Sustainable Development – Local Government Powers

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Introduction

Recently most Provinces in Canada have granted local governments broader powers than existed under century-old predecessor legislation.[1] This empowerment comes at a time when the Supreme Court of Canada has been interpreting provincial municipal governance legislation such that municipal powers have become further amplified.[2] Municipalities, which govern more than eighty per cent of Canada's population, are now using these new broad powers in the context of environmental protection, human health, sustainable development and other similar public policy objectives.

Although the federal/provincial/territorial/municipal division of powers presents a feast for lawyers, politicians and the courts, these separations, which are invisible to the average citizen and all other species, work against climate change adaptation and other environmental protection priorities.[3] The absence of vertical integration in our governmental system comes at a time when climate change and other

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1 Federation of Canadian Municipalities, *Assessment of the Municipal Acts of the Provinces and Territories*, by Donald Lidstone, 20 April 2004, online: FCM <http://www.fcm.ca/english/documents/assess.html>.

2 See *Nanaimo (City of) v. Rascal Trucking Ltd*., [2000] 1 S.C.R. 342, 183 D.L.R. (4th) 1 [*Rascal*]; *114957 Canada Ltee. (Spraytech, Societe d'Arrosage) v. Hudson (Town of)*, [2001] 2 S.C.R. 241, 200 D.L.R. (4th) 419 [*Spraytech*]; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City of)*, [2004] 1 S.C.R. 485, 236 D.L.R. (4th) 385 [*United Taxi Drivers' Fellowship*]; *Croplife Canada v. Toronto (City of)* (2005), 75 O.R. (3d) 357, 254 D.L.R. (4th) 40, leave to appeal to SCC refused with costs, [2005] SCCA No. 329 (QL) [*Croplife*].

3 Office of the Auditor General of Canada, *2006 Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (Ottawa: Office of the Auditor General, 2006), online: OAG <http://www.oag-bvg.gc.ca>.

environmental concerns need to be addressed.[4] Despite this balkanization of interests within jurisdictions, municipalities that contain nearly all of Canada's population are now positioned to move on sustainable development and greenhouse gas emission issues with or without the federal, provincial or territorial governments. This is underlined by the new authority in a number of provinces for municipalities to provide services or regulatory regimes together on a regional basis[5] such that two or more municipalities may by bylaw establish an intermunicipal scheme to regulate and provide services. In any event, there is a growing sense that the entity that is closest to the problem, the source of the problem and the people affected should have the power to regulate, implement change and otherwise respond.[6]

I. Protected Areas

The documented advantages of natural area protection include: biological diversity; heritage and history preservation; protection of watercourses and riparian values in the protected area and downstream; tourism and other economic objectives; visuals and aesthetics; wildlife habitat protection; wetlands protection and others. Federal and provincial governments establish parks, conservation areas, reserves and other preservation areas, sometimes in partnership with local government. A municipality may, within its boundaries, employ a number of legal tools to preserve public open space.

A. Park Dedication

Most municipal legislation empowers local councils or boards to dedicate park land. Under section 30 of the *Community Charter*, a council may by bylaw reserve or dedicate for a particular municipal or other public purpose real property owned by the municipality. A bylaw to remove the reservation or dedication requires the approval of the electors

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4 Nicholas Stern, *The Economics of Climate Change – The Stern Review* (Cambridge: Cambridge University Press, 2007), online: HM Treasury <http://www.hm-treasury.gov.uk>.

5 See *e.g.* s. 14 of the *Community Charter*, S.B.C. 2003, c.26.

6 E.F. Schumacher, *Small is Beautiful: Economics as if People Mattered* (New York: Perennial Library, 1973) at 50-58.

following notice and a hearing. Section 30(5) provides that bylaws adopted or works undertaken that directly affect park or other reserve or dedicated property must be consistent with the park or other purpose for which the property was reserved or dedicated. In a number of jurisdictions a local government may acquire parkland on subdivision. In British Columbia section 941 of the *Local Government Act* governs such dedication and allows an approving officer to acquire up to five per cent of the subdivided land or cash in lieu; if cash is received it must be placed in a statutory park reserve fund.

B. Fee Simple

A municipality may exercise its natural person or corporate property acquisition powers to acquire property for park or public open space purposes. Such ownership may or may not be accompanied by a condition on title, a right of reverter, a trust, a restrictive covenant or a statutory covenant with respect to the "park purpose." In British Columbia, a municipality has authority to acquire property under section 8(1) of the *Community Charter*. A municipality may expropriate land for a park. The authority for a municipal council in British Columbia to expropriate is found in section 31 of the *Community Charter*.

C. Trust

Municipal public open space or park land may be subject to a reverter, trust condition on title, settlor's trust condition, common law restrictive covenant or a statutory covenant. Although in *Armstrong v. Langley (City)*[7] the British Columbia Court of Appeal held that the settlor of a park trust could have enforced the trust, the general rule of law is that a settlor cannot enforce a charitable trust but the Attorney General on behalf of the beneficiaries may do so. On the other hand, a municipality itself could apply to court to enforce a trust.

The British Columbia Supreme Court in *Victoria (City) v. Capital Region Festival Society et al*[8] held that Beacon Hill Park in Victoria could not be used for an annual music festival. The Court found that the

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7 (1992) 11 M.P.L.R. (2d) 121, (1992) 69 B.C.L.R. 92d 191 (B.C.C.A.).

8 (1998) 62 B.C.L.R. (3d) 143, [1998] B.C.J. No. 2658 (B.C.S.C.) (Q.L.).

governing principle is whether the proposed use is necessarily incidental to the park trust. The park had been set aside for a "public park or pleasure ground," with the City as trustee. The Court defined the park as a nature park and ornamental pleasure ground with playing fields. The Court held that utilization of the property must be consistent with the character of the property such that the park could not lawfully be used for the music festival purpose. The festival failed to meet the principle of consistency of the utilization of the property with the character of the property.

In arriving at this conclusion, the Court considered the fact that the festival would involve a concession, even though Begbie C.J. in *Anderson v. Victoria (City)*[9] held that a park was not to be used for profit or utility. Although the festival was to be held only over a three day period, the Court found this breached the "park" trust. As well, although the event was to occupy a small portion of the park, the Chief Justice found that no part of the park could be surrendered by the City as Trustee.

In *Armstrong v. Langley (City)*,[10] the City received land on trust "to be used only for the purpose of a public park, playground or recreational facility." The British Columbia Court of Appeal found that a City road constructed through the park violated the Trust. The Court found as a fact that the road connected two city streets and was not introduced to improve the park. The test was whether the improvement was constructed for the purpose of enhancing the usefulness of the land as a public park or playground.

D. Covenant

An owner of land may grant a covenant to a municipality. In British Columbia, a covenant may be granted under section 219 of the *Land Title Act.*[11] The general rule is that a local government may not impose the requirement for a covenant as a condition precedent to a rezoning or issuance of a development permit[12] unless the condition is

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[9] (1884) 1 B.C.R. (Pt. 2) 107, [1884] B.C.J. No. 17 (B.C.S.C.) (Q.L.).

[10] *Supra* note 7.

[11] *Land Title Act,* R.S.B.C. 1996, c. 250.

[12] *Vancouver v. Registrar of Vancouver Land Registration*, [1955] 2 D.L.R. 709, 15 W.W.R. 351 (B.C.C.A.).

imposed under an amenity zoning bylaw under section 904(1) and (2)(a) of the *Local Government Act.* An approving officer of a local government in British Columbia may require a covenant as a condition of subdivision under section 82 and 219(9.1) of the *Land Title Act.* As well, a council may impose a requirement for a covenant under section 910(6) of the *Local Government Act* in relation to flood protection. Section 219(4)(b) of the *Land Title Act* provides that a covenant may require that land or a specified amenity in relation to land be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant. Given that elected municipal councils come and go and municipal policies change with the councils, it is advisable to include as a grantee of a conservation covenant an independent land trust designated by the minister responsible under section 219(3)(c) so the covenant will not be discharged by a future council.

E. Zoning for Amenities

Under section 904 of the *Local Government Act,*[13] a zoning bylaw may establish conditions that will entitle an owner to a higher density, such conditions dealing with the conservation or provision of amenities. Amenities include a conservation or preservation covenant, public open space, dedicated park land, the planting of trees, recreational facilities or the like.

F. Leased Land

A municipality may under its natural person powers or statutory land acquisition powers lease land. Stanley Park is leased land. The District of West Vancouver has acquired a head lease of its foreshore from the Province and controls development and use of the foreshore by way of subleases and zoning.

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[13] R.S.B.C. 1996, c. 323.

G. Private Property

Private property may be protected in whole or in part by way of a conservation covenant, discussed above in relation to covenants generally. A council may, as stated, expropriate the land or expropriate an interest in the land, including a covenant or right of way to preserve and protect an area. In a number of provinces, municipalities may protect natural features of private property by way of development permits issued as a condition of development. In British Columbia, a development permit is required before subdivision, construction or alteration of land designated in an official plan for protection of the natural environment or protection of development from hazards. The permit may include requirements and conditions or set standards in relation to development free areas, preservation of natural features, dedication of watercourses, natural feature protection structures and other measures, including the requirement to plant trees or vegetation.

In a number of provinces, a municipality may also require tree preservation or tree planting as well as screening. This is discussed below.

II. Trees

Municipalities in a number of jurisdictions have the authority to regulate the cutting or removal of trees and in some cases to require the planting of trees. "Recent studies in urban environmental science report undeniable evidence that trees in cities improve the environment in many ways. Urban sustainability is a blend of conditions of the physical environment and the well being of the people who inhabit those environments. Another field of research, the investigations of the social benefits of trees, provide additional compelling data."[14] In British Columbia a municipal council may require trees to be planted under section 8(3)(c) of the *Community Charter* or in respect of an applicable development permit area under section 920(7)(e) of the *Local Government Act*.

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[14] U.S., Georgia Forestry Commission, *Trees, Parking and Green Law: Strategies for Sustainability*, by K. L. Wolf (Stone Mountain, GA: Georgia Forestry Commission, 2004), online: University of Washington, College of Forest Resources <http://www.cfr.washington.edu/research.envmind/transportation.html>.

As well, a council in British Columbia may regulate or prohibit the cutting down of trees or shrubs or require an owner to obtain a permit before cutting down a tree or shrub under sections 8(3)(c) and 15. Section 909 of the *Local Government Act* empowers a council or board to enact a bylaw to require and set standards for landscaping or other screening in relation to preserving the natural environment.

The courts have considered a number of cases respecting local government tree protection powers in British Columbia. In *Larmon Developments Inc. v. Saanich (District)*[15] the British Columbia Supreme Court held that the existence of trees on land is a factor the approving officer may consider in deciding whether or not there is a tree bylaw. In this case, the Court found there was a tree bylaw which prevented the cutting or removal of trees from parcels which could be subdivided under applicable enactments. A tree bylaw was upheld by the British Columbia Supreme Court in *Whistler Housing Corp. v. Whistler (Resort Municipality).*[16] In that case, the Petitioner submitted that the bylaw was invalid because it required the owner to obtain a building permit or subdivision approval before applying for a tree-cutting permit. The Court upheld the bylaw on the basis that it was not discriminatory or unreasonable. In *Service Corporation International (Canada) Ltd. v. Burnaby (City)*[17] the British Columbia Court of Appeal found that a bylaw stating that certain lots must be "fully and suitably landscaped and properly maintained" provided a proper basis for a reasonable person to decide what to do in order to comply. The Court found, however, that the City did not exercise the power to set standards for landscaping required under the bylaw, although it had the power to do so.

III. Greenways

Greenways are

> linear open spaces or parks established along natural corridors such as river or stream valleys or along historic infrastructure corridors such as railroad rights of way. Greenways provide communities many health, recreational, environmental and

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[15] [1993] B.C.J. No. 2800 (B.C.S.C.) (QL).

[16] (1994), 92 B.C.L.R. (2d) 62 (B.C.S.C.).

[17] (2001), 95 B.C.L.R. (3d) 301 (B.C.C.A.).

> economic benefits. Millions of people use greenways for exercise and fitness or for family recreational outings. Greenways help to conserve forests, provide ecological benefits such as habitat, and help mitigate air pollution and pollution in storm water runoff.[18]

Greenways include bike paths, walking ways, seawalls, pedestrian crossovers, horse paths, trails or other such corridors. Greenways can be established in British Columbia by way of amenity zoning under section 904 of the *Local Government Act*, highway or park dedication or reservation, as a condition of subdivision or as the subject of a covenant or statutory right of way.

In *Burns v. Dale*[19] the British Columbia Supreme Court held that an approving officer as a condition of subdivision could require dedication of a public walkway adjacent to the high water mark as a dedicated highway without compensation to the owner-subdivision applicant. The Court concluded the waterfront walkway was a highway and that the municipality's long term plan for a walkway network constituted a highway network as described in section 75(2)(f) of the *Land Title Act*. The plan for the waterfront walkway network gave the approving officer the adequate factual basis on which to require the owner to dedicate the three metre wide right of way adjacent to the water.[20]

IV. Riparian Areas

Jurisdiction over the protection of fish habitat is split between the federal and provincial orders of government. Section 91(12) of *The Constitution Act, 1867*[21] grants Canada exclusive jurisdiction over "Sea Coast and Inland Fisheries." The provinces have exclusive legislative authority in respect of "Matters of a merely local or private Nature in the Province" under section 92(16) and "Property and Civil Rights in the Province" under section 92(13). Noting that many species reside in the

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[18] U.S., Center for Urban Policy and the Environment, *People's Preferences for Greenway Landscapes: Survey Ratings of Indianapolis Trails*, by Kelly Dickson & Greg H. Lindsey, online: http://trailsurvey.urbancenter.iupui.edu/about_greenways.htm; see also online: North Carolina State University Libraries <http://www.lib.ncsu.edu/specialcollections/greenways/>.

[19] (1997), 45 M.P.L.R. (2d) 104, [1997] B.C.J. No. 2318 (B.C.S.C.) (QL).

[20] *Ibid.*

[21] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

ocean and spawn in fresh water, it is significant that the federal government has exclusive jurisdiction over fisheries and the provinces over land use regulation.

Although municipalities do not have the authority to enforce the *Fisheries Act*,[22] *Species at Risk Act*[23] or *Migratory Birds Convention Act*,[24] a municipality may legislate in relation to land use in a manner that is complimentary to the federal regime. In this regard, local government delegatees of provincial powers cannot exercise powers greater than those held by their provincial governments. In a zoning bylaw under section 903 of the *Local Government Act* a council or board can deal with setbacks or uses in relation to riparian areas. A development permit in a development permit area can specify areas that must remain free of development, require the preservation of natural features, require natural watercourses to be dedicated or require works to be constructed to preserve watercourses or other natural features.

In British Columbia, municipalities must also take into account the *Riparian Areas Regulation.*[25] Under the *Regulation*, in relation to a riparian area, an owner must obtain an authorization to damage fish habitat from Canada or, in the alternative, a report from the province to the local government that both Canada and the province have received a certification from a "qualified environmental professional" that the development can be carried out without damaging fish habitat. The *Regulation* does not apply in areas that have established Streamside Protection and Enhancement Areas (SPEAs) where the local government considers its system of bylaws and permits is equal to or better than the standards of the previous provincial riparian protection regulation. An amendment of a SPEA must comply with the new Regulation, noting that the new Regulation is silent in relation to any aspect of SPEAs.

V. Runoff Bylaws

"The greatest single impact of urbanization is the increase in the amount of impervious surfaces. Developed landscapes are covered with

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[22] R.S.C. 1985, c. F-14.

[23] S.C. 2002, c. 29.

[24] S.C. 1994, c. 22.

[25] B.C. Reg. 376/2004.

paving, buildings and other land treatments that alter the interaction of air, water, sunlight and living things with the land. In recognition of this problem, many cities are exploring new approaches to reduce impervious cover in new and existing urban areas."[26]

Impervious surface and runoff bylaws deal with the impacts of the heat island effect (increased temperatures, carbon dioxide emissions, bad ozone, other pollutants, storm water runoff and displacement of trees and vegetation). A number of provinces have given municipalities the power to deal with runoff control. In British Columbia, section 907 of the *Local Government Act* provides that a council or board may by bylaw require ongoing disposal of surface runoff and storm water in relation to the construction of a paved area or roof area. The bylaw may establish the maximum percentage of the area of land that can be covered by impermeable material and the rules may be different for different zones, uses, areas, sizes of paved or roof areas or terrain or water conditions. The City of Seattle has adopted a state of the art runoff control enactment. The City of Vancouver under the *Vancouver Charter*[27] has established unique drainage and runoff control provisions for the historic and heritage properties known as "First Shaughnessy" further to a process initiated by the owners of residences in the Shaughnessy area.

VI. Air Quality

"Canadian municipalities have demonstrated leadership in reducing greenhouse gas emissions through energy-efficiency measures and the use of alternative energy sources. But the challenges of adapting to climate change have received far less attention. One of the greatest concerns is an expected increase in climate variability and in extreme weather, causing floods, droughts and storms… as the climate changes, it is anticipated that even small shifts in climate normals will have potentially large ramifications for existing infrastructure."[28] Municipalities have significant powers in relation to climate change, ranging from the control of vehicle idling to impervious surface

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[26] Wolf, *supra* note 18.

[27] S.B.C. 1953, c. 55.

[28] Canadian Climate Impacts and Adaptation Research Network, *Adapting to Climate Change – An Introduction for Canadian Municipalities*, Bano Mehdi, ed. 2006, online: C-CIARN <http://www.c-ciarn.ca/pdf/adaptations_e.pdf>.

treatments (green roofs or treed boulevards) to building design controls to pollution abatement.

The City of Toronto adopted an idling control bylaw in 1998 under an omnibus provision of the *Municipal Act.*[29] The bylaw restricts idling to three minutes or less in any 60 minute period, with exemptions for transit vehicles or in the context of extreme ambient temperatures.[30] The District of North Vancouver and City of Vancouver have subsequently adopted similar idling bylaws.

A number of municipalities have considered their broad powers under recently enacted provincial or territorial legislation, in the context of the recent decisions of the Supreme Court of Canada, to consider measures to implement the *Kyoto Protocol.*[31] In light of *Spraytech*, municipalities may exercise their powers under the heads of "public health," "protection of the natural environment," "municipal services," "buildings and other structures" and "protection and enhancement of the well-being of (the) community in relation to [nuisances and other objectionable situations]" under section 8(3) of the *Community Charter.* Municipal empowerment in relation to greenhouse gas emissions is reinforced by section 14 of the *Community Charter* which provides that two or more municipalities may by bylaw establish a regional scheme in relation to regulating or services. In regard to greenhouse gas emissions, municipalities may control the emissions from buildings or structures under subsections 64(a) and (c) of the *Community Charter*; prohibit engine idling under subsections 8(3)(i) and (j) and 64(c); address public nuisance under subsection 64(a); restrict the common law right of passage by the public over certain highways that are now vested in the municipality under sections 8(3)(a) and 36(3); require energy efficient new construction under section 8(3)(l) (subject to section 9); and develop energy efficient buildings, structures, works, services or facilities under section 8(1) under which the municipalities now have the capacity, rights, powers and privileges of a natural person of full capacity.

Municipalities in some provinces have the power to neutralize emissions by way of carbon offsets or other mechanisms. This is a

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[29] *Municipal Act,* S.O. 2001, c. 25.

[30] Online: City of Toronto <http://www.toronto.ca/transportation/onstreet/idling.htm>.

[31] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 37 I.L.M. 22 (entered into force 16 February 2005)[*Kyoto Protocol*].

controversial public policy initiative. Whatever the merits may be, a municipality in British Columbia may make all municipal operations carbon neutral under section 8(1) of the *Community Charter* (natural person powers). Sources of greenhouse gas emissions within municipal operations include lighting, heating, air conditioning, computers, printers, photocopiers, vehicles, air travel, staff commuting, paper use, incinerators, solid waste disposal, building inefficiencies and emissions and numerous other sources. Carbon offsets are designed to neutralize polluting emissions by acquiring an equivalent amount of carbon neutralizing offsets with the net result of "zero emissions."

The District of Saanich is proceeding with a carbon neutral initiative. The District has calculated that in respect of the baseline year 2004 its fleet was responsible for emissions totaling 3174 tonnes; buildings—598 tonnes; natural gas serviced buildings—2100 tonnes; street lighting—107 tonnes; water and sewage—58 tonnes for a total of 6037 tonnes of CO^2.[32] The District has calculated that the cost of carbon offsets would be $90,555 based on a carbon price of $15/tonne and an objective of net zero emissions from municipal operations. To keep carbon offset funds within the District, the Council is establishing a carbon neutral reserve fund to offset the emissions. The reserve fund would be used only for emission reducing initiatives such as solar hot water, building retrofits, urban forestry, or other improvements. The reserve fund will be established under section 188 of the *Community Charter* which allows the establishment of a reserve fund for a specified purpose. Section 189 provides that money in a reserve fund, and interest earned, must be used only for the fund purpose.

VII. Soil Preservation

In most of the provinces, municipal governments may regulate in respect of soil conservation or deposit. In British Columbia, section 8(3) of the *Community Charter* provides that a council may by bylaw regulate, prohibit or impose requirements in relation to the removal of soil and the deposit of soil or other material. Given the provincial interest in respect of mining, minerals, gravel extraction and related matters, section 9 of the *Community Charter* provides that a removal and deposit of soil bylaw that prohibits soil removal or prohibits the deposit of soil by making reference

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[32] District of Saanich online: http://www.saanich.ca/climate/pdfs/carbonneutral.pdf.

to the quality or to contamination requires approval by the Minister unless there is a pre-existing regulation or agreement allowing that class of bylaw.

VIII. Pesticides

Subject to the application of section 9 of the *Community Charter*, a municipality in British Columbia may regulate, prohibit or impose requirements in relation to pesticides under the public health or natural environment spheres of jurisdiction found in section 8(3)(i) and (j). A pesticide bylaw is subject to the "concurrent jurisdiction" provisions of section 9. In this regard, the *Spheres of Concurrent Jurisdiction—Environment and Wildlife Regulation*[33] provide that a municipality may, among other things, regulate, prohibit and impose requirements in relation to the application of pesticides for residential purposes or on land vested in the municipality.[34] Pesticides known to have a lower health safety concern (to the extent, for example, that provincial enactments allow them to be kept with food) are exempt. Although the Supreme Court of Canada in *Spraytech* recognized the jurisdiction of the Town of Hudson to adopt a bylaw regulating the use of pesticides under the general welfare or omnibus "health" provision of the Quebec *Cities and Towns Act,*[35] the power to enact a pesticides bylaw in British Columbia would likely fall under the "protection of the natural environment" head and not the "public health" head under section 8 because of the existence of the express provisions in the concurrent jurisdiction regulation.

IX. Environmental Assessments

If a municipality or a regional district in British Columbia amends its Official Community Plan to designate areas for which development approval information may be required, and sets out the conditions or objectives to justify the designation, the local government or an officer or employee of it may require an applicant for zoning, a development permit or a temporary permit to provide the local government at the owner's

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[33] B.C. Reg. 144/2004.

[34] *Ibid.*, subsections 2(1)(b)(ii), 2(2).

[35] R.S.Q., c. C19, ss. 410(1), 412(32), 463.1, (now repealed).

expense information prescribed by the local government in relation to the natural environment of the area affected. This only applies if the council or board adopts a bylaw to establish procedures and policies on the process for requiring the information and for dealing with a reconsideration by the council or board of a requirement imposed by an officer or employee. Section 920.1(7) of the *Local Government Act* provides that development approval information is not required if the development is already subject to the provincial *Environmental Assessment Act.*[36]

X. Development

Local government may employ land use control powers in the context of sustainable development policies. An official plan in most provinces is enacted to provide a broad, general overview of municipal policies in relation to land use and development, including density, transportation, classes of and conditions on use, limits to growth, park land, transit and other such items. The prohibition or regulation of use, density, siting circumstances, height and other such specific land use control matters are normally regulated pursuant to the zoning power. In a number of jurisdictions, development permits are required prior to the issuance of a building permit or subdivision.

Some sustainable development initiatives controlled by a mix of these land use control powers include the following (with the British Columbia municipal power to regulate, prohibit or impose requirements set out in brackets after the item listed):

1. On site waste diversion, including recycling, composting or reusing (section 8(3)(a), *Community Charter*);
2. On site waste water treatment (section 8(3)(a), *Community Charter*);
3. On site storm water management, including requirements for green roofs, permeable paving, on site retention or detention, riparian area protection and other matters (section 8(c)(a) *Community Charter*; section 907(1), *Local Government Act*);

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[36] S.B.C. 2002, c. 43.

4. Water efficient landscaping, including drought resistant and native plantings, reclaimed water use, efficient irrigation or rainwater cisterns (section 8(3)(a) and (c), *Community Charter*; section 907(1) and 909, *Local Government Act*);

5. Site planning, including incentives for car sharing, parking sharing, HOV lanes, promoting transit, cycling and walking and the like (section 8(3)(a) and section 36(1), *Community Charter*);

6. Reducing runoff from roadways, paved areas and roof areas, with reduced permeability, ditches, trees and vegetation (section 8(3)(a) and (c), *Community Charter*; section 907(1) *Local Government Act*);

7. Water use reduction, with low consumption fixtures, elimination of garburators, sprinklering restrictions and storm water irrigation (section 8(3) *Community Charter*);

8. Building regulation, including renewable energy such as solar, independent, off-grid, geothermal, wind, ground heating/cooling, high efficiency fixtures or other green power (section 8(3)(l) and section 9 *Community Charter*);

9. Building siting in relation to natural ventilation, high performance envelopes, solar shading, passive solar gained and sun patterns (section 903(1)(c)(iii)(A) *Local Government Act*; section 8(3)(l) and section 9 *Community Charter*);

10. LEED certification, use of recycled materials such as high volume fly-ash concrete, use of non-toxic materials and management of construction wastes (section 8(3)(l) and 9 *Community Charter*).

XI. Storm Water

A board or council may deal with storm water issues in relation to flood protection, the conservation of water supplies and protection of the receiving aquatic environment or aesthetics. In British Columbia, a municipality may by bylaw regulate, prohibit or impose requirements in relation to municipal storm water services under section 8(3)(a) of *Community Charter*. In this regard, source control provisions control what goes into the storm sewer (as well as a sanitary sewer). As well, storm water management can be the subject of a development approval information requirement under section 920.1 of the *Local Government*

Act. The riparian area protection powers referred to in Part IV pertain to this discussion. A council or board may use its zoning powers to plan new and infill community developments so as to provide for the most effective storm water management system. This power in British Columbia would be combined with the drainage, runoff, development permit and subdivision approval processes discussed in other parts of this paper.

XII. Municipal Operations

Many of the new provincial statutes governing municipal powers have granted municipalities "natural person powers." The natural person powers under subsection 8(1) replaced numerous proprietary and business powers enumerated in previous legislation, such as the power to dispose of land or to contract. Section 8(10) provides that these powers are subject to specific conditions or restrictions established by statute and must be exercised in accordance with the *Community Charter*. In *Kitimat (District) v. Alcan Inc.*,[37] the Supreme Court of British Columbia held that the exercise of natural person powers is not limited by the fact that other more detailed corporate powers are set out expressly elsewhere in the statute and that subsection 8(1) does not limit a municipality to powers enumerated in other sections. Natural person powers are limited only if the exercise of them would conflict with the provisions of the statute.

Accordingly, a municipality may acquire land or an interest in land, develop property, enter into contracts and hire officers, employees and consultants.

Subsection 8(2) of the *Community Charter* allows a municipality to establish any service, work, facility or activity, and subsection 8(3)(a) gives councils the powers to regulate, prohibit, or impose requirements in relation to these municipal services.

Under the authority of natural person powers and municipal service powers, a municipality may impose upon itself a comprehensive scheme of sustainable development. This is the basis for the "carbon neutral" initiative of the District of Saanich. Other examples include the Natural Step program in Whistler and the District of North Vancouver,

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[37] (2005), 250 D.L.R. (4th) 144, 37 B.C.L.R. (4th) 250 (B.C.S.C.).

the requirement for municipal facilities to satisfy LEEDs requirements, and innovative and inventive approaches to liquid and solid waster management.

XIII. Procurement

Municipal procurement is carried out under the natural person powers. Councils and boards have discretion to establish public policy initiatives in relation to municipal procurement given the breadth of the natural person powers. In *Shell*,[38] the Supreme Court of Canada set aside a resolution of Vancouver Council to boycott Shell products until the Company ceased operating in South Africa. Setting aside the resolution as being beyond the powers of the Council, the Court stated that a municipal exercise of legislative powers is reviewable to ascertain whether the actions are *intra vires*. The Court held the resolution was not allowed under the *Vancouver Charter*[39] sections which gave the City the power to act beyond its boundaries and could not be implied from general language found in the legislation.

The dissent, written by Justice McLachlin (as she then was), contained the seeds of the new Supreme Court of Canada direction in reviewing the municipal exercise of statutory powers. The dissent stated that the Courts should not unduly confine municipalities in respect of the responsible exercise of powers conferred upon them. In this regard, the Courts must respect the responsibility of local elected officials and act in a cautious manner so as not to substitute the Courts' perspective on what is best for local citizens. If powers are not conferred expressly, they may be implied, and accordingly the Courts must apply a "benevolent construction" methodology and identify powers by way of rational implication. A generous, deferential approach to municipal empowerment is appropriate in the context of effective municipal operations (and in order to head off unnecessary court action). The dissenting Judges concluded by saying that this approach is consistent with both the true nature of municipalities at this point in history and the deferential approach the Supreme Court of Canada had applied recently when reviewing administrative agencies. McLachlin J. stated that the

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[38] *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231.

[39] *Supra* note 27.

Council resolution should be upheld under the City's general power to engage in commercial and business activities. In light of the more recent decisions of the Supreme Court of Canada,[40] the Vancouver resolution referred in *Shell* would likely be upheld today.[41]

In regard to procurement, the City of Richmond has adopted a "green procurement policy." Richmond's environmental purchasing policy is set out in the Richmond Environmental Purchasing Guide which sets out purchasing practices that reflect the City's bias toward environmental responsibility and sustainable operations and development. The policy deals with building maintenance, janitorial products, vehicles and maintenance, furniture and office systems, lighting, construction, parks, recreation and landscaping, and special programs.

The *Canadian Agreement on Internal Trade*[42] contains a number of restrictions on municipal procurement. Nonetheless, it is not enforceable except to the extent federal or provincial orders of government impose AIT conditions on grants or contracts with local governments. The *Trade Investment and Labour Mobility Agreement*[43] between British Columbia and Alberta contains procurement constraints on local governments that could obviate effective municipal green procurement practices. TILMA contains onerous enforcement provisions. Local governments have until March 31, 2009 to negotiate exemptions or concessions with the two Provincial governments that are parties to TILMA.

Conclusion

In recent years the Supreme Court of Canada has moved in the direction of leaving the responsibility of making laws of local import to the order of government that is nearest the impact and therefore nearest the solution. In the context of the broad interpretation and omnibus empowerment provisions of the new provincial empowerment legislation

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40 *Supra* note 38.

41 Donald Lidstone, "Recent British Columbia Legislation: The *Community Charter*" (2007) 40:1 U.B.C. L. Rev., at page 401.

42 Online: http://www.ait-aci.ca/index_en/ait.htm (entered into force 1 July 1995).

43 British Columbia and Alberta, 28 April 2006, online: <http://www.tilma.ca/> (entered into force 1 April 2007) [*TILMA*].

that has been adopted in recent years in the territories and provinces and the deferential approach of the Supreme Court of Canada, the trend is toward a constitutional setting where local governments may act or exercise power in relation to spheres of jurisdiction that are within the legislative competition of the province, not expressly excluded from the local government's jurisdiction by an enactment, and not inconsistent with an enactment of the province or Canada. In this regard, the emerging powers of local governments provide adequate scope for local governments across Canada, individually and collectively, to take charge in respect of sustainable development.