YOUNG ANDERSON
BARRISTERS & SOLICITORS

WHO'S IN CHARGE? PROVINCIAL OVERRIDE IN LAND USE MANAGEMENT

NOVEMBER 18, 2022

Bill Buholzer

WHO'S IN CHARGE? PROVINCIAL OVERRIDE IN LAND USE MANAGEMENT

I. INTRODUCTION

Over the past several years commentators on municipal land use policy in BC have been suggesting that the time has come for the provincial government to play a greater role in local land use management, specifically with respect to the accommodation of additional housing units in existing communities. Various reports, including *Opening Doors: unlocking housing supply for affordability*, the final report of the Canada-British Columbia Expert Panel on the Future of Housing Supply and Affordability, have detailed some suggested interventions.[1] Our new Premier signalled during the campaign for his party's leadership that the era of complete municipal autonomy in matters of residential zoning and housing supply is coming to an end.[2] In response, some local government leaders have indicated an intention to defend against provincial incursions into what they consider to be their exclusive jurisdiction. The time is right for a review of the legal framework in which this exchange of views is occurring.

II. A CONSTITUTIONAL REALITY

An appropriate place to start is with the Supreme Court of Canada's recent decision[3] in Toronto's challenge to Ontario legislation that, over the City's objections, reduced from 47 to 25 the number of wards (and thereby the number of councillors) in the city. The legislation came into force midway through the 2018 civic election campaign, after nominations had closed and election campaigns had begun, creating predictable chaos. Though the legislation was found in the Ontario Superior Court to infringe on certain political rights protected by the *Charter of Rights and Freedoms*, the Province appealed and obtained a stay of the decision under appeal, thereby producing the 25-ward 2018 civic election that it preferred. Subsequently the Ontario Court of Appeal reversed the decision below, and the Supreme Court of Canada dismissed the City's further appeal (though by a bare 5-4 majority). In doing so, the majority in the Supreme Court made these all-too-familiar observations (at para. 2) with which the dissenting Justices didn't take issue:

> Section 92(8) of the *Constitution Act, 1867* assigns to provinces exclusive legislative authority regarding "Municipal Institutions in the Province".

[1] For example, *Opening Doors* recommends (at p. 26) Province-imposed requirements for minimum density standards and requirements for sufficient pre-zoned sites for the development of market and non-market homes around provincially funded transit infrastructure. Fundamental to suggestions addressing the supply of market housing is the assumption that the cost of housing will decrease, or will at least increase more gradually, as supply increases.

[2] David Eby's leadership campaign housing plan said that "homebuilders in major urban centres will be allowed to replace a single family home with up to three units on the same footprint, as long as they are consistent with existing setbacks and height requirements" and that "secondary suites will be made legal in every region of the province".

[3] *Toronto v. Ontario (Attorney General)*, 2021 SCC 34.

> Municipalities incorporated under this authority therefore hold delegated provincial powers; like school boards or other creatures of provincial statute, they do not have independent constitutional status [citation omitted]. The province has "absolute and unfettered legal power to do with them as it wills" [citation omitted]. No constitutional norms or conventions prevent a province from making changes to municipal institutions without municipal consent [citation omitted].

While our provincial government indulged in a good deal of rhetoric about a municipal 'order of government' when the *Community Charter* was being introduced in the early 2000s, it's an enduring legal reality that the Canadian constitution doesn't recognize local governments (much less confer legislative powers on them) except to the extent that it allocates the power to create municipalities to the provinces rather than to the federal government. The very existence of local governments and the scope of their authority are derived from provincial legislation. Both our *Community Charter* and subsequent case law support the *interpretation* of legislation delegating governmental powers to local governments in a way that they might not have been interpreted a century ago when Dillon's Rule dictated a very narrow interpretive approach. However, these trends leave unchanged the basic reality that local government powers in the first instance derive from a specific enactment of the Legislature (or must be necessarily implied from such powers). And once such powers have been conferred, the provincial government retains an unfettered right to alter them, or withdraw them entirely.

In that regard, BC local governments lack even procedural rights. Where the BC Legislature had proclaimed (in s. 3 of the *Local Government Act*) an intention to consult with regional districts before enacting legislation that affected their interests, our Court of Appeal held that the Legislature could proceed without any such consultation to divest a regional district (without compensation) of a valuable area of land that the Province wished to employ in a reconciliation arrangement with a local First Nation.[4] The Court of Appeal refused to accept that consultation provisions "buried" in a preamble to the *Local Government Act* were anything more than "aspirational". Such is the all-encompassing nature of provincial authority in relation to local government.

In the land use management context, some of the more dramatic illustrations of the true legal nature of the provincial-municipal relationship, again taken from Ontario, are Minister's zoning orders (MZOs). Long provided for in Ontario's *Planning Act* but rarely used until quite recently, the MZO substitutes for the duly-enacted local government zoning regulations for particular sites the regulations that the provincial Minister of Municipal Affairs considers appropriate. The City of Toronto's website indicates sharply increased use of these orders within its boundaries over the past few years,[5] including in situations where the City actually requests the Minister to

[4] *Metro Vancouver (Regional District) v. British Columbia* 2011 BCCA 345

[5] Information on the City's website indicates that one Toronto MZO was issued in each of 1996 and 1998; eight in 2020; five in 2021; and twelve in the first three months of 2022. The trend is similar in other cities in southwestern Ontario. For MZOs recently supported by the City of Toronto see

exercise this power so as to overcome delays inherent in the City's own development approval processes (which, unlike those in BC, can involve time-consuming appeals in addition to the usual public hearing process).

On the subject of appeals, it's worth noting that provincial overrides of local government decisions in other Canadian provinces often occur by means of appeals to provincially-appointed tribunals such as the Ontario Land Tribunal (formerly the Ontario Municipal Board) and Alberta's Land and Property Rights Tribunal, that have jurisdiction to hear and determine appeals on land use management matters "on their merits". The scope of such appeals goes beyond the jurisdictional and procedural errors that are the focus of legal challenges in the BC Supreme Court, to include the policy merits of the decision: does it represent good planning? In this regard the tribunal may, and often does, take a different view of the matter than the local decision-makers, including local elected officials. For example, the Land and Property Rights Tribunal has recently overruled the Canmore town council's refusal to adopt the Three Sisters Village Area Structure Plan, whose implementation is expected to double the Town's population.[6] Control of the membership of these tribunals gives provincial governments indirect control over land use management through the determination of appeals on such matters. There is no such tribunal in BC and it seems unlikely that the Province would create one, given the notorious cost and delay associated with such appeals in provinces like Ontario and the fact that the development industry in this province has never lobbied seriously for such a tribunal.

The land use management enabling legislation in our province does, however, provide numerous other tools that the provincial government could wield or rely on to play a greater provincial role in relation to its housing policy objectives. As was the case with Ontario's MZOs until recently, some of these tools have been rusting away in the provincial toolkit for many years, with the result that there is no case law confirming that they would constitute a proper exercise of provincial jurisdiction if used. However, case law from other provinces clearly supports provincial authority, and some of the tools described in this paper have been judicially considered in other provinces with results upholding provincial jurisdiction. Further, the Province may choose to create new statutory limits on the use of local government land use management powers in relation to its housing supply agenda. The balance of this paper describes eight existing tools that might suggest approaches that local governments can expect from the Province over the next few years.

https://urbantoronto.ca/news/2022/04/ministers-zoning-orders-support-east-harbour-and-four-more-transit-oriented.

[6] See https://calgaryherald.com/news/local-news/tribunal-rules-in-favour-of-three-sisters-resort-developments-in-canmore. The Town has obtained leave to appeal this decision to the Alberta Court of Appeal, further prolonging a nine-year legal battle.

A. Direct Provincial Exercise of Land Use Management Authority

It's useful to start with the basic point that the provincial government might choose for policy reasons to exercise its legislative powers directly in respect of land use management (under the "property and civil rights" and "matters of a merely local and private nature" heads of jurisdiction in ss. 92(13) and (16) of the *Constitution Act, 1867*). It already does so in relation to the University Endowment Lands west of the City of Vancouver boundary,[7] and (under the *Local Services Act*) in relation to certain rural areas.[8] Policy considerations have in the past led the Province to delegate these powers to local governments, but it's useful to recall that the creation of the Agricultural Land Reserve and the Islands Trust each stemmed from the Province's dissatisfaction with the consequences of local government exercise of delegated authority over land use management, in one case in relation to the protection of the Province's agricultural land base and in the other the preservation and protection of uniquely sensitive natural ecosystems and communities in the southern Gulf Islands. There's no reason to assume that our current housing crisis would not be triggering discussions at the provincial level on whether delegation to the local level of government of unfettered authority over residential land use management is any longer consistent with provincial policy objectives. One can imagine, for example, the creation of a "residential land reserve" consisting of areas in our larger cities that are within a stated distance of transit services, wherein provincial law would permit certain residential land uses (such as small apartment buildings) that the local government would not be allowed to prohibit in its zoning regulations, in the same way that the *Agricultural Land Commission Act* permits in the ALR certain agricultural land uses that local government cannot prohibit.

B. Positive Obligations to Exercise the Zoning Power

Another land use policy realm in which the provincial government has historically expressed a strong interest is riparian area protection. In regions with spawning habitat for migratory fish, the *Riparian Areas Protection Act* (originally the *Fish Protection Act*) requires municipalities and regional districts to exercise Part 14 powers – the sole exception to the otherwise entirely discretionary nature of these powers – and to exercise them with particular policy outcomes in view. This remote-control approach to land use management permitted the Province to avoid having ownership of (and direct political responsibility for) land use regulations that significantly affected owner's development options, in addition to avoiding the cost of developing and administering the regulations, which has turned out to be significant for local governments.

[7] See http://www.universityendowmentlands.gov.bc.ca/library/Land_Use_and_Building_Bylaw.pdf.
[8] See https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/262_70#section1.01.

Predictably, though, results for fish habitat protection have been uneven across the regions and, as assessed in third-party reports, local government compliance was initially rather poor.[9] The legislation does not establish any consequences for local governments that fail to protect riparian habitat to the specified standard. Given the high profile that the current provincial government has given housing supply issues, the urgency of the issue and the administrative and legal difficulties that the government encountered with its riparian area protection initiative, it seems unlikely that it would use a remote-control approach to facilitate housing supply improvements via the exercise of the local government zoning power.

C. Express Limits on the Exercise of the Zoning Power

The Province's inherent authority to delegate its legislative powers respecting land use management includes authority to prescribe limits on the exercise of the delegated powers. Numerous examples of this are sprinkled throughout provincial statutes. In Part 14 of the *Local Government Act* itself, the Legislature prohibits the use of the zoning power delegated in s. 479 to regulate farm businesses in farming areas, and enables a member of the provincial cabinet to determine where that prohibition applies. In the *Community Care and Assisted Living Act* the Legislature prohibits the use of the zoning power to restrict the use of single-family homes for small-scale child care services. In the *Utilities Commission Act* the Legislature provides that nothing done under the *Local Government Act*, which would include the enactment of a zoning bylaw, supersedes an authorization granted to a public utility under the UCA. The *Private Managed Forest Land Act* prohibits the adoption of a bylaw in respect of private managed forest land if doing so would have the effect of restricting, directly or indirectly, a forest management activity as defined in the Act. Many other examples could be given. Using this approach, the Legislature could easily amend our zoning enabling legislation, as legislatures have done in jurisdictions like New Zealand[10] and Oregon,[11] to restrict the use of the zoning power such that secondary suites, duplex dwellings, triplexes or small apartment buildings are permitted uses on all subdivided parcels of land. Our new Premier's policy position on housing could clearly be implemented in this fashion.

[9] See Striking a Balance: The Challenges of Using a Professional Reliance Model in Environmental Protection – British Columbia's Riparian Areas Regulation, Office of the Ombudsperson Public Report No. 50, 2014 (and the Ombudsperson's Systemic Investigation Update dated January 2022); The Uncertain Future of Fraser River Sockeye, Final Report of the Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, 2012 at pp. 289-290.

[10] See https://environment.govt.nz/assets/publications/Files/Medium-Density-Residential-Standards-A-guide-for-territorial-authorities-July-2022.pdf.

[11] See https://www.oregon.gov/lcd/UP/Documents/HB2001OverviewPublic.pdf.

D. Reliance on the *Interpretation Act*

One of the most significant limits on the exercise of local land use management powers is contained in a confusing section of the BC *Interpretation Act*:

> **14** (1) Unless it specifically provides otherwise, an enactment is binding on the government.
>
> (2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the Assessment Act, does not bind or affect the government.

The first subsection reverses the common law rule that enactments of the Legislature are not binding on the government itself. That rule had its origins in common law notions that it's unnecessary for legislation to apply to the Crown because the Crown can do no wrong; in legal jargon, there can be no 'mischief' for a law to address where the conduct of the Crown is concerned. Modern legislatures finding those common law notions obsolete have enacted provisions like s. 14 to indicate that the government will, in fact, follow its own rules, at least unless a rule specifically indicates that it doesn't bind the government. However, recognizing the consequences that approach might have for the government's ability to carry out governmental functions, given the broad statutory definition of "enactment" which includes local government bylaws, the second subsection establishes that the government isn't bound by any enactments in relation to the specified activities. A few observations on s. 14(2):

- In a couple of statutes (notably the *Heritage Conservation Act* and the *Agricultural Land Commission Act*) the Legislature has made the exception in subsection (2) inapplicable; in other words, these particular statutes do bind the government in its use and development of land.

- The fact that a local bylaw like a zoning bylaw doesn't bind or affect the government doesn't mean that the government won't choose to comply with the bylaw voluntarily, for example by applying for zoning amendments or obtaining development permits or building permits. The government sometimes prefers to be seen to be following the law, when the law isn't seriously obstructing a project that's in the provincial interest.

- Non-government entities that are carrying out activities described in subsection (2) on provincial Crown land are not sheltered from legislation if they are carrying the activities out for private purposes only. Non-government entities that are carrying out activities described in subsection (2) on behalf of or at the behest of the government may, however, be sheltered from otherwise applicable legislation.

In the land use management context, an interesting example of provincial reliance on s. 14(2) can be seen in recent amendments[12] to Part 3 of the *Transportation Act*, which added to the purposes of the BC Transportation Financing Authority the undertaking (not just the financing) of "transit-oriented development" defined to include all types of commercial, industrial, institutional, recreational and residential development in the vicinity of transit facilities. The BCTFA as an agent of the Crown is behind the s. 14(2) shield as regards local zoning restrictions.

Non-government entities partnering with the Province to provide affordable housing may be able to rely on the precedent in *Buechler v. Island Crisis Care Society*[13] to construct and operate housing projects without obtaining zoning amendments or development permits. There, the Society had an agreement with the Province to construct and operate temporary emergency housing on a site owned by the Provincial Rental Housing Corporation and was held to come within the scope of s. 14(2).

E. Override of Bylaws against the Public Interest of the Province

There is in s. 584 of the *Local Government Act* a literal override of a range of Part 14 bylaws that may be exercised by the Minister of Municipal Affairs if the Minister considers that all or part of the bylaw is "contrary to the public interest of British Columbia". Having formed that opinion, the Minister may require the bylaw to be altered within 90 days, presumably to conform to the provincial public interest in a manner specified by the Minister. If the local government doesn't comply, the Minister may (with Cabinet approval) order that the bylaw be altered, whereupon it is conclusively deemed to have been altered. Similar legislation exists in most other provinces. The author is not aware of this power having been exercised by the BC government over the past 30-odd years.

An example of the type of order that might be used, in relation to current residential zoning issues in our province, can be seen in recent MZOs from Ontario that provide a detailed body of land use regulations for the site that is the subject of the order, to apply in place of the regulations applicable under the general zoning bylaw.[14] Section 584 provides, in the BC context, the closest equivalent to an MZO under the *Ontario Planning Act*. There is no reason that our Minister of Municipal Affairs could not require a local zoning bylaw to be altered so as to provide, for a particular site or area, a detailed body of land use regulations that are different from those provided by the bylaw, in order to enable a development project that the Minister considers to be in the public interest of the province. (A bylaw doesn't have to have been adopted recently to be subject to a s. 584 order; it could be a zoning bylaw that has been in effect for many years.) In that regard, a reviewing court would be highly deferential to the judgment of the Minister as to whether a particular development project or group of projects in a particular area is in the provincial public interest such that it ought to proceed despite an

[12] https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/42nd-parliament/3rd-session/bills/third-reading/gov16-3.
[13] 2019 BCSC 1899 (B.C. Supreme Court).
[14] See, for example, Ontario Regulation 339/22 https://www.ontario.ca/laws/regulation/r22339. The order authorizes a 40,000 m^2 mixed-use development.

existing bylaw. Note that a zoning bylaw alteration that is accomplished by these means would not have to be consistent with the relevant official community plan, and would not require a public hearing.

F. Provincial Guidelines for OCPs and Zoning Bylaws

Another longstanding and unused provision in Part 14 of the *Local Government Act* (s. 582) enables the Minister of Municipal affairs to issue "policy guidelines" regarding both the content and the process for adopting official community plans. Section 473(4) of the Act requires municipalities and regional districts to "consider" any such guidelines when developing an OCP. Further, the Minister may under s. 582 issue policy guidelines regarding both the content and the process of developing and adopting regional district zoning and subdivision servicing bylaws; this authority does not extend to municipal bylaws. There is no counterpart to s. 473(4) making such guidelines binding on regional districts, though under s. 585 the Minister has separate authority to make a regulation imposing a ministerial approval requirement for regional district Part 14 bylaws, which could be used to police compliance with such guidelines. The Minister may only exercise authority to establish guidelines under s. 582 after consulting with UBCM representatives.

The *Local Government Act* currently requires an OCP to include statements and map designations respecting the "approximate location, amount, type and density of residential development required to meet anticipated housing needs over a period of at least 5 years" as well as "policies of the local government respecting affordable housing, rental housing and special needs housing". Guidelines issued under s. 582 could, as an example, add much more detail to these existing requirements, referencing the contents of the local government's current housing needs report and requiring land use policies that would actually accommodate affordable, rental and special needs housing demand documented in the report without the necessity for site-by-site zoning amendments.

The relatively soft language of s. 473(4) requiring only that councils and boards "consider" provincial guidelines for OCPs suggests that these provisions were never intended to enable the provincial government to implement specific priorities, for example in relation to housing supply, by dictating the content of OCPs. By contrast, under s. 3 of the Ontario *Planning Act* local decisions affecting planning matters "shall be consistent with" provincial policy statements issued under that section.[15] This suggests that our provincial government would be unlikely to rely on existing s. 582 authority to override local government legislative discretion in relation to land use management matters.

[15] See https://files.ontario.ca/mmah-provincial-policy-statement-2020-accessible-final-en-2020-02-14.pdf.

G. Imposing Provincial Bylaw Approval Requirements

Provincial overrides of local government legislative authority that are perhaps most familiar to BC local governments are those that take the form of approval requirements for local bylaws. In the land use management context, the most familiar of these are development cost charge (DCC) bylaw approvals by the Inspector of Municipalities. By issuing detailed guidance in the form of the DCC "best practices" guide, the provincial government is able to use the approval requirement to ensure that all such bylaws in the province adhere to the letter of Division 19 of Part 14 of the LGA as well as provincial policies that aren't necessarily based in the legislation. Ministerial approvals are also required for zoning bylaws of the "right to farm" municipalities (Kelowna, Abbotsford, Langley Township and Delta). Approval of the Minister of Transportation and Infrastructure is required for zoning bylaws affecting land near controlled access highway intersections.

While a provincial refusal to approve a local government bylaw can properly be seen as a certain kind of override of the local government's exercise of authority to adopt the bylaw, the problem that provincial officials have lately been identifying is local government *failure to adopt* (or to adopt in a timely way) bylaw amendments that would enable increases in housing supply. Provincial bylaw approval requirements cannot address situations where no bylaws are being adopted. In any case, provincial approval requirements would inevitably add time to the bylaw enactment process, and might therefore be counter-productive in relation to housing projects requiring bylaw amendments.

H. Designating and Facilitating Provincially Significant Projects

Twenty years ago the provincial government was more interested in facilitating large resource-based development projects in the BC interior than facilitating growth of the housing supply in urban areas. In 2003 it enacted the *Significant Projects Streamlining Act*, which, as its name suggests, was intended to permit the government to "cut red tape" that was obstructing the approval of resource projects. Essentially, the Act permits a member of the provincial Cabinet to make binding orders in respect of such projects as the Cabinet has determined to be of provincial significance. The effect of such an order is to require authorities having jurisdiction over the project at every level of government (other than, of course, the federal level) to take all reasonable steps to make decisions expeditiously and to facilitate the expeditious completion and operation of the project. The Cabinet may alternatively authorize one of its members to craft a new regulatory regime for the project to replace any and all existing regimes, such as the provincial environmental assessment process, the agricultural land reserve exclusion process and local government OCP and zoning bylaw amendment and subdivision approval processes. In this respect the legislation authorizes an override of any provincial or local regulations that apply to the project. The new regulatory regime could (to pose an extreme example) take the form of a simple letter from the Minister's office approving the project.

While it would technically be possible for the Cabinet to designate a housing project in a municipality or even a rural area to be of provincial significance, such a designation being subject only to a legal test of reasonableness, it seems unlikely that the Province would rely on this legislation to override local government zoning regulations to facilitate individual private sector housing projects. The legislation does, however, in authorizing a provincial minister to prescribe a replacement set of regulations for a provincially-favoured project, resemble the MZO provisions of the Ontario *Planning Act*, and thereby suggest another legislative tool that the Province could create to advance its housing supply agenda. In an era in which governments are as concerned with being seen to be responding to a problem as with actually responding to it, one should anticipate the enactment of fresh enabling legislation rather than reliance on an existing tool.

III. CONCLUSIONS: WHAT'S AHEAD?

While several of the tools described in this paper could potentially be used to override local bylaws in relation to the provincial government's housing supply agenda, there has been a tendency for the government to create new tools to address issues to which it has decided to give priority. Introducing a Bill in the Legislative Assembly tends to create media attention, enabling the government to demonstrate to the public that it's taking action on the issues. By contrast, relying on existing tools may attract little attention from the media, and could even lead to awkward questions as to why those existing tools weren't used long ago to address the issues.

It's been noted above that Ontario municipalities have recently taken to requesting their Minister of Municipal Affairs to issue MZOs to authorize favoured projects that are being obstructed by time-consuming local approval and appeal processes. Obtaining an MZO enables the municipal council to avoid making a local decision that may antagonize residents who oppose a project that the council favours. In this province, it has been suggested in relation to the affordable housing shortage that local governments might appreciate the provision by the Province of 'political cover' enabling needed housing projects to go ahead despite neighbourhood opposition that local elected officials cannot politically afford to discount or ignore.[16] Some of the tools described in this paper could certainly provide such political cover. In any event, whether or not local elected officials welcome it, overriding local land use management regimes is clearly within the Province's authority, and there are numerous existing and potential tools available to the Province to get it done.

[16] In its August 2020 interim report, *What We Heard*, the Canada/British Columbia Expert Panel on the Future of Housing Supply and Affordability said this: "Leadership also plays a key role in governance. This leadership takes two forms including the leadership required to make contentious political decisions and the ability for one government to provide 'political cover' to another for unpopular decisions that are for the good of the community." In the context, it was clear who would be covering whom.

NOTES

NOTES