.C.J. No. 1257, the approving officer refused a subdivision plan, and one of the reasons for the refusal was because the City of Penticton’s (the “**City**”) OCP designated the lands to be subdivided “low density residential,” and the proposed subdivision plan did

not comply with the OCP for that area. The Court concluded that the approving officer was entitled to consider the City's OCP in determining what was in the public interest.

Similarly in *Cole v Anderson (B.C.S.C.)*, [1993] B.C.J. No. 2557, the approving officer in the District of Campbell River (the "**District**") rejected a proposed subdivision on three grounds. The first was because it was next to the body of water which constituted the watershed for the District, and public debate and discussion discouraged development around the lake to preserve and protect the water supply. The appellants attacked the decision on all three grounds and argued that there was no factual basis to support the rejection, and it was made in bad faith or discriminatory.

The Court said, on its face, the proposed subdivision complied with the District's zoning bylaw. However, the District's OCP created a special area around the lake near the property, which said:

Due to the importance of the Campbell Lakes watershed area (eg. as part of the Municipal water supply) no further intensification of land use shall be permitted either by subdivision or rezoning of land. Land use controls will be developed to reduce negative environmental impacts on the water resource.

The Court said, the District's policy was clearly expressed in the OCP, and the approving officer considered the proposed subdivision to not be in the public interest because it conflicts with the policy in the OCP. The Court concluded the existence of that expression of policy is a reasonable factual basis for the approving officer's assessment of the public interest under s. 83(3) of the LTA. This decision was upheld in the Court of Appeal (*Cole v Anderson*, 1995 CanLII 2170).

MacFarlane v British Columbia (Minister of Transportation) (1994), 27 M.P.L.R. (2d) 300 (B.C.S.C.) confirms an approving officer has the power or duty to consider all relevant matters pertaining to the public interest, including those expressed in unrelated bylaws. That is, a class of public interest concerns is not excluded from the public interest discretion only by the reason that such concerns were subsequently codified in a bylaw which does not directly apply to a subdivision application.

We are not aware of any examples of approving officers rejecting a proposed subdivision for not being in the public interest based on a policy that relates to energy conservation or GHG reduction in an OCP. Based on the case law, it is somewhat likely that a local government could do this. However, a local government could not likely use this method to impose a building

requirement that s. 5 of the *Building Act* would otherwise make of no force or effect. Section 5(3) of the *Building Act* provides that:

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.

(4) Subsection (3) does not apply in relation to a matter that is prescribed by regulation as an unrestricted matter.

Section 5 of the *Building Act* defines a local building requirement as, “a requirement in respect of building activities that is enacted by a local authority other than a treaty first nation, the Nisga'a Nation or a Nisga'a Village.” Following this definition, a policy that includes a building requirement in an OCP would likely constitute a local building requirement under the *Building Act*. This means s. 5 of the *Building Act* would likely still apply to an OCP policy.

We note that the *Building Act General Regulation* lists any matter as it relates to district energy systems as an unrestricted matter. As such, it is possible that a local government could include a policy in its OCP that encourages the use of or connection to district energy systems. Then, the approving officer in that local government could refer to that policy in determining whether a proposed subdivision is in the public interest.

CC. It is our understanding that the ways that a Zoning Bylaw can be used to support renewable energy or energy performance are as follows:

- a. **regulate permitted land use (permit renewable energy development in specific zones)**
- b. **regulate setbacks/building height in favour of renewable energy (e.g. ensuring setbacks are not a barrier to air source heat pump equipment; ensuring solar panels don't impact building height etc)**
- c. **regulate parking and enable EV ready charging**
- d. **regulate density and incentivize energy efficiency (e.g. density bonusing for increased energy efficiency)**

Are there any other tools in Zoning Bylaws that we could consider to support renewable energy development or increased building energy performance?

Section 479 of the LGA gives local governments the authority to enact zoning bylaws.

479(1) A local government may, by bylaw, do one or more of the following:

- (a) divide the whole or part of the municipality or regional district into zones, name each zone and establish the boundaries of the zones;
- (b) limit the vertical extent of a zone and provide other zones above or below it;
- (c) regulate the following within a zone:
 - (i) the use of land, buildings and other structures;
 - (ii) the density of the use of land, buildings and other structures;
 - (iii) the siting, size and dimensions of
 - (A) buildings and other structures, and
 - (B) uses that are permitted on the land;
 - (iv) the location of uses on the land and within buildings and other structures;

Based on s. 479, local governments are rather limited with how they can use zoning bylaws for renewable energy development outside of permitting the use of renewable energy development within certain zones or regulating setbacks and building height with renewable energy in mind. However, local governments can likely leverage zoning to encourage renewable energy development. For example, a local government could enter into a phased development agreement with a developer to “freeze” the current zoning in exchange for renewable energy development or increased building performance. Alternatively, a developer could offer a s. 219 covenant or amenity rezoning that includes a commitment of renewable energy development or increased building performance as a factor for a council or board to consider in their decision to rezone a property.

Another possibility is a local government can likely include requirements in relation to renewable energy development or increased building performance in a DPA. Section 488 of the LGA allows a council or board to specify the guidelines for a DPA in a zoning bylaw rather than in an OCP.

A final option is under s. 8(3)(l) of the *Community Charter*, a municipality could likely, by bylaw, require new buildings to be built in accordance with a step in the Energy or Zero Carbon Step Code. Although a Zero Carbon or

Energy Step Code requirement is a building requirement and not technically a zoning requirement, some municipalities have included this requirement in their zoning bylaw. We note that, if this is included in a zoning bylaw, the zoning bylaw amendment or adoption would need a public hearing pursuant to s. 464 of the LGA. However, section 464 of the LGA provides that the public hearing requirement could be waived if the zoning bylaw is consistent with the local government's OCP.

We also note that when a local government requires EV charging in its zoning bylaw, this is likely not a zoning requirement, it is more likely a requirement enacted by bylaw under the authority of s. 8 of the *Community Charter* or s. 127.1 of the LGA. EV charger requirements often fit well with the other provisions in a zoning bylaw, so local governments will sometimes include EV charger requirements in a zoning bylaw, but these requirements are technically not zoning.

DD. Item F of the Emerging Regulatory Pathways Phase 2 document argues that solar and/or battery storage can be required as part of a DPA. Does this still apply for battery storage if it is located inside a property's primary building or does it need to be housed somewhere that is external to the building in order for the DPA requirement to apply? If the latter, what are the requirements if the batteries need to be located inside an enclosed structure on the property? For example, could it be required if it is housed inside a garage or other ancillary building?

While, in our view, local governments likely have the authority to impose requirements such as compulsory connection to solar panels and battery storage as part of a DPA, the battery storage likely needs to be external to the building for a local government to require this.

Under s. 488 (1)(h)(e) of the *LGA*, a local government may prescribe requirements in relation to machinery, equipment, and systems external to buildings and other structures. Also, the *Building Act General Regulation* designates any matter relating to machinery, equipment, and systems external to a building as unrestricted matters for energy conservation and reduction of GHG DPAs. Both the authority in the *LGA* and the matters that are designated as unrestricted specify that the required connection must be external to buildings and other structures. Thus, if a local government were to use its DPA authority to require a connection to batteries, the batteries would likely need to be external to the building and any structures, such as a house, condominium complex, or garage.

EE. Can a DPA be used to require buildings to connect to and participate in a microgrid? If it can be used, can it be applied to both new and existing buildings?

(a) DPA

Local governments could likely use DPAs to require buildings to connect to a microgrid. Sections 488(1)(h) and (j) of the *LGA* allow local governments, through their OCP, to designate a DPA to promote energy conservation and the reduction of GHG emissions. Within a DPA, owners of land must obtain a development permit before they can construct, add to, or alter a building or other structure.⁸⁰ 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, 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 GHG 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*,⁸¹ 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.⁸² This was established in the context of considering the scope of the commercial, industrial, or multi-family residential form and character DPA under section 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

⁸⁰ *LGA* at s 489(b).

⁸¹ 2001 BCSC 245 [*Salmon Arm*].

⁸² *Salmon Arm* at para 60.

to adopt guidelines with respect to exterior equipment such as water cisterns, solar collectors, heat pumps, 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 micro grids.

Since DPA requirements apply when a building requires a development permit, the requirements can likely only be enforced when a person is constructing, altering, or adding to a building or other structure. This means, the requirement to connect to a micro grid would likely apply to a new building or an existing building that is undergoing an alteration or an addition.

Based on the language of s. 491(9) and the fact that the section does not specify anything relating to ownership of the systems and equipment, a municipality could likely impose a requirement for a building to connect to either a municipally owned micro grid or a micro grid that is not municipally owned.