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Part I: Local Government Law

The Nature and Purpose of Municipalities

Decentralization

Case for Decentralization (Toqueville)	Case for Centralization (Madison)
Participation in local decision making is the best way to learn how to participate in civic life and therefore to learn how to be free	Efficiency
Local people are better equipped to understand and address local issues	Expertise (well-resourced and can hire experts in whatever field they need to)
Mistakes are on a smaller scale so easier to correct (can take more risks)	Fascism rises more easily at a local level due to the smaller population
Encourages local initiative, involvement, and experimentation	Interjurisdictional concerns
Higher orders of government (elites) may see locals as disgusting	Local revenue sources inadequate for redistribution of wealth
Sense of fulfillment for those that get involved in local politics	Local politicians will naturally be inclined to "move up the ranks", leaving municipalities with the lemons.
One individual can participate in local politics in a more meaningful way than they can at the provincial or federal level.	Effectiveness

Local Government and Public Interest

Michelman: Political Markets and Community Self-Determination

- Two conceptions of local government:
    - Economic/Public Choice Model
        - All substantive values or ends are regarded as strictly private and subjective. No overarching goals.
        - Legislature is market-like but votes are the medium of exchange.
        - Not public spirited, self-interested.
        - No public or general interest, just concatenations of particular interests or private preferences.
    - Public Interest Model

        - Depends on a belief that there are public/objective values.
        - Legislature as forum for identifying overarching goals.
        - Mutual search and joint deliberation.
        - Majority rule as a natural way to take action as a group.

Fischel: Homevoters, Municipal Corporate Governance, and the Benefit View of Property Tax

- **Homevoter hypothesis:** Homeowners cannot diversify their assets so they turn into "home voters" – their voting is guided by concerns about home values.
- Homeowners as the dominant shareholders in a municipal corporation.
- **Tieboutian view**: "voting with their feet" – moving to municipalities that have the proper level of public goods.
    - College-municipality analogy
        - Quality of municipal services affects home values. Similar to reputation's impact on value of a degree from any college.
        - Municipalities more political.
        - College more able to exclude.
- Theses:
    - Zoning and related reg powers serve the same function as the college registrar, making sure that potential residents pay their expected charges.
    - Politics in the name of economics. Corporate view of municipal governance but main difference is the riskiness/elasticity of portfolios of homeowners vs. trad shareholders.

The Legal Organization and Power of Municipalities

Creatures of the Province

- The provinces have exclusive jurisdiction over "Municipal Institutions" (s 92(8) of the Constitution Act, 1867)
    - Other relevant constitutional provisions include s 92(13) (property and civil rights) and 92(16) (matters of a local nature)
    - The Municipal Government Act (MGA) is the governing provincial statute for municipalities in Alberta
- Municipalities cannot interfere with matters that fall under federal heads of power, including national parks, military bases, aboriginal reserves, interprovincial undertakings (such as railways, pipelines), federal airports etc.

The Scope and Interpretation of Municipal Authority

Competing approaches to Municipal Authority

1) **Traditional view (Dillon's Rule):** Municipalities have only those powers that are explicitly conferred or necessarily implied (not only convenient, imperative to the functions and purposes of municipalities.)
2) **Benevolent Approach:** Municipalities are elected and accountable, they must be allowed benevolent construction of their powers to do their jobs.
3) **Purposive Approach (endorsed in *Shell*):** what is the purpose of the Vancouver Charter and what is the purpose of Vancouver more broadly?

Three Models of Local Government

1) An Arm of Central Government
- MGs are little more than arms of the central governments from which they derive their powers
- The mayor is a dignitary, and the most important figure is the CAO (head of local public service)
- The municipality's primary purpose is to collect provincially approved taxes, pass a budget that is to be approved by the province
- This is the historical model - previously, local magistrates were directly appointed by the central government

2) A self-contained "polis"
- The "sovereign city", opposite of central government
- The city is its own form of government that is its own complete political unit (some view this as the most important and basic political unit - federations are little more than amalgams of local municipalities)
- All functions of local government are seen as political choices

3) A Vending Machine
- MGs are little more than providers of services to local residents
- Cities are created solely to deliver goods and services, nothing fancier than that
- Best way to find out what services are required is to "vote with your feet" - people will naturally move to the municipality that offers the best services and opportunities
- Notions of higher politics and community are missing from this model

Shell v Vancouver (SCC 1994)

Facts	**Vancouver municipal resolution boycotted Shell Canada products (city would not purchase from Shell) on that basis that it had commercial activities in South Africa during apartheid. Shell argues that these resolutions are ultra vires the**

	Constitution Act and the Vancouver Charter - it is beyond the delegate's authority to base decisions on foreign policy considerations. Vancouver argues that they are also a corporation, and they can exercise their corporate powers as they see fit to choose to do business with other entities for whatever reasons they want.
Issues	Was the decision made for an improper purpose?
Analysis	As creatures of statute, municipalities must stay within the confines placed by their enabling statutes. Generally, a municipal authority is only authorized to act for municipal purposes. This is determined with reference to those that are expressly stated and also reasons that are otherwise compatible with the purpose and objects of the enabling statute. In this case, the Vancouver Charter gives the City of Vancouver its legislative parameters. The Charter allows the city to enact bylaws for the betterment of the welfare of the city, that does not extend to foreign affairs. IF the power sought by the city is to be implied, the purpose of the enabling legislation must be considered. In this case, the municipality is authorized to act only for municipal (local) purposes - to render services to the municipality to advance health and good government. In this case, the bylaw is intended to affect Shell's actions outside the territorial limits of the city (that is, its operations in South Africa) - there is no logical linkage between promoting the health and welfare of Vancouver's citizenry and effecting corporate change on the other side of the world. Therefore, it is not a municipal purpose, and cannot fall within the ambit of the Vancouver Charter. In this case, the purpose of the municipal legislation was extensively defined in the preamble. Its explicit purpose was to influence Shell to divest in South Africa by expressing moral outrage against the apartheid regime. There is no mention on how the City itself is to benefit from this. Therefore, the legislation's purpose is directed to influence matters outside of its territorial limits, and is therefore ultra vires the City's powers.
Dissent	Justice McLachlin believed that the legislation should be upheld because municipal councils are elected, and should be given the discretion to express the community's general outrage. The courts should show more deference to bodies that have wide electoral mandates of their own, including expressing communal displeasure with international affairs. **Rules of construction should not be used to usurp the legitimate role of municipal bodies as representatives of a community.** Allowing this legislation to stand will create greater certainty on the wider ambit of municipal powers, advances the law to keep in step with the evolution of the modern municipality. Deference is based on the specific expertise of the bodies powers are delegated to - in this case, councils are in the best position to pass laws locally because they are best positioned to do so. They also have electoral

	mandates which indicates that such decisions are made with the consent of the municipality's residents. Furthermore, striking the legislation down on the basis of the doctrine of improper purposes is impermissible, because it is very difficult to properly determine the true intent of a legislative body. In Justice McLachlin's view, the Vancouver Charter gives the city the power to take action against organizations that the community deems offensive - helps to promote residents' **psychological welfare**.
Ratio	**Subordinate legislation cannot be passed for an unlawful purpose that strays from the confines of the delegate's defined authority.** **A municipality must act only for a municipal purpose.**

- In Alberta, s. 3 of the MGA provides for the purposes of the municipality.

Nanaimo v Rascal Trucking (Nuisance – SCC 2000)

Facts	Pile of dirt stored on a vacant plot of land. Would blow into people's homes when it was windy. Also lots of trucks driving through area. Nanaimo tried to pass a bylaw to be able to order a structure to be removed if council designated it so dilapidated or unclean that it was offensive to the community.
Issue	Can City Council declare something a nuisance to assist citizens in a civil case?
Analysis	Utilizing purposive approach from Shell. "Or other matter or thing" expands the categories of constructed/erected things and watercourses. A pile of soil is a hazardous erection.
Ratio	If the jurisdiction of the municipality is confirmed, courts should otherwise apply a deferential approach to decisions made by municipal governments.

Spraytech (Pesticides – SCC 2001)

Facts	Hudson passed bylaw prohibiting use of pesticides for personal lawn care, which severely compromised Spraytech's business. (exemptions granted to golf courses and public parks)
Issue	Does the bylaw conflict with prov herbicide legislation (not as restrictive)
Analysis	Court adopts dual compliance doctrine: The mere existence of prov or fed legislation in a given field does not oust municipal prerogatives to regulate in that area. As long as dual compliance is possible, all provisions can be operative. Potential inconsistency is not enough – must be a true conflict.
Ratio	Municipalities can enact more onerous legislation than is required by prov statute.

United Taxi Drivers v Calgary (SCC 2004)

Facts	
Issue	Is the bylaw that freezes the number of taxi plate licenses ultra vires under the new MGA?
Analysis	ss. 7-8 grant the City the power to pass bylaws limiting the number of taxi plates. S. 8 supplements s. 7 by illustrating some of the powers exercisable by a municipality. "Including" means the list is non-exhaustive.
Ratio	The new MGA enhances and broadens municipal power to enact bylaws.

Relevant MGA sections: 3-12

Municipal Finance; Property Assessment and Taxation

The Benefit Principle

There are two principles or criteria of public finance:

- **Benefit:** those who benefit more, should pay more.
- **Ability to pay:** those who are able to pay more, should pay more.

Ex: Should a library be benefit or ability to pay based?

- If we think 70% of the benefit goes to the users and 30% is for larger societal benefit, the initial ratio should be 70% user based (memberships) and 30% gov funded (taxes).
- The more we rely on the benefit principle the more people will **economize their decisions** and we can decide what the public actually wants.
- If its $70 a year for a library membership (fully benefit based), but people will only pay $20, maybe we shouldn't have a library

The Budget

Relevant MGA sections: 242-49

- Main expenditures:
  - Policing
  - Infrastructure and Roads
  - Transit
  - Overhead
  - Planning
  - Parks and Rec
- Main sources of revenue:
  - 20% grants (a lot less than it was in the 80s)
  - 60% taxation in Edmonton in 2022
  - Other sources:

        - User fees
        - Borrowing/debt financing
        - Dev charges
- **Capital budget (ss 245-246)**
    - Best form of finance would be a loan if its long term. If its short term put it on the property tax or user fees.
- **Operating (ss. 242-244)**
    - For each calendar year, council HAS to have an operating budget.
        - It must estimate the amounts to be spent for all municipal programs and services. (both voluntary and required expenditures)
        - Must include costs to repay loans
        - Reserves for capital projects
        - Shortfalls from previous years.
- Once the operating budget has been planned, it's now time to plan for revenue streams.
- Estimated expenditure CANNOT BE BIGGER than the planned revenue. Cannot plan for a deficit.
- If there is some sort of emergency or unforeseen expense, it will go to the shortfall for the following year.
- A municipality cannot spend money UNLESS it is authorized under s. 248
    - Budgeted item
    - Emergency
    - Legally required
    - Otherwise authorized by council
    - Personal liability for unauthorized expenditure.
        - Residents can sue a council member for unauthorized expenditures.
        - Has never happened to Kaplinsky's memory
- If the municipality continues to not have its ducks in a row the provincial gov can step in and write a budget for them. Council MUST use that budget.

Municipal Borrowing

Relevant MGA sections: 251-253
Debt Limit Reg Alta 255/2000

- Requires passage of bylaw (s. 251) and within provincial debt limit (s 252-256).
    - Total debt limit generally 1.5x revenue. Limit for Edmonton and Calgary 2x municipal revenue. Debt service 0.25 outside of the major municipalities – 0.35 within.

- **Intergenerational fairness:** If you are building a facility that will benefit tax payers for 20 years, it's not really fair to put that entire cost on 1 year of taxpayers. Borrowing allows this cost to be distributed over generations because you pay back the loan over the life of the project and spread the cost over user fees (tolls) or property taxes if it benefits everyone.
- Capital projects:
    - Financing must be in place first (s. 254)
    - Short or long term borrowing, misc (ss. 257-262)
    - Local improvements/special assessments
        - Assessment by a municipally appointed assessor as per the assessment standards listed in the regulations. Statute says the assessment is as per December 31, YEAR.
            i. Residential (can be subclassified)
            ii. Non-residential (can be subclassified)
            iii. Farm land
            iv. Machinery and equipment (immovable/fixtures improvements on land)
    - Non-assessable property (s 298)

Property Assessment and Taxation

Relevant MGA sections: 1(1)(n), 285, 289, 297-298, 302-303
Matters Relating to Assessment and Taxation Alta Reg 220/2004
Matters Relating to Assessment and Taxation Alta Reg 203/2017

- Each municipality must prepare annually an assessment for each property (except designated industrial). (s. 285)
- By municipally elected assessor (s. 289) must create assessment to reflect:
    - Characteristics and physical condition of property
    - Valuation standards prescribed by regulations

Market Value Assessments

- MGA does not say that we use Market Value as the basis of assessment but it does define market value (s(1)(1)(n))
    1) Assessment standard:
        - 7(1) Valuation standard for a parcel of land is (a) market value, or (b) agricultural use value if used for farming.
        - 5 market value assessment must be obtained via mass appraisal, assuming an estate in fee simple, and reflecting typical market conditions for properties similar to that property.

        - Churches, cemeteries, tough to discern market value.
    - 8 improvements are assessed based on market value unless the regs provide otherwise.
- Once assessment is complete:
    1) Assessment roll complete
    2) Assessment notices sent out
        - Now you can make an assessment complaint. Go tell the appropriate board, "how could you say that this is a store, it is very clearly a residence." "There's no way this property is worth $800,000"
    3) Tax roll prepared (s. 329) - sets rate of taxation for each class of property.
        - How much do we need?
        - How much will the market bear?
    4) Bylaw to set tax rates
    5) Tax exempt or exemptible properties (ss. 361-364): hospitals, libraries, schools, universities, land reserves, churches, cemeteries, etc.)
    6) Tax notices (to allow payments)
- Tax debts: become arrears to the municipality. (s. 348)
        - Recoverable through tax liens on property. Cannot be sold without the municipality recovering.
        - Ultimate penalty: foreclosure.
        - Mass delinquency can have catastrophic impacts: Taber with orphan wells.

Policy Considerations

- For growth:
        - Residential generally bad for taxes unless municipality is building luxury or going for a rebrand.
        - Best kind: commercial, large employer (think Amazon)
        - Industrial brings in lots of revenue but also significant pollutors.

Property Taxation

Relevant MGA sections: 327, 333, 348, 353-356, 358.1(1)(2)

- Virtues:
    - Property tax is unavoidable. Income, capital gains, etc. you can hire an expert and evade. Property taxes, not so much. You can't shift your location in response to the tax.

    - Relatively efficient because they do very little to distort economic activities compared to other taxes. Not much you can do to respond to this - vote council out or exit the municipality.
    - Local accountability, autonomy, involvement in local affairs
- Drawbacks:
    - Criticized as unfair because it is not relate to the ability to pay.
        - Ex: little old lady on a fixed income who lives in a $2M house. Solution: Defer taxes to when she dies. Tax lien on the house.
        - Don't make policy at the margins - sure there are some 90 year old ladies living in expensive houses. Don't make policy for them, make policy for the average citizen and carve out exceptions for them.
    - Not enough - municipalities need more revenue.
    - Not responsive to actual use of public services, only based on value of home (*ad velorem*)

Part II: Land Use Planning and Regulation Law

Bylaw Drafting (Guest Lecture)

Bylaw Passing Authority (Edmonton)

- Primary Authority: ***MGA s. 8***
    - City of Edmonton Charter, 2018 Reg (Super regulation, can amend the MGA within Edmonton) Lots of new environmental powers.
- Others:
    - TSA
    - Weed Control Act
    - Historical Resources Act
    - Safety Codes Act

Bylaw Purpose

- Approve or adopt statutory tools (ex: borrowing bylaws)
- Establish rules and consequences (ex: Community standards bylaw)
- Enable development (ex: Zoning bylaw)
- Delegate authority (ex: City administration bylaw)
- Establish council committies (ex: Anti-Racism Advisory Committee)
- Establish designated officers (ex: City Auditor)

Enforcement

- Options:

- MGA 545 and 546 Written orders:
    - Typically deal with nuisance properties. Issue them an order that says "there is an offence occurring, you need to clean it up/address it, if you fail to take action we will send people in to do it for you then bill the costs to your tax roll."
- MGA 549 Court injunction
- Municipal tags: basically warnings
- Violation tickets: prosecuted, pay fines, go to court.

Passing/amending a bylaw

Regular bylaw:

- MUST:
    - 3 readings
    - Provided to Council prior to first reading
    - Be amended/repealed in the same way it was passed
- MAY:
    - Require advertising
    - Require a public hearing
    - Require provincial approval
    - Require a petition period to expire
    - Be revised to correct errors or non-material details

    ****CHARTER BYLAW REQUIRES ALL OF THESE THINGS, VERY DIFFICULT****
- Amending a bylaw is a long process but sometimes the only option.
- S 63 allows for revision of bylaw where:
    - A bylaw is inoperative, obsolete, expired, spent, or otherwise ineffective;
    - Regularly scheduled opportunities (omnibus legislation to correct typos and other small issues)

Drafting

- Structure varies by location. Edmonton's are numbered by when they were enacted – 2202 is currently the oldest bylaw (Parkland).
    - Preamble sets out purpose (not required)
    - Definitions and elements of an offence
    - Deeming provisions
    - Exemptions
- Values: the more specific, the more citizens are aware of exactly what the law is BUT the harder it is to prosecute.
- Non-legal considerations:

    - Practical and operational limits (don't say a bylaw is going to solve homelessness)
    - Politics and reputation
    - Clarity and plain language for end users (citizens, prosecutors, judges)
- Prosecutorial considerations:
    - Elements of the offence (what needs to be proven)
    - Standard of proof (how does it need to be proven)
    - Public interest
    - Strict liability and defences
        - Due diligence
        - Mistake of fact
        - Necessity
        - Statutory exemptions

Process for drafting a bylaw:

1) What is the problem to solve? Is a bylaw appropriate for solving this problem?
2) What are the jurisdictional and legal limits?
3) What process do I need to follow to pass the bylaw?
4) Start with a skeleton:
    a. Choose a structure
    b. Identify words and phrases that need to be defined
    c. Identify rules that need to be communicated
    d. Look for gaps in decisions or snags that need to be fixed.
5) Review and finalize
6) Amend

Planning and Plans

The Nature of Planning

From Carruthers - Planning consists of a synthesis of:

1) The identification of long term and immediate goals and objectives by means both of legislation establishing community planning and of broad statements of policy;
2) The gathering and analysis of facts and trends concerning the community relevant to these goals;
3) The preparation of operational plans and programs with a full measure of citizen participation;
4) The carrying out of such plans by means of administrative activity. During every phase, it is necessary to reconsider, reanalyse, and redesign in order to adjust to continually changing conditions and circumstances.

- Planning is used to coordinate the use of land, keeping in mind the ideal arrangement of activities, and the appropriate intensity of uses
- Planning deals with civic design, the provision of public infrastructure, control of externalities, sustainability (intergenerational equity), social and political ends of the community
- **At its core, planning is an exercise in resource allocation in connection with the use of the land**
    - **Assumption of scarcity in everything related to a community, planning seeks to deal with that economic problem**

From Kaplinsky:

1) To coordinate uses of land:
    a. Ideal arrangement of activities
    b. Appropriate intensity of uses
2) To provide public goods
    a. Civic design
    b. Infrastructure and public health
    c. Control of externalities
    d. Sustainability
3) To attain the sociopolitical ends of the community

MGA part 17 s 617

The Case for Planning

- At common law, land use was determined by:
    1) Market value
        - Issues with this approach:
            - Market failure to produce socially optimal results
    2) Nuisance
        - Issues with this approach:
            - Incapable of exact definition
            - Rights established ex post
            - Injunction is discretionary (equity)
            - Courts consider the litigants only
    3) Voluntary arrangements (contracts)
        - Restrictive covenants (run with the land)
        - Examples: maintain works, refrain from building
        - Issues:
            - Difficult to establish or change
            - Third party effects not considered

        - Only restrictive covenants are enforceable.
    - Similar instruments:
        - Condo boards and HOAs
        - Building schemes
4) Social norms

- Spontaneous order does not exist - need some direction to establish order
- That being said, market forces cannot be completely curtailed (Cambridge Common problem)
    - Thus, central planning must be receptive to market reactions, should resist trying to curtail market impulses
- Finding out information by crowdsourcing is one of the biggest issues for planners today - helps aggregate information about the population's behaviour that can help shape planning decisions

The Economics of Planning

- Unfettered markets fail to produce socially optimal results
    - For example, landowners are unlikely to consider the impact of developments on adjacent lands
    - The landowner's decision does not take into account ALL of the regular costs, only those costs that accrue to him
        - Pigou's solution - mixture of taxes, subsidies, restrictions helps account for the social cost of developments on private lands. Suggested interventions:
            - Approvals and permit system,
            - Zoning and other land use regulations,
            - Publicly provided infrastructure for use by the whole community
- ***Ronald Coase's Law and Economics theory built on Pigou's work***
    - The problems Pigou describes are reciprocal in nature. It is incorrect to say that some landowners create "externalities" that interfere with other people's property without a corresponding externality generated the other way
        - i.e. the factory's pollution interferes with the quality of air enjoyed by adjacent residents, but it is also true that the adjacent residents are seeking to interfere in the operation of the factory
    - Both sides of the equation must be dealt with equally - which of the conflicting activities avoids the greater harm, or produces the greater good? Perhaps the economic advantages realized by the operation of the factory outweighs the interests of the adjacent landowners?

- Economic incentives and realities will mediate disputes between adjacent landowners, with laws helping to catalyze the transaction
    - Could end up costing less to mitigate a problem than bearing the full cost of the problem itself
    - No matter who has the rights over the contested resource, the bargaining between the parties should lead to efficient resource allocation
- **Therefore, according to Coase, the law really is secondary - doesn't matter what the law is, economic activity and negotiations will lead to most efficient allocation of resources**
- Markets fail if the parties are not able to bargain to the optimal outcome, normally related to transaction costs (any cost other than a production cost, including the cost of seeking out bargaining partners, cost of contracting, monitoring and enforcing the contract etc.)
    - Legal fees are a transaction cost
    - When transactions costs exceed the gains from bargaining, the market will fail
- The main problem with Coase - not everyone thinks in economically rational terms (may hold out for an impossible deal, may place high value in sentimentality etc.) - this is effectively a transaction cost
- Coase's recommendations for the scope of municipal planning:
    - **Should focus on crafting property rights taking into account what is known about transaction costs in specific contexts**
    - **Governments should interfere/regulate when private bargaining is unlikely to lead to efficient outcomes**
    - **Make contextual, as opposed to ideological, decisions**

The Values Promoted by Planning Law

McAuslan: Three competing approaches to planning law:

1) Traditional approach: protection of private property and institutions at the expense of public interest if needed. (Lockeian)
2) Public Interest approach: advancement of the public interest at the expense of private property and institutions if needed. (Benthamian)
3) Populist approach: advance the cause of public participation, at the expense of public interest and private interest if needed. (Millian)

Land Use Planning and Regulation by the Provincial Government

- Land Use Framework: Seven plans based on provincial watersheds.

- ***Alberta Land Stewardship Act (ALSA) 2009*** gives the Cabinet the authority to establish land-use regions and promulgate regional plans.
    - Elevates status of regional plans to binding regulations.
    - Regional plan contains objectives, policies, and directives. Once approved, binding on the Crown as well as every decisionmaker, local gov, and landowner in the province. All planning authorities must review their regulatory instruments to ensure compliance.
        - Only 2 regional plans adopted: South Sak and Lower Athabasca.
    - Support LUF's call for greater reliance on Market Based Instruments including:
        - Conservation easements
        - Conservation directives
        - Conservation offsets
        - Transfer Development Credit Schemes
    - S. 19 disentitled people from compensation other than under compensation directives or other enactments. People were pissed and this was amended. Kap said it didn't change anything and neither did the amendments.

Statutory Plans

MGA s 616, 636, 692(1), 606

- Definition from s 616:
    - **Statutory Plan:** intermunicipal development plan, a municipal development plan, an area structure plan and an area redevelopment plan.
    - Different public participation requirements than LUBs

Intermunicipal Development Plans

S 631(1) Neighbouring municipalities must adopt an intermunicipal development plan unless they are within a growth region, exempt by the Minister, or agree with one another that they don't need one.

S 631(8) IDPs must address:

- Physical Planning
- Transportation
- Process for dispute resolution
- Administrative matters
- Any other matter related to the physical, social, or economic development of the area that the councils consider necessary.

Municipal Plans

MGA s 632(1)(3) – What the plans must include

- Ideally a plan contains:
    1) A study of present conditions
    2) Forecasts
    3) The community's objectives
    4) Policy recommendations
- Plans usually
    1) Indicate the desirable development patterns
    2) Designate different parts of the municipality for different uses
    3) Indicate infrastructure plans
- Plans serve the following functions:
    1) Rationalize municipal decisions
    2) Guide real estate markets
    3) Set the benchmark for land use controls
- Time horizon for the plan is usually about 20-25 years.
- Sets a benchmark for different departments so they have an eye to broader community goals.

The Legal Force of the Plan

Toronto v Goldlist Properties Inc (ONCA 2003)

Facts	Toronto is concerned about the adequacy of rental housing supply. Toronto's Official Plan Amendment established a series of policies aimed at preserving and improving the supply of rental housing, including restrictions on converting rental apartments into condominiums. Note that the Planning Act, s 16 allows for policies to be established by municipalities primarily to manage physical change. Goldlist argues that the rental housing amendments fall outside the scope of what is permitted in Toronto's municipal development plan, because it does not concern "physical change."
Issues	Is Toronto's Municipal Development Plan concerning the preservation of rental housing stock intra vires its powers under the Planning Act?
Decision	Yes, the enabling legislation should be interpreted broadly in the context of the Act as a whole. It is clear that the legislature desired that municipalities be given great leeway to determine land use and development patterns so as to ensure that the interests of society are met. It is within their discretion to impose a municipal development plan that preserves renting stock.
Ratio	Enabling legislation concerning municipal development plans should be read broadly.

Calgary v Hartel Holdings (ABCA 2006)

Facts	Hartel owned lands that were designated as Agricultural and Open Space in Municipal Development Plan. City expressed an intention to develop a park on lands owned by Hartel, but did not change the zoning. Hartel argues that the Municipal Development Plan froze development rights on its land, and it should be compensated for constructive expropriation.
Issues	Does Calgary owe Hartel damages for constructive expropriation?
Decision	No, pursuant to the MGA, compensation only arises if development rights are frozen by a bylaw. A designation in a Municipal Development Plan does not have the same legal status as a zoning designation made in an official bylaw. Furthermore, in this case, Hartel purchased the lands while they were still zoned for agricultural and related uses. There is nothing in the city's plans that invalidates those uses now. Therefore, Hartel's claim that it is deprived of all reasonable use of the land is false - it can still use the land in the same manner as it was able to when the land was originally purchased.
Ratio	Compensation will only arise through constructive expropriation if all reasonable uses of the land have been neutralized by an official enactment of the municipality. **Designations in Municipal Development Plans do not rise to the level of an official enactment (bylaw).**

Old St. Boniface Residents Association v Winnipeg (City) (SCC 1990)

Facts	In the City of Winnipeg's official master plan for the St. Boniface community, the area was given a prospective designation of "residential uses," which is commonly thought to mean single family residential. The developer wants to build two tall residential towers on those lands. The Residents Association objects to this, saying that it does not conform strictly with the master plan.
Issues	Is the City of Winnipeg permitted to allow for the construction of tall condo towers in an area designated for single family residential in its municipal development plan document?
Decision	On the issue of whether a development must conform strictly with designations in municipal development plans, the answer is a clear NO - provided the development is in the spirit of the plan, that is sufficient. City council should be given some flexibility and discretion to approve specific projects within the general parameters of the master plan. In this case, there is nothing in the master plan that would prevent the city from constructing residential towers in the St. Boniface area, instead of single-family housing.

Dissent	Municipal Development Plans are best defined as quasi-constitutional documents, and should be given greater weight when future zoning decisions are made. Some flexibility should be allowed for, but these plans are intended to be restrictive by nature, as they are used as a benchmark for future decisions. Decisions made by planners are not arbitrary, and should be respected.
Ratio	**Municipalities need not strictly conform with municipal development plans, and can deviate from them slightly provided the deviations are in the spirit of the master plan.**

Three Sisters (ABLPRT 2022)

Facts	Three sisters ASP was defeated at third reading. Appellant argued that the Town had to approve the ASP because it was consistent with the Natural Resources Conservation Board (NRCB) approval of an application for a Golf Resort.
Issue	
Analysis	LPRT ordered Town to adopt ASP.
Ratio	Regulatory approval by the NCRB is binding on an ASP, LUB, Subdivision decision or development decision as per s 619 of the MGA.

- Typically, plans are considered to be long-term policy documents (***Boniface***). However, plans are trending towards binding regulatory documents especially given the 2018 amendments to the MGA (***Mohr***).
- "Plans and a LUB must be reasonably consistent and the bylaw should, in the main, follow the plans." (***Mohr***)

Conformity with the Plan

MGA s 618.3 spells out the hierarchy of plans – silent on LUBs

- Interpreting conformity is difficult given the broad and undefined language of statutory plans. Applying provisions requires good faith and a reasoned approach. (***MacNeill***)
- A development proposal can fall short of achieving a particular objective in the plan and yet not offend the plan as a whole. (***Hoffman***)

Non-Statutory Plans

- Non-statutory Plans must not be treated as binding (***Dalhousie Station***)

Zoning

Introduction to Zoning

- Zoning refers to a municipal bylaw that divides a municipal territory into districts
    - Regulation of uses (residential, commercial, industrial)
    - Development standards (height, bulk)

The Origins of Zoning

- Common law nuisance and covenants
- 1850s – emergence of local regulations related to fire, contagion, smell
- 1900 – emergence of early zoning: wash houses, butcher shops, etc.
- 1916 – NYC zoning ordinance
    - 2 forces:

1) Manhattan is starting to build too high – concerns that people won't be able to see the sun/sky soon. Need ordinance to limit height of skyscrapers.
2) 5th avenue lobby is trying to oust garment industry on 5th avenue because at lunch hour there are too many immigrants in the streets and rich people don't want to see them

- 1924 – first comprehensive zoning scheme in Canada – Kitchener
- 1926 – ***Euclid v Amber*** – SCOTUS endorses zoning. After this, every city in America begins zoning (except Houston)
    - Birth of Euclidian Zoning

Euclid v amber (USSC 1926)

Facts	Ambler Realty owns tract of land within municipality of Euclid. Adjoining the tract are lands are lands that have been restricted to residential uses. Village passed a comprehensive zoning plan for the first time in 1922. Ambler's lands are affected and restricted by these new zoning rules, as it wants to build a car parts plant on the lands that are now restricted for residential uses. Ambler is challenging the law as a derogation of s 1 of the Fourteenth Amendment by depriving it of liberty and property without due process of law.
Issues	IS the zoning ordinance unconstitutional in the US?
Decision	The exclusion of buildings devoted to business, trade, etc. from residential districts ***bears a rational relation to protecting the health and safety of the community***, facilitating the extinguishment of fires, preventing contagion etc. The court knows this because of deference to wide body of expert evidence on the benefits of zoning. There is nothing in the statement of claim to suggest that restricting the use of lands through zoning will deprive Ambler of its right to develop the property. The zoning rules are logical and consistent with the natural development of the area. Modern realities have made urban areas far more complex than before, and this has led to significant health, sanitation and other problems as cities have grown. Regulations are justified as necessary to ensure the orderly and safe development of municipalities. ***Zoning is an extension of the common law of nuisance - it is not completely novel.*** In this case, the purpose of the zoning is to divert industrial uses to other areas while retaining certain lands for residential development. It is true that this will decrease the value of the future residential land. It is proper for the municipality to regulate its industrial development within fixed lines.

	What about the restrictions on the size of residential units? The purpose of these is to suppress disorder, allow for the extinguishment of fires, and enforce street traffic regulations and other ordinances for the general welfare of the community. Apartments are parasites (lol). There is validity to these. An injunction would not be fair in this case. If a specific ordinance were to arbitrarily interfere with someone's property rights, they can bring that interference to the court and seek a specific remedy. There is no specific harm alleged here. Therefore, no remedy can be granted. Courts can strike down zoning bylaws that are irrational for violating the 14th Amendment, but the "institution of zoning" itself does not prima facie infringe on the 14th Amendment.
Ratio	**Zoning is a perfectly legitimate municipal exercise of power to ensure greater community welfare through establishing democratic plans for land use.**

- Typical Euclidean Zoning:
    - Uses segregated in advance
        - Classes of uses deemed compatible are grouped together
        - Actual compatibility or impact irrelevant
    - Zoning restrictions are hierarchical/cumulative with single family (R1) being the most exclusive.
    - All properties in the same zone are subject to the same restrictions.
    - Zoning scheme subordinate to plan.
- Affirmed with rhetoric re: public interest but really it's about the demand side and what homeowners want. They had to couch it as public interest to fit it within the police power which revolves around health, welfare, and safety of community.
- Issues with Euclidean Zoning:
    - Does it promote community welfare?
        - Ambler wouldn't think so. It decreased their land value from $800,000 to $200,000. There is an argument that society in a broader sense benefited to a greater extent (Pigovian) but Epstein says we should pay landowners for these losses to ensure municipalities only do this when necessary.
    - Is zoning really a tool of community planning?
        - Kap says no.
        - Tibou hypothesis: musical suburbs.
        - Zoning is a collective property right.
            - Zoning allows owners to retain current use rights while handing off future use rights to municipal council.

- GOOD for homeowners who want their use to remain the same AND their neighbours uses to remain the same. Creates reciprocal restrictions on development.
- BUT, doesn't respect the rights of future residents. If you want a house in Toronto you're SOL if the NIMBYs keep barring that from happening.
- In Edmonton, used to be 50/50 single family and multifamily, now it is 0% single family. You can have a duplex or townhouse anywhere.

Modern Zoning

- The practice of zoning in both US and Canada influenced by social, political, and business forces than by planning. Focused largely on protecting property values and amenities.
  - A lot of problems come from the fact that Canada keeps importing its municipal policies and zoning from the US, which is a different context. US is mainly very small cities (racialized) surrounded by a lot of suburbs (white). Most of these suburban municipalities are fully zoned for single family, which means that if you can't afford that type of home you can't live in that municipality.
  - Not the case in Alberta.
    - St. Albert: 51%
    - Okotoks: 67% (or something)
  - Minimum lot sizes also come into this - in the states lots of minimum lot sizes are 5000 sq ft - this is purposely trying to keep poor people out. In AB, lot sizes are generally 3800 sq ft or less.
- Looking at Canadian law you can still see some of the myths that come out of Euclid.
  a. Planning and Development Act s. 45 - still incorporating police powers reasoning even though this is not required under our Constitution
  b. MGA NS s. 219(3) - solely focused on municipal planning strategy - this is not really how zoning works in practice.

Hard to rationalize on welfare grounds:

- Can we really do a cost benefit on the zoning of every parcel of land? No. Even though homeowners may be happy that an industrial/commercial development does not come to pass, there will be other interests that are not served by that decision.

Abolishing Zoning?

- Arguments for:
  - Zoning only results in corruption (Chicago and Boston)
- Arguments against:

- Advantages of zoning are that they mimic the market - what people would do if they could enter into restrictive covenants, but much easier than entering into restrictive covenants.

Issues in Modern Zoning

- Municipalities tend to overzone for the types of uses that will bring in the most property tax: Commercial and High tech industrial. But really, there will be more residential development and residential developments almost always demand more services than their property taxes can pay for.
- Increased emissions attributable to zoning regulations
- Kap's notes on urban sprawl:
  - Community doesn't tell the Gap how many bermuda shorts to manufacture.
  - The zoning scheme tells the market: this is how many single-family dwellings and how many multifamily dwellings based on the notion that they can locally control development to serve municipal goals.
  - No reason to suppose that municipalities will be good predictors of real estate markets so this doesn't make sense
- Issues with sprawl:
  - Cost of infrastructure and services to outlying areas
    - Municipality can only see these costs
    - Developers see the money they could make
- Lifecycle of neighbourhood
- Car-centric development
- When we shit talk the suburbs we tell the poor suburbanites that they are choosing the wrong way to live:
  - You shouldn't be living in car-centric communities
  - You shouldn't be driving to big box stores
  - Why can the government tell us how we should live
- Zoning is more flexible than restrictive covenants so we shouldn't be incentivizing the use of restrictive covenants by making zoning too permissive. Restrictive covenants making a comeback because voters no longer believe that Council has their best interests in mind.
- Zoning is ALWAYS about private interest of the voters.

Excluding Uses and Users

Szymanski v. Excel Resources Society (2004) ABQB

Facts	The Hudson's Bay (HB) Restrictive Covenant restricts the use of the land to private dwelling houses. "No building shall at any time be erected upon the said lots for manufacture or business purposes, and only single-family homes may be constructed on the property. Only one private dwelling house be erected on any of the lots." Excel operated a group home on the land, home to 6 unrelated adults
Issue	Does the operation of a group home breach the HB Restrictive Covenant?
Analysis	Court found the group home was **structurally** a private dwelling house within the meaning of the covenant. The covenant does say that the house must be intended for "one household" - however, there is nothing in the covenant that mandates that all residents must be related by blood. For example, when the covenant was entered into, it was common for servants to also be present on the property. No business is being conducted on the property (the group home was a non-profit), and the building is consistent with residential uses. Note that the court indicates that this is a borderline case - if there were more services being provided to the residents, or if there were more people on the property, then it might contravene the restrictive covenant.
Ratio	A publicly funded body attempting to provide a living situation for the disabled which is close to their own home is "borderline" residential.

Brown Camps 1 & 2 (1969 and 1973 ONCA)

Facts	Brown Camps provide services for kids who are in care. Bylaw permits usage as single family detached dwellings. Defined to be occupied by one family, have one kitchen, private garage for not more than 2 cars. Family also defined to mean one or more persons living as a single housekeeping unit – may include servants and up to two boarders.
Issue	Is a group home permitted in a residential zone?
Analysis	Group home not allowed in Brown I – did not fall into the definition of family. In Brown II, "family" reinterpreted as purpose of the group home was very similar to a conventional family household.
Ratio	Bylaws should be interpreted purposively.

R v Bell (SCC)

Facts	City bylaw restricted the use of residential property to "family", which was defined as people related by blood or marriage. 3 unrelated tenants lived

	together, none of whom owned the house. Bell, one of them, was convicted of violating the bylaw.
Issue	Can a municipality create a bylaw to regulate the users of a parcel of land?
Analysis	Therefore, it is ultra vires the powers of the municipality - municipalities were not permitted to regulate personal actions on property, only the use that the property can be put to.
Ratio	Zoning cannot regulate USERS, only uses.

Note that, after this case, Ontario amended its legislation to confirm that municipalities are not empowered to regulate the type of people that can live in a property.

Phi Delta beta of London (1995 OJ)

Facts	Fraternity moving into an existing house. Proposing significant renovations to be able to pack all the frat boys in. House currently zoned residential and supposed to be used as a single and independent housekeeping establishment.
Issue	Are sorority and fraternity buildings excluded?
Analysis	The intended use of the property will not constitute an independent household. To be a tenant, a person must be admitted to the fraternity. Therefore, the housekeeping establishment created by the lease to a group of individuals is not independent from the fraternity.
Ratio	Frats aren't housekeeping units

Other limitations on exclusion:

640(8) MGA: … the authority to pass a LUB does not include authority to pass a LUB in respect to the use of a building or part of a building for residential purposes that has the effect of distinguishing between any individuals on the basis of whether they are related to one another.

- Restrictions based on age:
    - Covenants must touch and concern land
    - Protection from discrimination under the AHRA.

Short term rentals and tenure discrimination

Canmore Property Management v. Canmore (Town) (2000) ABQB

Facts	Neighbours didn't want cottagers renting in their neighbourhoods. Prevents stability. Distinction was therefore made between short- and long-term occupation

	Town argued that the use was a commercial use (to rent to people for short periods of time)
Issue	Can a zoning bylaw prevent cottagers from renting for short periods in residential neighbourhoods? Is the creation of a separate class of property based on the use of a dwelling unit occupied for short term periods for non-residential purposes a valid exercise of the town's powers?
Analysis	Yes. The use of dwelling houses for groups of people who stay short term as visitors is a different use than longer term family use. This is so from the point of view of community facilities, amenities used, and the commercial nature of the use of the property.
Ratio	Regulating short term rentals is permissible under the MGA.

Spot Zoning, Discrimination, Bad Faith

HG Winton Ltd v North York (Borough) (Ont Div Ct 1978)

Facts	Winton owns a large mansion once owned by Mazo de la Roche (bestselling Canadian author). He plans to sell it to the Zoroastrians who wish to construct a temple on the land. The neighbours complain, and the municipality responds by passing a zoning bylaw that disallows the construction of churches in the area. Zoroastrians are challenging this on the basis that the bylaw was passed in bad faith and was discriminatory.
Issues	Is the bylaw discriminatory? Is there bad faith?
Decision	Yes to both. Where council acts unreasonably and arbitrarily, and without the degree of fairness, openness and impartiality required of a municipal government, then it will be deemed to have acted in bad faith. In this case, there were several indicia of bad faith evidenced in the municipal council's conduct: The bylaw was pushed through with inordinate speed It was designed to give the pretense of being operative on a larger area, but was really just designed to frustrate this specific development

	Usual council practices and procedures with regards to zoning amendments were not followed. No study of traffic and neighbourhood impacts was done. The two parties that were most affected by the bylaw were never informed of it, consulted on it, or given a chance to be heard The bylaw singles out one property to the clear detriment of its owners for a use classification that all other owners could have availed themselves of **Every zoning bylaw is inherently discriminatory, but there must be a proper planning purpose and adherence to procedural fairness to warrant discriminatory distinctions between property owners in the same position relative to each other.** In this case, there was no planning consideration whatsoever, no report from planning staff, no public purpose other than to appease neighbours Also, it was done in bad faith. The fact that the Zoroastrians were not given an opportunity to present their case is indicative of that. ○ Since this is effectively a spot zoning, the municipality MUST give the affected parties an opportunity to be heard
Ratio	Bylaw changes that discriminate against a particular landowner can be quashed if bad faith is evidenced through the deliberate failure to follow procedural norms and show fairness to the affected parties.

Land Use Bylaws

Euclid's Legacy: the Myth of Welfare

The purpose of zoning bylaws is to "organize a municipality's territory so as to protect citizens' interest and maintain order" (***Congrégation***)

Zoning legislation has as its purpose the regulation of land use, having regard to the underlying characteristics and uses of the land in question. It generally seeks to treat similar areas similarly and avoids stand-alone one off prohibitions… to rationalize land use for the benefit of the general populace (***Lacombe***)

MGA s 617 to achieve the orderly economical and beneficial development, use of land and patterns of human settlement" and "to maintain and improve the quality of the physical environment."

ss 640-644:

Zoning vs licensing or other bylaws

- City passes a bylaw for establishing minimum and maximum store front requirements

- City passes a bylaw imposing special drainage requirements for new development south of the river
- City passes bylaw prohibiting gas stations in a certain part of the community.

"Prohibit or regulate the use of land and development"

S 640(1) Every municipality must pass a land use bylaw

(1.1) A land use bylaw may **prohibit** or **regulate** and **control** the **use** and **development** of land and **buildings** in a municipality…

MGA 616(a.1) defines building and (b) defines development

Characterizing "use"

Old Strathcona Foundation v Edmonton (the Varscona)

DOMINANT PURPOSE OF THE ENTIRE DEVELOPMENT

Facts	Westcorp applied for development permit to construct and operate a theatre. Permit was refused by the development officer, that was reversed by the Appeal Board, and the Old Strathcona Foundation launched this appeal. The land is zoned for maximum four storey developments (theatre would be six), and spectator entertainment establishments are not precluded from the zoning. The zoning designation allows for six storey structures, but such structures must face Whyte Ave., and must be a "Hotel Development." Westcorp argues that hotel *development* is broader than simply stating *hotel*. "Hotel" is defined in the Land Use Bylaw as a development used for the provision of rooms for temporary sleeping accommodation. "Hotel development" is not defined. Old Strathcona Foundation argues that a theatre does not fall within the definition of "Hotel development."
Issues	What is the meaning of the phrase "Hotel Development" in the Edmonton Land Use Bylaw?
Decision	Two stages of analysis for development officers when they are evaluating permits: Determine what use has been applied for and whether it is either permitted or discretionary in the district Whether proposed development complies with the development regulations applicable to that district and use. If both stages are met, then the officer must approve the permit. If it is non-compliant, the officer can either grant a variance or refuse the permit. It is an error in law to conclude that any permitted use with fall within the rubric of "hotel development." It also does not follow that just because the theatre will be joined with the existing hotel, it necessarily falls under the definition of "hotel

	development." This definition would allow for any development rising to six storeys, which is clearly not what the zoning was intended to allow for. ***The relevant inquiry is whether the dominant purpose of the entire development is in its essential character that of a hotel.*** That is not met in this case.
Ratio	Boards must correctly interpret the scope of land use bylaws and determine whether a development permit complies with the bylaw in order to approve it - the Board cannot approve bylaws that run contrary to the bylaw's intended purpose.

Chen v Edmonton (the drive through)

ONLY THE PRINCIPAL USE OF THE DEVELOPMENT NEED BE CONSIDERED

Facts	Stantec was given development permit to build a Burger King. Chen runs a Humpty's restaurant nearby. The zoning for the area allows for construction of Drive-in Food Services and Eating and Drinking Establishments. Drive-in Food Services are defined exclusively as meaning intended for consumption of food within a car, and Eating and Drinking Establishment is defined as being intended for consumption of food within the premises. Burger King is to have a vehicle pickup window, and restaurant seating. Chen is challenging the decision on the grounds that the development is non-compliant since it is trying to be two types of development at the same time.
Issues	Can Chen succeed?
Decision	This is nonsense. **Subclauses within the zoning bylaw must be read together, not in isolation.** The dominant use of the premises is the only major consideration - ancillary uses to not affect that. **Also, the bylaw says that uses may be accessory to the principal use, whether or not it is listed in the bylaw.** The Burger King's principal use is as an Eating and Drinking Establishment, and the drive-in window is an ancillary use that is permitted under the bylaw. Once the drive in window is found to be ancillary, it is viewed in the law as not existing at all (only the principal use is considered).
Ratio	When assessing development permits, only the principal use of the development is to be considered when determining bylaw compliance - ancillary uses are invisible to the law.

Permitted and Discretionary Uses

The right to a development permit

642(1) When a person applies for a development permit in respect of a **permitted** use, the development authority **MUST** issue the permit with or without conditions (barring any other issues with the application).

642(2) Same as above but if it's a **discretionary** use the development authority **MAY** issue a development permit.

Statutory timelines in ***683.1:*** The MGA allows the DA **20 days** to determine if the application is complete, but this deadline can be extended in the land use bylaw or by consent.

684(1) DA must make a decision within **40 days** after the receipt the applicant of an acknowledgement (that the application is complete)

684(2) Time period can be extended by agreement

684(3) If the DA does not make a decision in that time, the applicant can deem it to be refused (so they can appeal)

642(3) DA must provide a **WRITTEN** decision

642(4) reasons for refusal **must** be given.

Development permit is considered to run with the land. If the property owner sells the land to someone else, the new owner now has the permit even though it was issued to someone else (no privity)

Permit conditions

274099 Alberta Ltd v Sturgeon (Municipal District) (ABCA 1990)

NO CONDITIONS IF THE APPLICATION IS FOR A PERMITTED USE

Facts	Company sought to develop land in Sturgeon Municipal District as a **public campground.** The District's development officer refused a permit, reasoning that the proposed use was not a permitted use under the bylaw, but was discretionary

	(and ought to be refused in this case, exercising discretion). The development appeal board decided that the permit should be issued (after public consultation), subject to 16 conditions. The appellant disputes that the District has the power to attach conditions on developments.
Issues	Can municipalities attach conditions to development permits that must be satisfied for them to be granted?
Decision	The land use bylaw indicates that a development officer may require an application to include a detailed landscaping plan, and that such applications can be approved with or without conditions. The appellant is suggesting that the magnitude of the costs to meet the conditions are too onerous, and represents an improper delegation of authority from the planning board to the individual development officer. First, the Court disagrees with the Development Officer on the classification of the use - it is PERMITTED, not DISCRETIONARY. **Council cannot delegate to the development officer, the discretion to impose whatever conditions they feel are necessary on <u>permitted uses</u> in a zoning bylaw.** This is an excessive delegation of statutory authority given by the province to the municipality, and is therefore ultra vires. It is clearly the intent of the Planning Act that an applicant for a permit will know from the land use bylaw what conditions they may encounter in developing land for a permitted use. This is intended to provide predictability to landowners. Any other interpretation would essentially leave the landowner at the mercy of the development officer.
Ratio	It is ultra vires for council to delegate blanket authority to development officers to attach conditions to permits for **permitted uses**.

Burnco Rock Products Ltd v Rocky View (Municipal District) (ABCA 2000)

CONDITIONS PERMITTED IF THE USE IS DISCRETIONARY

Facts	Burnco operated gravel quarry for 30 years under the authority of development permits issued from time to time. A new five-year permit was issued for this discretionary use of the land. The new permit included conditions that were not present on previous permits, including limitations on when the quarry could be operational and limitations on truck traffic to and from the site.
Issues	Can the municipality attach conditions to the new permit, even though previous permits did not contain conditions?
Decision	Burnco submits that the power to impose conditions must be found in the land use bylaw, and any condition that is not expressly authorized by that bylaw is illegal.

	The land use bylaw for MD Rocky View indicates that the development officer or municipal planning commission can approve an application subject to conditions considered appropriate. Burnco argues that the land use bylaw is non-compliant with the MGA because it does not specify what types of conditions that may be imposed, and therefore grants an ultra vires delegation of statutory authority to the development officer. This case is DISTINGUISHED from Sturgeon because it is dealing with a discretionary use in the bylaw, not with a permitted use. Discretionary uses in a bylaw may be refused by a development officer for a sound planning reason. These considerations may be in response to changing conditions that were not present previously. Development officers should be given latitude to craft conditions to respond to these changes for discretionary uses, and not be required to necessarily reject the applications outright.
Ratio	Land use bylaws may delegate authority to development officers to impose conditions on discretionary uses.

Direct Control Districts

The rights of Landowners and their Neighbours

Holding Zones and Zoning for Public Purposes

- **True *Euclidian* zoning:** municipality would zone every area of town in advance. This didn't' work well because municipalities found that they could not anticipate the real estate market.
- Now, municipalities presumptively zone something into "holding zones" and the developer/owner applies to develop the land. Ability to develop the land depends on the success of this application.
    - Issues with fairness because two developers could buy similar parcels of land and one will be worth $1M and the other will be worth nothing, based on council's decision which comes down to things completely outside of the applicant's control.

Holding vs. Open Space

- Open Space is intended to be permanent, strips private land of all development potential. **Only recreational uses will be allowed.**
- Holding zone is a temporary designation intended to last only until the municipality is ready to move forward with development. Usually how marginal suburban land is zoned.

- ***Hartel*** in the context of development freezes:
    - Hartel owned the land since 1971 (Nose Hill Park). Land in the path of urban expansion. Intended to subdivide and develop the land. Land was classified agricultural at the time of purchase.
    - In 1972 the City expressed interest in purchasing this land for a public park, but nothing came of it.
    - In 1972 council passes a resolution that froze development in the area, including Hartel land.
    - 1979, council developed a statutory plan, in that plan there is a commitment to purchase the land.
    - Then there is an area structure plan with Nose Hill Park identified (on Hartel's land)
    - At that time, a land use bylaw designates the Hartel holdings agricultural and open space. Allows public services, parks and playgrounds, agricultural, single family homes on lots that are 20 acres or more. Some discretionary uses as well.
    - At this time, Calgary makes several offers to Hartel to buy the land - price is less than market value. Martel says "this is our price, either buy it or rezone the land and allow reasonable uses like the lands all around". Calgary says no.
    - Martel applies for an order of MANDAMUS (do something) - comply with provisions of ***s. 644***. Only two cases in which this has been invoked - ***Canmore*** and ***Hartel***.
    - Wilson affirms that designation in a LAND USE BYLAW is required to trigger ***s 644.*** She also says there is nothing wrong with a holding zone bylaw, even if it severely affects the land owners economic interest in the land. **Planned public acquisition is a valid reason for refusing to grant a building permit/rezoning application, even if the city is not ready to formally expropriate the land yet.** (Assuming no bad faith)

The Right to Non-conforming Use

- Generally, non-conforming use is a rule of construction: regulation of existing uses/building *ultra vires*
    - Now EXPRESSLY protected (***MGA s. 643***)
    - In every jurisdiction Kap's studied there is a legal right to a non-conforming use. (Acquired rights in QC).

Policy considerations:

- Retroactive legislation is offensive
- Community's interest in responding to changes, implementing new policy

- Owner's expectations
    - Presumptively contrary to the public good to allow non-conforming use because it goes against community expectations.
- Equal treatment of everyone in the district; monopoly.
    - One owner protected because they were there 10 years ago and other owners need to comply with new rules.

Tensions:

1. How broadly or narrowly should we interpret existing use?
2. Should a non-conforming use be tolerated forever?
    a. Some jurisdictions have sunset clause.
3. What happens if the use is discontinued? (i.e. if your non-conforming garage burns down)
    a. Loss of protection
    b. Limits on power to repair

The Prima Facie Right to a Development Permit

When do a property owner's rights vest?

General rule from RC:

Toronto (City) v Roman Catholic Separate School Trustees (JCPC 1925)

Facts	The Roman Catholic Separate School districts purchases a plot of land in a community, and submits an application to tear down the houses on the land an build a pre-school in its place. The community petitioned city council to change zoning bylaw after the school board applies for the development permit, but **before** the 40-day period ends The school board applies for mandamus to have the decision changed to allow the
Issue	Does the application for a permit give RC Schools the right to non-conforming use?
Analysis	**No, the JCPC finds that the municipality CAN change zoning bylaws to effectively invalidate a permit application**

	Sometimes, a problem with allowing a certain development in an area will not become obvious until an application for that development is submitted, council should have an opportunity to react. Also, the political process allows for changes in bylaws that do not serve a proper planning purpose, such as to exclude certain groups from the area. Issues: Allowing this type of behaviour will encourage municipalities to "drag their feet" in approving controversial development applications, so as to allow for bylaw changes to go through. AND, this also reduces the predictability of zoning bylaws (leads to ad hoc decision-making) Ultimately, it IS permissible for municipalities to pass bylaws invalidating development applications after applications are received, but before they are formally approved. Developer's only option is to attack the process by which the bylaw was passed (bad faith or discrimination – ***HG Winton***)
Ratio	The filing of an application vests only a *prima facie* right. Rights do not crystallize until the permit is approved. (Implied in ***MGA 643(1***))

Central Jewish Institute v Toronto (1948) SCC

Facts	On the day of the purchase there were no restrictions on the property and it was used by the vendor as a boarding house. However, the neighbours were agitated about this use, so council intended to create a zoning bylaw to limit the use to single family houses or dental offices. Central Jewish entered into a supplementary agreement with the vendor and had the right to enter the premises in July instead of September and start renovations as long as they didn't mess with current tenants. In accordance with this agreement, the buyers sent a few teachers and kids to occupy the property in July. Used the grounds and part of the building as a summer school.

	On July 24 the city enacted a zoning bylaw (approved by OMB and retroactive to July).
Issue	What kind of protection does Central Jewish have against the new zoning bylaw?
Analysis	**Distinguished from RC.** CJ argued that their summer school was enough to grant them the right to a non-conforming use. SCC agreed. Would not have been the same if the summer school hadn't existed.
Ratio	Legal non-conforming use requires ACTUAL USE, not an intended/contemplated use.

Saint-Romuald (Ville) v Olivier (SCC 2001)

Facts	Respondents owned a country and western cabaret that they converted into a strip club. Police increased surveillance to find people who were in breach of court orders, were driving impaired etc. There was no evidence that nude floor shows attract more clients in trouble with the law than other types of nightclubs. The town later changed the zoning bylaw to prohibit nude floor shows on the premises.
Issues	Can the town change its bylaw to prevent a use that was previously permitted and is in fact in operation on the premises?
Decision	The protected "acquired right" of neighbours only refers to the status quo, it does not refer to potential or contemplated uses that have not materialized. The town takes the position that changing the venue from a western cabaret to a strip club is an extreme variation of the use, so as to transform it into a wholly different use. The Court disagrees. **Municipalities cannot retroactively truncate property rights.** While the purpose of zoning is rightly to minimize adverse effects on neighbouring properties, that does not imply the right to change zoning to prohibit something that was previously lawful and is in fact occurring on a premises. What about the effect of increased patronage? That is irrelevant. Provided the type of use is permitted, **the intensity of that use is not relevant**. The question then is how many of these activities can be modified before it becomes an entirely different use? You must look at whether the activities change the

	dominant character of the business. The objective is to obtain a fair balance between the landowner's interests and the neighbour's interests - therefore, the effect of the changed or new uses on neighbours will be considered. Also, must look at whether the non-conforming use is too remote from the original, dominant purpose of the establishment. Process: • **IF the scale or intensity of the activity brings about a change in the type of use, then it will not be grandfathered (the threshold is high, the businessowner will not be punished for increased business success)** • **If the addition of new activities is seen as too remote from the earlier activities, then protected status is lost.** • **If the new or modified activities create undue problems from the neighbourhood as compared with before, then protected status is lost.** In this case, the substitution of western singers for nude dancers is not too remote from the dominant purpose of a nightclub under the former bylaw. Therefore, offering nude shows is a non-conforming use that is allowed under the previous bylaw, since the dominant character of the development is still that of a nightclub.
Dissent	There is a significant prima facie different between the two uses - one is used to entertain, the other to sexually arouse. Also, private lap dances are provided in strip clubs, while the entertainment offered in a cabaret is purely public. Therefore, the existing bylaws cannot be said to allow for a change to a strip club, since that constitutes a different use that is not expressly permitted under the zoning bylaw.
Ratio	**Must look at INTENSITY, REMOTENESS, and UNDUE PROBLEMS for neighbourhood.**

Provincial Approval of Zoning Changes:

- Can occur where owner applies for a permit for a permitted use and council adopts a zoning bylaw to exclude that use before the application has been approved.
    - Developer applies for mandamus (equitable rem to force the municipality to give them their permit)
    - ***Boyd*** test to defeat *prima facie* right to development: (NOT AB LAW – NO MANDAMUS IN ALBERTA unless statutory appeal mechanism is exhausted – ***Edith Lake)***
        - Prior intention
        - Good faith
        - With dispatch (no dilly dallying)

Variances

Edmonton Library Board v Edmonton (City)

- The primary issue in all three appeals revolved around the interpretation of the authority given to appeal boards. Although development officers can't grant permits that are counter to city bylaws, the appeal board has the authority to approve variances on a case-by-case basis.
- "An appeal board has the jurisdiction to issue a development permit for a proposed development even if it does not comply with the applicable land use bylaw if, in the appeal board's opinion, **the proposed development would not unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,**" Chief Justice Catherine Fraser wrote in her decision.

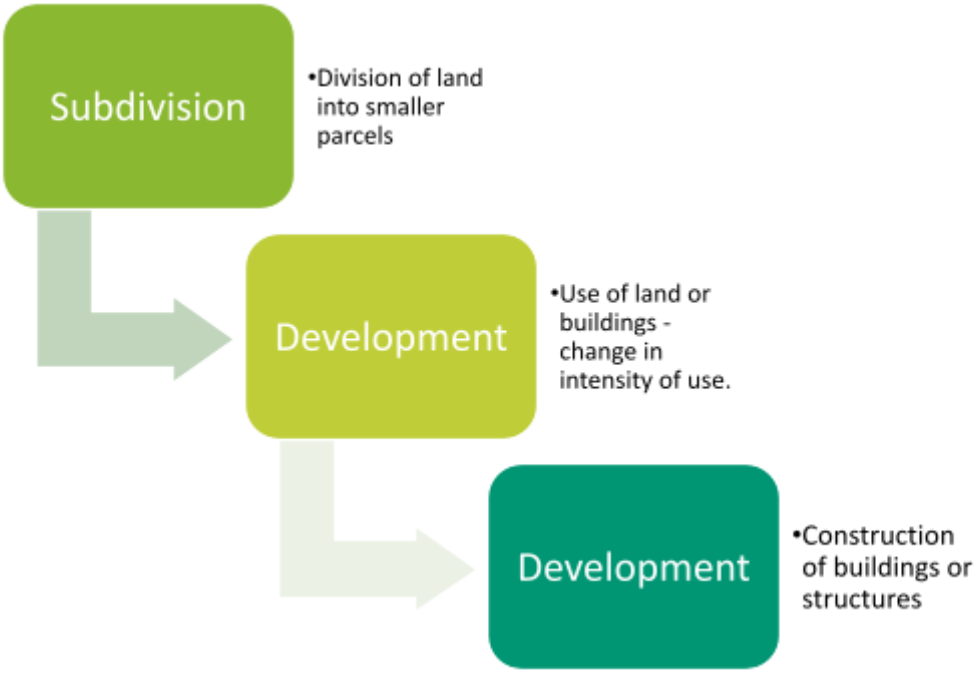
11.3 EDMONTON ZONING BYLAW on variances

- The Development Officer may approve, with or without conditions as a Class B Discretionary Development, an application for development that does not comply with this Bylaw where:
    - the proposed development would not, in their opinion:
        - unduly interfere with the amenities of the neighbourhood; or
        - materially interfere with or affect the use, enjoyment or value of neighbouring properties.
    - the proposed development would, in their opinion, conform with the **Use** prescribed for that land or building in this Bylaw.
- The Development Officer may approve, with or without conditions as a Class B Discretionary Development, an enlargement, alteration or addition to a non-conforming building if the non-conforming building complies with the Uses prescribed for that land in this Bylaw and the proposed development would not, in their opinion:
    - unduly interfere with the amenities of the neighbourhood; or
    - materially interfere with or affect the use, enjoyment or value of neighbouring properties.

Direct Control

- Direct control districts have flexibility at the expense of predictability, uniformity, and (some would say) rule of law.
    - Ex: St. Albert is fully Direct control
- Direct control is a form of spot zoning.
    - Council can designate any property direct control and can regulate development and control as they see fit. BUT, if there's bias or didn't advertise or something you can still challenge.

Subdivision and Development Appeals and Judicial Review



Subdivision Authority

- Subdivision Authority is the original decider of subdivision. Whether to divide land into smaller parcels.
- Exercises subdivision powers and duties on behalf of the municipality (***s 623(a)***)
    - Considers applications for subdivision approval (***ss 653, 654***)
    - Imposes conditions on subdivision approvals (***ss 655, 651***)
- Decisions on SUBDIVISIONS:
    - Must be in writing
        - Options: Approve, approve with conditions, refuse
        - Given to all circulation agencies
        - Reasons to be given

- Decisions on DEVELOPMENTS:
    - Must be in writing and given or sent the same day decision was made (***s 642(3)***)
        - Options: Approve, approve with conditions, refuse
        - Distributed in accordance with LUB
        - Reasons for refusal to be given (***s 642(4)***) so applicant can determine grounds of appeal
        - Deemed refusal:
            - Under ***s 683.1(8)*** if DA determines application incomplete and applicant fails to submit requested information in time
            - ***Under s 684*** if DA fails to make a decision within statutory timeframe or extension.

Appeals to the SDAB

- SDAB (Subdiv and Development Appeal Board) hears appeals from decisions of the SA or DA UNLESS:
    - Direct control approval by council (s 685(4)(a)); OR
    - Appeal goes to the Land and Property Rights Tribunal (LPRT) (s 678(2) and 685(2.1))

Pre-hearing Considerations

- Notice of appeal:
    - SUBDIVISION: Must include legal description, municipal location and reasons.
    - DEVELOPMENT: Must include reasons for appeal.
        - Court generous to the appellant and strict compliance not necessary if there is no prejudice (***Wheatland***)
- Notice requirements:
    - All types:
        - At least 5 days (secretly 7 because the dau of the hearing and the day of sending the notice don't count – ***Interpretation Act s 22***)
        - In a subdivision appeal, the notice must be given in a specified way (***ss 679(3); 653(4.2)***)
        - Adjournment required if notice inadequate
    - Parties to give notice to:
        - SUBDIVISION:
            - Applicant
            - SA
            - Adjacent municipality (if land adjacent to the boundary)
            - School authority who received a referral
            - Gov departments given notice under the S & D regs

        - Owner of adjacent land ***(s 653(6.1)(b))***
    - DEVELOPMENT:
        - Appellant
        - DA
        - Owners required to be notified under LUB
        - Any person the SDAB considers to be affected by the appeal and should be notified. (Consider nature of the development)
- Disclosure:
    - SUBDIVISION
        - No statutory requirement
        - Duty of Fairness
        - FOIP
    - DEVELOPMENT
        - SDAB must make available for public inspection all relevant documents and materials respecting the appeal, including the application, the decision or stop order and the appeal.
            - Degree of cooperation between SDAB and DA required.
    - Limits on Disclosure:
        - SDAB only has to disclose what it has. It is not compelled to order discovery of documents in the possession of a party (***Two Hills***)
        - But if a party is caught by surprise, it may be the basis for an adjournment, if requested. (***Johnston***)
- Timelines for hearings:
        - ALL: Must hold a hearing within 30 days of notice of appeal (ss 680(3) and 686(2)
        - Must give a decision within 15 days of concluding the hearing (***ss 680(3) and 687(2)***)
            - Consequences of not meeting timelines:
                - SDAB will not lose jurisdiction (***Pendella***)
                - Adjournments to ensure compliance with duty of fairness are appropriate
                - If timelines are missed, a Court will direct the SDAB to proceed and award costs against SDAB. In an egregious case, the costs could be payable personally.
- The right to a hearing:
    - SUBDIVISION:
        - Persons who are required to be notified of the appeal

        - Owners of the adjacent land
        - NOT any person affected by the appeal
    - DEVELOPMENT and STOP ORDERS
        - Appellant
        - DA
        - Any other person given notice of the hearing
        - Any person who claims to be affected (but not a busy body)

Jurisdiction of the SDAB

- Subdivision:
    - Decision of a SA on an application for subdivision approval
- Development:
    - Issuance of a development permit
    - Refusal or failure to issue a development permit
    - Issuance of a development permit subject to conditions
    - Stop order (s 685)
- Bar to SDAB jurisdiction?
    - The land is within "green area" s 678(2)(2.1) and (5)
    - Subdivision within regulated distance of highway, body of water, sewage treatment plant, or waste management facility or historic site
- Matters relating to Subdivision and Development Regulation:
    - Review for appeals for "designated lands" subject to s 619 approval
- Development appeals
    - Exceptions in 618-620 (matters of provincial import)
    - Direct Control where Council is DA (s 685(4))

Filing

- Was the appeal filed by the right person?
    - SUBDIVISION:
        - Applicant
        - Specified government departments
        - Council (but not if Council is the subdivision approving authority)
        - School board, but only on the issue of reserve
    - DEVELOPMENT
        - Applicant
        - Person affected by permit or decision
    - STOP ORDER:
        - Target of the stop order (***Grande Cache***)

- Was the appeal filed in time?
    - Subdivision:
        - Within 14 days after receipt of decision or deemed refusal
        - Deemed date of receipt 7 days from date decision is mailed
    - Development permits:
        - 21 days after decision given in accordance with s 642(3)
        - Did the affected person file the appeal within 21 days after the date on which the notice of the issuance was given in accordance with the LUB?
            - Limitations for "persons affected"
                - Evidence of notice in accordance with the bylaw?
                - ***Coventry***: not an unlimited time for appeal even if they bylaw is silent or if notice is not given
                - Fact-based – was there actual notice or constructive notice? Are shovels in the ground?
            - Stop order s 686(1)
                - Was the appeal filed within 21 days after the date on which the order is made?
                - If not, the appeal is out of time.

THE DECISION

- SUBDIVISION: SDAB must act in accordance with ALSA regional plan (Edmonton doesn't have one)
    - Have regard to statutory plan
    - Must conform with the uses of land in the LUB
    - Must be consistent with land use policies
    - Must have regard to (but not bound by) SADR
    - May confirm, revoke, or vary approval decision or condition imposed by SA or make or substitute approval, decision, or condition of its own
    - May exercise same powers as a subdivision authority can exercise.
    - Variance powers straight from MGA.
- Appealing of deemed refusal – SDAB must determine if documents meet requirements of s 653.1(2).
- DEVELOPMENT: SDAB must act in accordance with ALSA regional plan (Edmonton doesn't have one)
    - Subject to s 683, must comply with applicable statutory plan
    - Subject to clause d must comply with LUB
    - Must comply with land use policies
    - Must comply with applicable requirements of GLCA
    - Must have regard to but not bound by SADR

- May confirm, revoke, or vary approval decision or condition imposed by SA or make or substitute approval, decision, or condition of its own
- Variance from LUB possible under ***Library*** test. REGULATION ONLY – use cannot be varied.
    - Basic rule: compliance with LUB unless the case for an exception is made.

Eckardts Tecumseh Mountain Guest Ranch v Crowsnest Pass (Municipality) (ABCA 2003)

- Permitted Uses:
    - NO appeal on a permit for a permitted use unless the provisions of the LUB were relaxed, varied, or misinterpreted. (s 685(3)) (***Eckhardts***)

Facts	Eckardts owns land in Crowsnest Pass. He applied for a development permit for a ski resort. The SDAB approved the development with conditions. Four neighbours appealed the development permit. The SDAB dismissed the appeals, affirming the conditions. Eckardts is appealing the conditions, since "ski resort" is listed as a permitted use under the land use bylaw, and it was issued with no variances or relaxations. The SDAB argues that the addition of log cabins to the resort makes that element of the application a discretionary use that can be subject to conditions.
Issues	Can the municipality add conditions to a development permit where part of the development is a permitted use, and part is discretionary?
Decision	The development officers classified the development as a "ski resort" at first instance, and this was upheld by the SDAB. This is a question of fact that should not be disturbed by appellate courts absent patent unreasonableness. The ABCA will not disturb this finding here. Since it was classified as a ski resort, and a "ski resort" is a permitted use under the land use bylaw, conditions cannot be added to the development application. Section 685(3) indicates that no appeal lies for development permits for permitted uses that are not relaxed or modified. Since no relaxations or modifications were requested, SDAB had no jurisdiction to hear the appeal.
Ratio	**SDAB cannot hear appeals of permits that are issued for permitted uses under the land use bylaw, provided no relaxations or variances were requested.**

- **Discretionary Uses:**
    - Where an application for a discretionary use complies in all respects with the LUB, the DA and SDAB may issue a development permit for it.
        - There are no limits on the scope of an appeal in relation to a discretionary use.

- Other decisions:
    - S 685(2) permits appeal by person affected by "decision" of development authority.
    - Scope of appeals on "decisions" in state of flux.
- Direct control (s 641)
    - SDAB has no jurisdiction to hear an appeal if the Council makes the decision on the application.
    - If the DA makes the decision, SDAB can hear the appeal. SDAB power limited to determining whether the DA "followed the directions of Council"

Reasons

- SDAB must give its decision in writing together with reasons within 15 days of concluding the hearing. Procedural fairness and statutory requirement.
    - Must be proper, adequate, and intelligible and must enable the person concerned to assess whether they have grounds of appeal.

Lor-Al Springs Ltd v Ponoka (County) (ABCA 2000)

Facts	Lor Al is a water bottling business. A neighbouring plot received a permit to build a piggery. Lor-al appealed to the SDAB, arguing that the discretionary use would adversely affect their business viability. The SDAB struck down the piggery permit. The permit was re-submitted and approved on a modified basis (bio shelters were now included). Lor Al appealed again, this time SDAB upheld the permit on the condition that more steps be taken to prevent groundwater contamination. Lor Al argues that SDAB did not provide adequate reasons for allowing the permit. Also argues that the piggery does not comply with the statutory plan, which the SDAB is bound to follow.
Issues	Were adequate reasons provided by the SDAB? Does the development comply with the statutory plan?
Decision	The only reasons provided by the SDAB was that the proposed development met the Minimum Separation Distance, a bottle plant existed within a mile of the development, it received a favourable site assessment from Alberta Agriculture, and the Health Region has advised that the project be built to prevent leeching. Reasons must be adequate to enable a reasonable person to understand how the decision was reached and whether any grounds for appeal exist.

	As for the statutory plan, it indicates that conflicting land uses may limit where intensive animal operations may locate, and seniority will govern which land has priority in any location (that is previous developments will have seniority over newer developments). The question of whether the bottling plant and the piggery are conflicting uses is a question of law. The SDAB did not rule on this issue specifically. The omission of a specific finding on whether these are conflicting uses. This is a significant error.
Ratio	**The SDAB must provide sufficient reasons to support why a proposed development complies with the overarching statutory plan.**

Conditions

- SDAB may impose conditions as set out in LUB
- Any conditions imposed must be for PROPER PLANNING PURPOSES
- Reasons for conditions must be included in reasons
- Conditions must be clear and enforceable.

Appeals from the SDAB to the Court of Appeal

- Straight to ABCA - not ABKB.
- Goes to appeal on permission to appeal (apply for permission to a one-person court) - court must agree before the matter can be sent up to a 3 person panel
- Process:
    1. File application including grounds for appeal (pick your best error don't throw the whole kitchen sink)
    2. Date is set
    3. Permission to appeal hearing - 30 minutes to argue and 10-page factum
        a. Responding party gets 10 pages to respond
            i. Board always notified
    4. Permission granted:
        a. Appellant files a notice to appeal
        b. Appeal record
        c. Factum
        d. Responding factum
    5. Now you're arguing why it was an error of law at the court of appeal.

For **EVERY** ground you allege you must meet this three-part test:

1. MUST be a question of law or jurisdiction
    a. Bias is a jurisdictional problem
2. Of sufficient importance

    a. What does this mean?
        - Does it affect planning through the province?
        - Is it an interpretation of a statute that would apply across the province?
        - Something very fact specific will not be enough.
3. Reasonable chance of success
    a. Weighed on a standard of correctness - NON-DEFERENT STANDARD (***Vavilov***)

- Possible errors:
    - Improper exercise of discretion
    - Bad faith/improper purpose
    - Failure to consider relevant factors
    - Taking irrelevant factors into consideration
    - Discrimination
    - Fettering
    - Improper sub-delegation
- Potential results:
    - Confirm, vary, reverse, or cancel SDAB decision
    - If court cancels decision, must refer issue back to SDAB to rehear it in accordance with directions
    - Court may deny an appeal if ground shows defect in form/technical irregularity and no substantial wrong

Judicial Review

Facts	Brazeau changed the zoning designation for some farmland to a direct control zone to allow for the development of an industrial maintenance facility. Nelson argues that the proposed development does not conform to the municipality's development plan, so the rezoning should be reversed. In particular, Nelson argues that the significant increased traffic causes problems with the use of adjoining lands for agricultural purposes. The facility had been built before the permit had been issued. The municipality held meetings with the adjacent landowners to determine if a compromise could be reached, but also visited the site without other parties being present. Also, one of the Reeves who served on the SDAB had a son who worked for the industrial company operating on those lands, Nelson argued that she should not sit on the SDAB due to a conflict of interest. Also, when the SDAB approved the application, the reasons cited were that the facility was already operating, so it would be

	onerous and costly to cease operations now. Lastly, the audio recording of one of the council meetings was erased.
Issues	Can the rezoning be quashed on account of it running contrary to the enacted development plan? Was procedural fairness infringed by having an (allegedly) biased Reeve sitting on the board? Were the reasons for the approval given inadequate? Was the erasure of the council meeting record sufficient to quash the entire process?
Decision	In this case, the MD is arguing that the decision is mainly political and should not be disturbed by courts. The ABCA disagrees - just because the decision involves balancing competing community interests does not make the issue purely political. Since this case engages issues of procedural fairness, due process and statutory interpretation, all of that is reviewable under judicial review. For Reeve Schwab, her eligibility to sit on the Board is challenged on the basis that she has a pecuniary interest in the matter. Section 170 of the MGA explicitly states that a member of council will not be considered to have a pecuniary interest in a matter merely by reason of being related to someone employed by one of the parties. Therefore, she cannot be considered to have a pecuniary interest by reason of her son being employed on the impugned site. For irrelevant considerations, just because Council hears both relevant and irrelevant submissions, it cannot be inferred that a decision was based on the irrelevant submissions without more evidence. In this case, many relevant considerations were cited before the MD made its decision, so it cannot be inferred that the decision was made on the basis of irrelevant considerations. As for improperly gathering evidence without other parties being present, that is made out. It was improper for the adjudicators to visit the site without all interested parties being present. The tribunal was quasi-judicial in nature, so a heightened level of procedural fairness is expected. The councillors essentially became witnesses and judges at the same time, which is improper. This breach in procedural fairness is sufficient to quash the order via certiorari. The MD must start the process all over again.

Ratio	**When hearing development appeals, heightened procedural fairness is expected.**

Subdivision Control

- **Subdivision control**: Regulation of the manner by which land can be legally divided.
- **Aims of subdivision control:**
    - Regulation and conveyancing
    - Development standards
    - Shifting growth-related costs
    - Growth Management

The Business

- All about the timing of conversion of suburban land (and the Benjamins, baby)
- Land is converted when a new use becomes more lucrative than the current use… and holding off isn't worthwhile.
- Land speculators provide important function/good value. – Smooth out fluctuations in price because they hold on to property when it's cheap and then put land in the market when it becomes scarce (because it's worth more).

Stage 1: Land Development

- Land survey
- Physical Studies
- Site design
- Grading and drainage
- Installation of utilities
- Road construction

Stage 2: Bricks and Mortar

- Likely to build in phases "now selling phase 1"
- Make sure subdivision is going well and you've got a stream of revenue before you take out more financing to do the rest.

Regulatory perspective

- Subdivision control becomes applicable whenever new interests in parts of a parcel are created.
- When land is subject to subdivision control its owner cannot subdivide without approval.
- In many jurisdictions, non-compliance with subdivision control is fatal to any transaction.
- Evolution of subdivision control
    - Instrument for registration of title
    - Prevention of excessive or premature subdivision
        - Anticipation for population growth (post-war)
        - Municipal competition for growth inspires a frenzy of speculative land subdivision subsidized by municipal infrastructure
        - Economic depression results in vast subdivisions fully-serviced, but empty
        - Municipalities fail to collect the property tax necessary to repay debentures. Some even go bankrupt.

The Right to Subdivide Land

- No more common law right – overruled by statute. (MGA Div 7)

Subdivision Approval Process

1) Application accompanied by plan of subdivision
2) Circulation (as required by regulation)
3) Draft approval (subject to conditions)
    a. Consider: traffic, drainage, layout, neighbouring uses, etc (***s 9 of Regulations***)
4) When all conditions satisfied, “final approval”
5) Registration

Regulating Design

- Purposes:
    - Health and safety
    - Control of public space
    - Compatibility with existing development
    - Fostering a sense of community
- Some options:
    - Classic grid
    - Radburn
    - New Urbanism

Exactions/Dedications

- Rationale
- Allocation
    - Fairness
    - Efficiency

Growth Management

- Smart growth/anti-sprawl
- Infrastructure
- Schools

Developer's obligations: Development Agreements, Exactions, and Development Charges

Land Exactions (Reserves)

- **Reserves and Land Exactions:** ***Section 661*** provides that municipalities can require developers to build utilities and infrastructure and transfer it to the municipality without compensation
    - ***Section 664*** deals with environmental reserves - land that is not developable due to environmental concerns (i.e. floodplains, swamps, natural drainage course)
        - No limit on this. If environmental concerns exist, then the land must be set aside
    - ***Section 662*** deals with roads and utilities - indicates that the maximum area is 30% of the subdivision, but if the owner has provided "sufficient" land for the purpose of building adequate roads and utilities, then the municipality cannot go above that
    - ***Section 666*** - deals with school reserves
- ***CLC v Edmonton***: SA required 19% of the parcel for the needs of the subdivision and an additional 2% to widen 137 Ave
    - CA: section 662 discloses a cost spreading policy which must be balanced against the user pay principle.
- ***Re Oulton, 2011 (MGB):*** future needs - projected the needs of a small subdivision decades into the future. MGB agreed with this even though the developer tried to argue that it would only pay for what the area needed here and now.
- ***Edmonton v Edmonton SDAB*** case about the LRT - should I be required to leave land on my property for an LRT station - court says regardless of policy this fits within public utilities.

Servicing Agreements and Development Charges (Off-site Levies)

Development charges

- **Development charges** are imposed to cover a proportionate share of growth-related capital costs
    - Ideally development charges should approximate the marginal cost on a development-by-development basis (but this can't really happen in practice)
    - In Alberta, DCs are called **OFF-SITE LEVIES** - you are paying for utilities that are not on your building site.
    - They can be charged in connection with applying for subdivision approval or getting a development permit.
- Kap's view: Developers don't see the costs, municipalities don't see the benefit - DCs are a way for the municipality to show the developer what the costs are so they will be considered in the decision whether or not to develop.

Are DCs equitable?

- If the developer is able to pass on the charges to the users, then the charges comport with the benefit principle. The person who benefits from the infrastructure pays for the infrastructure. (Legal vs Economic Incidence)
    - Fairness argument: Growth should pay for itself. We, the existing residents, should be shielded from the cost of growth.
    - Homebuyer argument: why should I have to pay for my infrastructure (DCs) and other infrastructure in the community (property taxes)
- When we are talking about equity we also need to think about legal and economic incidence.
    - **Legal incidence**: liability at law for a charge or a tax. If you're a subdivision developer and we say that you need to pay $300 per lot, then the legal incidence on the charge is on the developer.
    - **Economic incidence** has to do with the person who ultimately bears the burden of that charge. Developer can pass $300 on to the homeowner (if the market will absorb this cost) or try to get it removed from the original landowner that they are buying it from (shifting the cost backward).

Economic Optimization

- Can optimize investment in infrastructure - if you're not willing to pay for those services we shouldn't have them. (Economize decisions)

- Can optimize investment in housing - if you give people infrastructure for free and infrastructure is bundled up in housing then people will over consume housing and buy up too much stock
- Can optimize development patterns because DC would be higher in sites that are easier to develop.

Off-site levy calculation

1. For every development we calculate the total cost of servicing and the total benefit
2. Of the total benefit, we assess how much is public benefit and how much is private benefit
3. Charge to the development a corresponding share of the marginal cost:
    a. A facility charge
    b. A distance charge
    c. Density or other factors
    - A levy that equals the marginal cost is more equitable but more demanding
    - A levy based on the average cost of providing services tends to be perverse

Other approaches to developer obligations:

1. Community amenity contributions: negotiated or imposed as a condition of rezoning
    a. Ie. If you want to build this you need to put public art outside to benefit the cityscape
    b. Legislated in BC, allowed in Edmonton
2. Bonusing (incentive zoning): the zoning designation provides baseline development rights, as well as "bonus" rights that can be bought with amenities.
    a. Ie. You get X density automatically (permitted) but if you provide some affordable units or public art, etc. you can have Y additional density.
3. Inclusionary zoning: the provision of non-market housing units in the context of CAC or bonusing

    - Policy issues with these:
        - Violate finance criteria
        - Create bad incentives for municipalities
        - Undermine zoning
        - But sometimes they work!!

Lambert v Whistler (Resort Municipality) (BCSC 2004)

Facts	Lambert is seeking to set aside a zoning amendment bylaw. The defendants argue that the action was brought for ulterior motives, and is therefore an abuse of process. Lambert property faces south with a view to the lake. The Developers plan on building a 4-storey hotel next to Lambert property that would obstruct view of lake. A bylaw was passed by Whistler which gives bonuses to developers if certain amenities and density are included in their proposed developments. Lambert contends that the development is too large, and would not have been approved if Whistler was not motivated by the bonusing scheme. The Developers argue that the sole purpose for bringing this action was for the Lamberts to preserve their view to the lake.
Issues	Does the bonusing scheme enacted by Council provide improper incentives for approving developments that are otherwise too large for the area?
Decision	The zoning bylaw sets out a three-step process by which the development can be achieved. The basic density starts out as one building of 100 square meters (certain uses are specified), if a developer wants to construct a development for a different use on the same site, the bylaw specifies that certain conditions must be met (specifically, certain public amenities must be built). Specific legislative authority is required to allow bargaining to go on between a developer and a municipal council. Section 904 of the Local Government Act allows for council to zone for density in exchange for amenities - however there is no similar provision that allows council to zone for land use in exchange for amenities. As constructed, the bylaw does not allow for more density, it allows for more uses if conditions are met. **There needs to be specific legislative authority that grants a municipality the power to bargain for additional uses. Since there was no legislative authority granted allowing the municipality to change the use for the zoning in exchange for public amenities, the bylaw is ultra vires.** Note that, after this decision, the BC Government passed a special statute that allowed the development to move forward. Poor Mr. Lambert.
Ratio	A municipality must have explicit legislative authority to bargain with a developer on certain terms. Otherwise, the deal will be quashed as being ultra vires.

Fettering

Pacific National Investments Ltd v Victoria (City) (SCC 2000)

Facts	Province was interested in redeveloping industrial area near harbour. Concept plan published in 1984, and control of land shifted to Crown corporation in 1986. Signed a Master Agreement that bound the new Crown corporation to develop some of the lands in Phase I, sell other land to private developer in Phase II. Later began negotiating with PNI for them to take over Crown corporation's responsibilities. PNI's plans were to create a more noisy, vibrant community than the quiet, tranquil one that residents wanted. Residents protested to City Council, and Council changed the zoning to allow for only one storey buildings. PNI sued the City for breaching its agreement.
Issues	Can the City of Victoria sell zoning for, or at least commit to a freeze in the zoning of, a particular piece of property? Can a present City Council fetter the discretion of a future City Council?
Decision	At trial, the judge found that the signed agreement implied that zoning would remain in place for a reasonable period of time to give effect to the development intentions of the agreement. Court of Appeal overturned ruling on the basis that a present Council cannot bind a future Council. Authority over zoning bylaws granted by s 963 of Municipal Act. Reading a term into a contract with a municipal authority must be done carefully, PNI has the burden of proving that the term exists. This term would effectively bind the municipality from using its statutory authority over zoning for a period of time. **The question of whether a municipality may bind itself via contract in this matter is answered by referring to the enabling provincial legislation.** A purposive interpretation of the enabling legislation is required. The statute shows that Zoning is a legislative power and the statute does not, prima facie, provide for any power to constrain the future use of that power. Furthermore, the statute demonstrates that compensation should not be paid for losses due to the future exercise of the zoning power. Municipalities WILL, on occasion, enter into business contracts that constrain future councils on business matters. However, this is not akin to contracts that bind future legislative action. Reading in an implied power to enter into these contracts raise public policy concerns. Limitations on a municipality's legislative power is a very serious matter. **Municipal councils are NOT permitted to fetter the discretion of successor councils in areas of legislative jurisdiction.**

	PNI argues that the implied term allows the city to re-zone, but would require the city to pay compensation for breach of contract. Distinguishing "direct" from "indirect" fettering is not applicable to this case. City councillors who might consider a bylaw unwise might vote for it just to avoid breaching contractual obligations. This is an unacceptable situation. PNI is demanding compensation precisely because the municipality exercised its discretion in a particular way, which is explicitly precluded in the Municipal Act. There are special legal and political risks attendant with dealing with a municipality - PNI knew this going in.
Dissent	Justice Bastarache disagrees with the majority opinion, it would be contrary to all sense of business fairness to allow the city to essentially unilaterally repudiate the contract without compensation. The city recognized that the developer would require 10-12 years to complete the development, and so the zoning would have to remain in place for that time. The implied term is intra vires, it falls within the general power of the municipality to contract. He finds that the actual power to re-zone has not been constrained - the City can rezone, but will be required to pay the developer compensation.
Ratio	**Municipalities cannot enter into contracts that fetter their discretion to enact bylaws within their jurisdiction, unless this is allowed by the enabling legislation.**

Part III: Other Matters

Enforcement

- ***Division 5*** deals with offences and penalties
- Municipality can prosecute a bylaw infringement
- Question of collateral attack?
    - If the city prosecutes a defendant for bylaw infringement and the defendant argues that the bylaw is unconstitutional - this is a permissible collateral attack. BUT, can the SDAB hear this?
    - Case law in Canada says that if the enabling legislation allows this then its fine, but the AB must be judicial review. (s 536).
        - One option - seek an adjournment from SDAB, get a determination from ABKB re: the validity of the bylaw, then come back. You can also theoretically do this after the SDAB renders its decision.

- OR you can argue the Charter to the SDAB and appeal if you don't like the answer (on a question of law or jurisdiction) - this goes to ABCA

Liability of Municipalities

Nelson v Marchi

- What kind of decisions can attract municipal liability?
- Duty of care must be established

Case Review

- Employees of the city created snow banks and did not clear access routes to sidewalk – required citizens to cross snowbank to get to sidewalk.
    - P was injured trying to cross snowbank.
- *Just* established a category of proximity: a public authority has undertaken to maintain a public road to which the public is invited.
    - P in *Nelson* claims that they suffered injury because the City failed to maintain sidewalk in a reasonably safe condition.
- Application of ***Just*** test.
    - Nothing to exempt gov from liability
    - No evidence of bad faith or unreasonableness.
    - Only remaining issue in DOC stage: is the city immune from liability because it was a core policy decision?
        - No, not a core policy decision:
            - Process of snow removal is a policy decision – BUT the decision to clear the parking stalls (inviting parkers), make these snow banks and not clear a route to the sidewalk was an operational decision.
                - Supervisor not close to democratically elected decision-maker.
                - No evidence that the process was deliberative.
                - Not high-level budgetary decisions.
                - Can be easily assessed on objective criteria.

Key Take-aways

- Just test applies regardless of whether the DOC is novel (always use when gov is involved)
- The word “policy” is not determinative.

- **Core policy decision:** decisions as to a course or principle of action that are based on public policy considerations such as economic, social, and political factors, provided they are neither irrational nor taken in bad faith. Gives rise to **core policy immunity**.
- **Operational decision:** the practical implementation of the formulated policies. The performance or carrying out of a policy. Generally made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.
- **Consider:**
    - Level/responsibilities of the decision-maker.
        - **Core policies:** Higher/closer to elected officials = more likely to be a policy decision.
        - **Operational decisions:** Lower-level employees.
        - (Remember: the purpose of immunity-protecting the legislative and executive branch's core institutional roles and competencies is to protect separation of powers)
    - The process by which the decision was made:
        - **Core policies:** Deliberative processes requiring debate (perhaps in the public sphere), input from different levels of authority, intention to have broad application and be prospective in nature
        - **Operational decisions:** Reaction of an employee to a particular event, reflecting their discretion but with no sustained period of deliberation.
    - The nature and extent of the budgetary considerations. Depends on the type of budgetary decision.
        - **Core policies**: Talking about budgetary allotments at a high level in a large and complex manner. (*ex. Transport gets $X billion.)*
        - **Operational decisions**: Day-to-day budgetary decisions of individual employees. (*ex. we will allocate $500 to printing supplies in the office*)
        - Mere presence of budgetary considerations NOT determinative.
    - The extent to which the decision was based on objective criteria.
        - **Core policies:** decision requires weighing competing interests and making value judgments.

- **Operational decisions:** decision is based on technical or general standards of reasonableness.

Municipal Indigenous Relations and Duty to Consult

Duty to Consult

- TRC calls to action re: municipalities
    - Specifically calls on municipalities - there is a TRC guide specifically for municipalities

Neskonlith Reserve v Salmon arm

Facts	Municipality issues a permit to build a project upstream on the salmon arm Municipality prefers the developers experts to the FN's experts
Issue	Does municipality have a DTC given that a municipality is not "the Crown". When delegating power over land use to the municipality is the DTC also delegated.
Analysis	i. Arguments against it: Consultation between municipalities and Indigenous group waters down the nation-to-nation relationship between the federal and provincial crown and Indigenous nations ii. Arguments for: the modern nature of the municipalities requires them as full-fledged democratic bodies to undertake themselves to consult with Indigenous groups when their rights are affected. *"Justice Newbury found that, while the Neskonlith's arguments are "strong," there are "even more powerful arguments, both legal and practical, that…mitigate against inferring a duty to consult on the part of municipal governments."*
Ratio	No duty imposed at this time – but not determinative. **Open question.**