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Drafting in Municipal Legislation - A Weird Science

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DRAFTING IN MUNICIPAL LEGISLATION - A WEIRD SCIENCE

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INTRODUCTION

There are well over eight hundred legislatures operating in the Province of Ontario. Aside from the Federal and Provincial ones, operating in Ottawa and Toronto respectively, which are irrelevant for the purposes of this paper, there is a metropolitan municipality, ten regional municipalities, a district municipality, the City of London and a myriad of other cities, towns, villages and townships. Each has a membership directly elected by citizens who together form a body corporate known as a municipality. A municipal council performs many functions for its constituency, involving duties and powers which may be categorized into the following areas: executive, legislative, quasi judicial and administrative. This paper is concerned with the legislative function.

Of the four levels of government to which the majority of Ontario citizens are subject, the one that is closest to the people, most visible, and most directly responsive, is the council of the lower tier municipality. Somewhere above that, hovering in a sphere understandable only to the Ministry of Municipal Affairs, a small number of in-house lawyers, and a smaller number of politicians, is the upper tier municipality, having the vast responsibility of providing services of the mega-infrastructure variety, and legislative jurisdiction to pass laws covering a bewildering assortment of human activities, ranging from Sunday shop closings and openings and the regulation of body-rub parlors, down to the dumping of chemicals into municipal sewers, the latter of which can, in some circumstances, result, ultimately, in six months imprisonment for a corporate executive.

It appears to be accepted that for every social problem and neighbourhood dispute, there is a solution that one of the two municipal microcosms can provide. The solution is called a by-law.

A municipal by-law is a piece of legislation conceived in the minds of politicians responding to actual or apparent need as perceived by one or more citizens, enacted at a public meeting by a vote arrived at through a time-honoured and sterotypical process, and promulgated in documents which accumulate in the office of the municipal clerk. The functionary who puts the political solution into its final authoritative form, a bit player in the municipal scene, is usually the municipal solicitor or the clerk.

This paper concerns the role of this bit player, and some of the pitfalls and prat falls which from time to time lie in wait to ensnare this obscure but important functionary. This paper is about the municipal draftsman (draftswoman, draftsperson), hereinafter referred to as "the draftsperson".

THE GROUND RULES COVERING SUBORDINATE LEGISLATORS

A municipal by-law, although a form of what is known as subordinate legislation, can have full force and effect as if it were a provincial statute. Sections 91 and 92 of what was formally known as the British North America Act, divides between Parliament and the provincial legislatures, all of the potential subject matters of legislation which exist in the country, and, subject to the provisions of the Canadian Charter of Rights and Freedoms, such legislating bodies have the complete plenary power to enact legislation pertinent to their own jurisdictional realms. They also have the power, subject to the constitutional framework, to delegate (or impose) their legislative authority, (including duties, financial enforcement responsibilities, and the onus of bearing the brunt of political flak) upon subordinate legislative creatures such as municipalities. Municipalities, of course, fall within the provincial realm of legislative jurisdiction, and to all intents and purposes receive all of their powers pursuant to provincial law. Unlike the two senior levels of legislative jurisdiction, municipalities, constituting the two junior levels on the political pecking-order totem pole, are the creation of provincial statute, and the repository of provincially delegated legislative capacity.

Without provincial legislation, municipalities do not exist. They have no common law existence or power. The legislature of Ontario could, tomorrow, repeal any statute creating a municipality and aside from the fair amount of local fuss which would be created and the creation of a body of former disgruntled municipal employees, the legislative power to bring about this result could not be questioned. Such an enactment would also remove the substructure which supports the municipality's legislative decision-making, and all of its by-laws would be reduced to ashes.

The point is, that prior to the enactment of provincial legislation and enabling authority, municipalities did not exist in the form that we know them today, and their every executive, legislative and quasi judicial act must somewhere find support in a valid

provincial statutory enactment authorizing such power to be implemented. No legislation - no power.

Since Confederation, the Ontario legislature has seen fit, in view of its high level of trust in local elected officials, to delegate to municipalities a broad latitude of self-governing powers, and the law is clear that to the extent of such powers, the municipal councils' are masters (mistresses, supreme persons, top dogs) in their own house. A municipal by-law, enacted pursuant to valid provincial legislative authority, and produced through prescribed municipal processes and formalities, has full force, scope and effect as if it were a piece of provincial legislation. For instance, in the area of municipal licensing, the typical power given is to pass by-laws for licensing, regulating and governing a particular occupation, and all of those involved in it. It is this type of delegated authority which, when encountered by the municipal draftsperson and his or her political masters (mistresses etc.), provides ample scope for creative and ingenious solutions to social problems with which their work must deal.

It is necessary, therefore, for every municipal draftsperson in such situations, to have acquired sufficient knowledge of constitutional law, as well as the art of legislative drafting, to guide city fathers and mothers to the point of passing laws which the public, the legislature and the courts will support. This burden weighs even more heavily on the municipal draftsperson when it is realized that the municipal council has the power to enact subordinate legislation which can impose a wide range of duties and restrictions on the activities of citizens, in respect of which failure to conform may lead to penalities of up to $2,000.00, (and in some specific cases much higher amounts), in respect of each offence. (There is no longer a provision for imprisonment for breach of a municipal by-law, and, except for the anomaly of paragraph 230(1).1(h) of the Municipal Act, no power for a police officer to arrest a citizen for breach of a municipal by-law).

The great majority of provincial enabling legislation giving powers to municipalities, is expressed in broad terms, leaving it to a municipal councils to determine whether or not to exercise any particular power, the extent to which it is to be exercised, and the terms and conditions to be imposed upon the activities of citizens governed by it. In fact, at first glance, it might appear that in many areas of social activity, municipal powers are of unlimited scope, and that local elected officials may, by a vote, and the production of a document on its face complying with all formalities, pass any law that they desire in its area of delegated jurisdiction. However, as will be

seen in the remainder of this paper, things are not quite as rosy as they may appear, and in fact municipal draftspersons and their bosses are by no means as free as they might sometimes think, to run rampant and rough-shod over the rights of those who elect municipal politicians to office.

THE LAW IS ONLY SO GOOD AS THE LAW THAT SUPPORTS IT

The first requirement of valid municipal legislation, is that the enabling statute relied on as supporting the by-law is itself a valid law. The second is that, assuming such validity in general terms and assuming that the by-law is prima facie within the power granted, the by-law must be of a constitutional nature that the Provincial Legislature itself could hae enacted such a law. In other words, for example, prostitution.

Thirdly, another complicating factor is that provisions of apparently wide scope may be limited in their practical usefulness by the context in which they appear, and by provisions in the same other legislation which may be considered ti ubducate an apparent intention by the Legislature that they should not be taken too literally. For instance, in spite etc.

In other words, for example, notwithstanding the fact that provinces have validly conferred upon municipalities the power to own, construct, regulate activity upon, and generally manage municipal roads and sidewalks, to abate nuisance, to license, regulate and govern a wide range of business activities, including the transient hawking of goods and some services, to control noise, litter, and the expropriation of public sidewalks for private purposes, and to enact by-laws respecting public health, nevertheless, the Supreme Court of Canada has decided that municipalities cannot pass by-laws having as their pith and substance the prohibition of street solicitation for the purposes of prostitution.

In spite of the fact that the provincial legislature has seen fit to confer upon municipalities, by section 104 of the Municipal Act, the power to "pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient and are not contrary to law", nevertheless, this provision has been held by the

highest levels of courts to confer virtually no jurisdiction on municipal councils whatever. This makes things very confusing and bewildering to the working municipal draftsperson in trying to comply with the wishes of his or her elected pre-eminent legislator.

It might be mentioned in passing, that a similar quandry exists, in the area of municipal licensing, (which is the source of a considerable amount of the jurisprudence), in the field in the interpretation given to subsection 110(6) of the Municipal Act, dealing with the quasi-judicial capacity of municipal licensing tribunals, in the following terms:

> "(6) Subject to the Theatres Act, the granting or refusing of a licence to any person to carry on a particular trade, calling, business or occupation, or of revoking a licence under any of the powers conferred upon a council or a board of commissioners of police by this or any other act, is in its discretion, and it is not bound to give any reason for refusing or revoking a licence and its action is not open to question or review by any court."

Strong words. In fact, a review of decided statutory and case law in this area, makes it clear that even in the presence of the widest enabling legislation possible, municipal licensing tribunals are subject to a long list of restrictions on their discretion to grant, refuse, revoke or suspend a license, that their discretion must be and is severely limited by the total impact of all provincial legislation touching the field, the terms of the by-laws conferring the power, and a number of quite restrictive rules devised by the courts, (not even mentioning the Canadian Charter of Rights and Freedoms which imposes its own limitations, and has been construed to apply to municipal by-laws), nevertheless the municipal licensing authority has a limited discretion to refuse a licence, may well have to give reasons for slamming a licensee, and its actions are certainly open to question and review through both statutory rights of appeal and judicial review. Is it any wonder that municipal draftspersons fall by the way-side with alarming regularity?

However, in the course of time since Confederation, municipal draftspersons and municipal legislators alike have gradually learned of the very real limitations on what might otherwise have seemed to be unlimited powers, and most of the municipal players, being aware of the ground rules of the game, are careful to keep within them.

Returning to the first thought raised by the heading of this part of the paper, the municipal draftsperson must be familiar enough with constitutional and Charter limitations on provincial legislative jurisdiction, to ensure him or herself:

- that the power conferred is within the constitutional jurisdiction of the provincial legislature pursuant to the Constitution Act, 1867-1982;

- that the by-law sought to be enacted would be, if it were enacted by a provincial legislature, be constitutionally supportable under that Act;

- that neither the enabling legislation, nor the municipal by-law, notwithstanding the broad delegated legislative discretion, conferred upon the municipality runs afoul of the Canadian Charter of Rights and Freedoms;

This leads into a discussion of the other limitations which both the legislatures and the courts have imposed on municipal subordinate legislative authority.

WHY BY-LAWS TURN OUT TO BE BAD

Many writers, including the author of this paper, have analyzed in great detail and nauseous length, certain of the limitations which various courts have found or created in the act of putting a brake on municipal legislative creativity. So as not to unduly prolong the present discussion, suffice it to say that the following rules must be borne in mind by every municipal draftsperson, (at least, as is becoming more frequently the case these days, when any effective attack upon the product is anticipated; one school of thought has it that if the by-law isn't going to be attacked anyway, and particularly if it seems to fulfill somebody's need, the municipal council can do anything it wants. This is not, it must be added, a view universally held by municipal draftspersons).

The following is an exhausting but not complete list of reasons courts might find for pulling the rug out from under the feet of municipal councils and municipal draftspersons:

- the by-law, although apparently valid on its fact, may be found to be inoperative by reason of the "paramountcy doctrine" in an area covered already by valid federal legislation;

- the by-law, although apparently authorized by valid provincial legislation, might be seen to attempt to supplement or duplicate an area occupied by the Federal Parliament in its jurisdiction to enact criminal law;

- the by-law, although full authorized on its face by valid provincial legislation, infringes the provision of section 2 of the Canadian Charter of Rights and Freedoms protecting freedom of speech, and can not be shown to be demonstrably justified in a free and democratic society;

- the by-law deals with subject-matter within the exclusive jurisdiction of the Federal Parliament;

- the by-law, although apparently valid otherwise, creates a situation in which compliance with its terms constitutes breach of a federal statute, or vice versa, (it is unclear as to whether or not this violation of the general rule of concurrent jurisdiction has ever really occurred, but the "operating inconsistency" approach firmly espoused by the Supreme Court of Canada, would produce this result if it were to occur);

- the by-law is simply not authorized by any relevant provincial statutory authority;

- although apparently authorized by broad provincial enabling legislation, the by-law, by reason of the rule known as "expressio unius" is found not to be authorized, in the absence of more specific authority;

- the by-law, although apparently validly authorized, encroaches upon a field fully occupied by provincial legislation, or is operationally inconsistent with a provincial enactment;

- that the words of the provincial enabling legislation, although wide in scope, does not authorize in pith and substance, the particular exercise of this authority by the municipality, by reason of provincial legislative intent expressed in other legislation;

- the by-law, by repeating the provincial enabling legislation, converts a legislative authority into a purported free-standing administrative capacity;

- in another version of the foregoing conclusion, the by-law might be found to constitute a delegation of the powers of the municipal council to appointed officials;

- the by-law, while authorized to be regulatory, constitutes a prohibition;

- the by-law is unlawfully discriminatory against a particular class of individuals, not authorized to be so by the enabling legislation;

- the by-law effects an unlawful discriminatory element in breach of the Canadian Charter of Rights and Freedoms;

- the by-law contains ambiguities of language sufficient either to obscure its constitutional subject matter, or to render it incapable of understanding by those affected by it or by the courts;

- the content of the by-law is sufficient for the court to infer an absence of good faith in its enactment, or an improper ulterior motive in the mind of the municipal council which enacted it;

- while the unreasonableness inherent in the by-law does not constitute itself the ground for setting it aside, (see subsection 103(2) of the Municipal Act), nevertheless, it is strong enough to violate one or more of the following:

    - it is found to be partial and unequal in its operation as between different classes;

    - it is manifestly unjust;

    - it disclosesd bad faith;

    - it involves such oppressive or gratuitous interference with the rights of those subject to the by-law as could find no justification in the minds of "reasonable men";

    - if, by reason of one or more of the foregoing deficiencies, the court "might well say, "parliament never intended to give authority to make such rules; they are unreasonable and ultra vires"".

- the by-law is found to be upon any fair construction an abuse of the powers given to the municipal council;

- the by-law, although apparently authorized on its face, is passed for a purpose not within the scope of the intent of the enabling legislation;

- the by-law, although in valid form, is enacted in circumstances demonstrating the absence of a legislative condition precedent amounting to more than a technical irregularity in procedure;

- the by-law, although apparently authorized by enabling legislation and in a form in which in other circumstances it would be held to be proper, in the actual circumstances in which it is applied, would create a result which, if a similar application were to result from provincial legislation, would involve constitutional ultra vires; (this is getting fairly complicated, but seems to be a sufficiently discrete ground to add it to an already tediously long list of specific examples arising from actual court decisions);

- the by-law may be "read down" to correspond with a "reading down" of the provincial enabling legislation upon which it is otherwise supported, and thus held not to apply in the particular fact situation which it appears to govern;

- the by-law provision, while an apparently otherwise valid component of an omnibus by-law, is held not to be valid, by reason of the fact that the provincial enabling legislation stops short of giving it specific, as opposed to general, authority;

- a by-law will be more strictly construed where it restricts the carrying on of otherwise lawful activities. In this context, the by-law is held not to apply in precisely the type of fact situation with which it was intended to deal.

- a by-law is repealed by the repeal of its enabling legislation, although if other powers are substituted for those repealed, pursuant to the Interpretation Act, the by-law may remain good and valid so long as it is not inconsistent with the substituted enactment, and it cannot be said that the result of the provincial legislating has been to totally undercut any basis for the by-law's validity;

- the by-law is not passed by a duly constituted legislative body;

- if the finding of certain "jurisdictional facts" by municipal legislators, required as a condition precedent to the enactment of a valid by-law, is given objective meaning, which results in the finding of an absence of such facts, the by-law may be considered to have been enacted without jurisdiction; on the other hand, where the municipal council is given the power to determine all facts necessary to enact the by-law, the courts may not enquire further to decide whether or not the courts themselves would have independently come to the same conclusion;

- the by-law purports to have retrospective application, or interferes with existing rights in a manner not specifically authorized, even though the by-law is otherwise valid in respect of prospective situations to which it may apply;

- the by-law goes further than necessary to accomplish either the intent of the provincial legislature in conferring authority upon the municipal council, or the authorized intent to which the municipal council may put the legislation;

- a by-law purporting to be procedural, and resting solely on the basis of enabling legislation authorizing procedural enactments, may be found to be invalid if it is held to constitute an exercise in substantive law-making.

- generally speaking, municipal by-laws do not bind the Crown, whether in right of the province or in right of Canada, although a zoning by-law otherwise supportable, may govern a body such as the Hamilton Harbour Commissioners, created by federal statute pursuant to federal jurisdiction, in certain defined circumstances.

- generally, a municipal council cannot pass a by-law which fetters the power it would otherwise have to deal with cases that arise in the future. For instance, a municipality which has the power

> to license those involved in a particular business, cannot, in the absence of a specific power to do so, limit numbers of such licences or declare a moratorium on their future issuance, since to do so would preclude the council from exercising its statutory discretion with respect to any individual application brought before it.

The above list is not by any means exhaustive of the various problems that the courts have from time to time found with municipal subordinate legislation. It is also admitted that some of the rules are overlapping, and some of them flow out of somewhat unique and fact-driven attempts by municipalities to react to particular pressures. They do, however, represent a body of case law of which every municipal draftsperson should be aware, and except for the constitutional and Charter issues, do not bedevil draftspersons at the federal and provincial levels of government, where powers are original, and not delegated.

SO WHAT'S A POOR DRAFTSPERSON TO DO?

Actually its not nearly that bad. Most municipal by-laws are not attacked, and in many cases attacks fail.

Also, counter to the deficiencies that courts have found in by-laws as described above, there are many positive statements and principles that have been applied to give support to municipal by-laws, such as the "beneficial construction" and "liberal interpretation" tests, sometimes based directly on section 10 of the Interpretation Act (a very useful statute to the municipal draftsperson for many reasons), and sometimes based on the proposition, stated in many cases, that where the provincial legislature has seen fit to bestow upon municipal elected officials the power to govern a particular area of jurisdiction, the municipal members, being in the best position to assess and balance matters involving local public interests, support should be given to their deliberations and conclusions, and their by-laws should be supported if possible.

As mentioned above, there is also support in section 103(2) which allows municipal councils to be as unreasonable as they wish in the enactment of by-laws, provided that they don't run afoul of the principles set out above, and provided that they

have the power to pass the by-law under the Municipal Act, and do so in good faith. Brave words, but there are precious few cases in which a court has said:

> "this is an extremely unreasonable by-law, but we are going to support it anyway because of subsection 103(2)."

However, there are statements from time to time that matters of policy and otherwise supportable exercises of municipal attempts to enact by-laws dealing with problems that arise, for the purposes of benefitting the public interest, are for the municipal councils to decide, and will not be second-guessed provided that the municipality stays within the scope of its power.

The broad general terms in which most municipal powers are conferred, provide ample scope for creative drafting. It is also a fact of life that a by-law which is directory only, or which is created for some purpose internal to the municipal government, particularly one which does not create an offence provision or impact on fundamental rights, will not receive such intense scrutiny, and probably will not be attacked in the courts, no matter how sloppy its draftspersonship may be.

On the other hand, some municipal councils have not yet learned that not every social problem or gored ox can be cured by hurling by-laws at them. Every so often there comes a time in every municipal draftsperson's life when he or she must grit his or her teeth and simply tell the council that notwithstanding the significant public pressure and hurt which gives rise to a particularly silly piece of proposed legislation, the enactment of same may make the municipality the butt of jokes in the press, and in any event the by-law would prove to be unenforceable even were the judges dealing with it stop laughing long enough to listen to arguments advanced in its support by municipal counsel.

It is fascinating being a municipal draftsperson, especially in the capacity as chief legal advisor to a large municipality. Your collective client, consisting of over thirty prominent individuals, meets in public, and very frequently, with any major initiative bouncing back and forth between several committees prior to eventually being dealt with by the council itself. You must give advice to the council in public, in circumstances in which many points of view and perspectives are being brought to play. From time to time the situation may emerge out of circumstances in which different

factions of society are warning with one another, each seeking governmental assistance in support of their interests. A municipality, meanwhile, has significant powers to govern the day-to-day life of many of its citizens, who otherwise have no legal relationship with the municipal corporation, and probably would prefer not to have.

The municipal draftsperson must have regard to not only the legal principles involved in drafting and interpreting municipal by-laws, but also must have an eye to the essential political concerns which underlie every major initiative that the council takes. An error on the part of the draftsperson, and the by-law will be attacked, a process which, even through the summary powers to quash by-laws contained in part IX of the Municipal Act, normally takes several months to complete, sometimes followed by one or more equally long appeal periods. In the case of judicial review, it can well take seven or eight months to get to the first hearing of the case by the court. Needless to say, significant embarrassment flows to everyone concerned when after a lengthy period of debate, the council passes a major by-law, whose wheels fall off one or two years down the road, invalidating everything that went before. In some cases, however, where the court concludes that the municipality had the power to pass a by-law, but did not pass the right by-law, the municipal draftsperson can sometimes achieve quick satisfaction and revenge by bringing forward quickly to the council a draft by-law which the court decision would now support. This should give fair warning to those who might attack municipal by-laws, to make sure that they can find a ground which will be fatal not only to the by-law, but to any attempt to amend it. Otherwise, the court may agree that you have found the loophole, but then the by-law is amended and enforced with a vengeance.

Many mature municipalities have developed their own body of by-laws, sometimes in form of omnibus by-laws or municipal codes (see Municipal Act, section 105). Through the utilization of provisions of the Municipal Act and the Interpretation Act, and by a body of knowledge developed over the years of the manner in which certain terms have been effective in practice or interpreted by the courts, municipal by-laws can receive much benefit and improvement in the hands of a draftsperson who has kept track of such developments.

It is obviously also desirable that the municipal draftsperson be aware of all of the various powers available to the municipal council in dealing with any particular matter, since it is not necessary for a by-law to state in it its source of authority, and the municipal council is quite free to combine provisions based on a number of different

enabling powers, in one by-law without sorting out which is which. The municipal draftsperson should, of course, be aware of all of the existing by-law provisions extant in the municipality, so that an amendment to one by-law, which may impact upon other by-law provisions, or be impacted upon by them, can be carefully drafted to accommodate the intention of the council. Particular problems may arise where an attempt is made to incorporate by reference, or where by-law provisions refer to other sections in the same by-law or other by-laws or provincial legislation. Care must be taken to ensure that accurate references survive notwithstanding the creation of a number of successive proposed drafts.

For those municipalities who haven't yet begun to use them, consideration should be given to the use of a confirmatory by-law, by which all of the various proceedings, decisions and resolutions of a municipal council may be confirmed and implemented through the enactment of one simple Bill.

Speaking of Bills, both the City of Toronto and the Municipality of Metropolitan Toronto, in the last few years have abolished the procedure previously thought to be desirable or required, of giving three readings to all bills, and referring them to the committee of the whole after the second reading. There is no legal requirement for Bills to be given three readings, notwithstanding parliamentary precedents upon which the previous procedures were based. All that's needed is that the bill be placed before the council and voted upon. This has eliminated a ritualistic protocol which used to occupy the last few minutes of council meetings, and has also suppressed the tendencies by some members of council to try, through a debate on the reading of the bill, to re-debate the substantive decisions that lead to its introduction.

SOME USEFUL TIPS FOR THE MUNICIPAL DRAFTSPERSON

- be aware of existing enabling legislation and the status of any proposed amendments to it;

- consult with other municipal draftspersons, since most issues and problems confronting municipalities tend to be recurrent and universal; if you have a major problem, the odds are that some other municipality has already had it and tried to deal with it.

- try to be involved at the earliest stage of the process and produce the first draft of the by-law to which others must respond; try to avoid being in a situation in which you must start off with somebody else's draft, particularly that drafted by some interested party that is not an experienced municipal draftsperson.

- try to centralize drafting work; as in most areas of life, efficiency varies inversely with the number of persons involved in the project.

- remember that the by-law is not intended to constitute a political statement, nor a users' manual for enforcement officers; keep it short and keep it simple.

- to the extent that you can do so, don't allow any changes to the by-law by others, unless they effect an improvement to it.

- in view of the general responsibility of municipalities to all of their citizens, be vigilant in ascertaining where any particular proposal is coming from, and what its impact may be, so that the municipal council does not allow itself to be used as a tool of one pressure group to stifle or run rampant over the legitimate interests of others.

- try to be as helpful as possible to municipal councillors, but do not, to the extent that you can prevent it, allow them to draft the technical parts of the legislation. Years from now you will probably still be the municipal draftsperson, and it is nice to have by-laws that you can live with and which stand the test of time.

Finally, where you can do so, take all of the time that you need to do the best job possible, and wherever possible, consult with other experienced draftspersons along the way. Make full use of some of the excellent textbooks on the subject which are

available, particularly anything written by Elmer A. Driedger, whose writings are both informative and entertaining.

In conclusion, drafting is fun, and an excellent means of channeling creative instincts and legal abilities. By helping the politicians to reach consensus and solve the problems facing them, the municipal draftsperson can make a lasting and meaningful contribution to the exciting body of knowledge known as municipal law.

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