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SERVICING CAPACITY CONSTRAINTS: THE AVAILABLE TOOLS

NOVEMBER 20, 2026

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SERVICING CAPACITY CONSTRAINTS: THE AVAILABLE TOOLS

I. INTRODUCTION

Many municipalities in British Columbia have been challenged with rapidly growing communities and seemingly never-ending applications for rezoning and development. The passage of Bill 44 by the Province in 2023, requiring municipalities to amend their zoning bylaws to permit higher density housing within traditionally single-family residential neighbourhoods, exacerbated these challenges. As municipalities tried to point out to the Province when Bill 44 was being considered, zoning is only part of the story – for the density of development permitted under a municipality's zoning bylaws to be realized, there must be available capacity in required municipal services, especially water and sewer, to support the new development. Unfortunately, municipalities have historically rarely designed and installed municipal services to a capacity that contemplated today's levels of high-density development.

Municipalities are well aware of the capacity limitations of their services infrastructure and, for planning purposes, many municipal engineers will "allocate" capacity to development on the basis of development rights available under existing zoning, considering that allocated capacity to be "encumbered" and unavailable in the context of new development applications. The effect of allocating and encumbering capacity based on existing development rights can mean that a great deal of the unused capacity in municipal services is "tied up" in theoretical development. As everyone knows, not every development comes to fruition; notwithstanding having significant development rights, some properties will remain undeveloped for years.

Quite often, the inescapable result of the planning exercise of allocating and encumbering capacity in municipal services based on existing development rights is delays in the processing and approval of new development applications. Resolving a lack of capacity in municipal services to facilitate new development is often significantly constrained by the time and cost associated with required service capacity upgrades and expansions. Municipalities can attempt to offset these challenges by requiring developers to contribute towards the costs of these upgrades and expansion, but the simple fact is that those costs generally cannot be borne by a single developer. Usually, they will require a consortium of developers or significant contributions from the municipality. Of course, very few municipal councils are delighted by the prospect of raising property taxes, and so the problem persists and compounds. Often times, service capacity issues ultimately hinder the achievement of municipal objectives, such as the construction of affordable housing.

The foregoing being said, this planning practice is seen as prudent to avoid disputes and potential legal proceedings; property owners and developers who have had long-standing development rights generally don't take kindly to being told that, despite having had those long-standing development rights, they cannot develop because recently approved development has used up existing capacity.

For municipal water services, the capacity challenges aren't limited to the impact of today's levels of high-density development. The issue is not as simple as ensuring that the taps in a new development will turn on without negatively impacting existing users. Local governments must also ensure that there are sufficient water flows to support effective firefighting capabilities in newly developed areas. Minimum fire flows are significantly higher than typical service capacity requirements, both as a result of multi-dwelling buildings being permitted in historically single-family residential areas under municipal zoning bylaws (as required by Bill 44) and as a result of the BC Building Code now allowing six-storey wood-framed residential and business buildings up to 18 metres in height.

II. A CASE STUDY: *CSB HOLDINGS LTD. v. TOFINO*

A. The Issues

Capilano Suspension Bridge Holdings Ltd. v. The District of Tofino and Nicholas Henderson, Building Inspector, 2026 BCSC 2014, provides a case study for circumstances where a municipality is faced with significant constraints in the capacity of its municipal water service and, as a result, refuses an application from a developer to connect their proposed development to the water service despite the developer having had its development rights in place for decades.

In this case, Capilano Suspension Bridge Holdings Ltd. ("CSB") sought a court order overturning the District of Tofino's ("Tofino") refusal to grant a water service connection for CSB's proposed resort development (including a hotel, restaurant, spa, and employee housing) to be located in the heart of Tofino.

CSB argued that Tofino did not have the authority under its service powers to refuse a water connection for CSB's proposed development where that development was compliant with Tofino's zoning bylaw. CSB's position was that the denial of a water connection was tantamount to Tofino prohibiting CSB's use of its lands, which CSB said could only be effected through the exercise of its zoning powers. From CSB's perspective, as its proposed development was wholly compliant with the zoning applicable to the lands in question, it was entitled to develop its lands.

CSB further argued, in the alternative, that Tofino's decision to refuse the water connection was unreasonable in the circumstances. One can understand why CSB, having obtained development permits and proposed a development that clearly complied with how Tofino intended the land be used via its zoning, was perturbed to have their development scuttled at the building permit stage on the basis of a refused water service connection.

B. The Facts

The facts that led to the Court's ultimate decision to dismiss CSB's petition were as follows.

Tofino operates a "flow-through" water supply system, which offers little in terms of reservoir or aquifer based water storage, and instead relies on water that is actively passing through the water source – in this case, five creeks near Tofino. In other words, Tofino's ability to provide water to the users of its water system is restricted by the supply of water feeding into the system at any given time. While Tofino is located in one of the wettest regions in the province, significant periods without rainfall can seriously detract from the water system's ability to meet user needs.

Historically, water shortages in Tofino have been common, but they were typically resolved by intense periods of rainfall before serious conservation measures were required. The summer of 2006 demonstrated that the rain would not always come in time to avert a crisis.

Rainfall in Tofino was low throughout that summer of 2006, and by August of 2006, Tofino was forced to declare a local state of emergency and close or restrict many businesses due to critical water supply concerns. Hotels cancelled reservations, weddings were called off, food services were closed, and Tofino was forced to truck in water from the District of Ucluelet to stave off harsher restrictions. Even then, Tofino was only able to provide about half of the normal volume of water required to meet user needs. Unsurprisingly, the need to declare a local state of emergency was exacerbated by a significantly higher number of users of the water system because of Tofino's characteristic summer tourism boom.

Tofino was in the process of upgrading its water supply system's capacity at the time of the emergency, so steps were already being taken to mitigate the risk of future water shortages, but Tofino's Council also decided to update its bylaws to expand the tools available to Tofino for managing water consumption. Those tools included the Water Utility Bylaw No. 1213, 2015 (the "Water Utility Bylaw"), which provided that staff could "limit the number, size, and capacity" of connections to the water system to prevent adverse effects on other water users, and the Water Use and Conservation Bylaw No. 1224, 2016 (the "2016 Water Conservation Bylaw"), which introduced four stages of water restrictions. Tofino also commissioned studies of its water supply system in the following years, analyzing water supply, flow and water modelling, conservation strategies, and infrastructure to identify risks and priorities for the water system.

In January 2021 and May 2023, CSB applied for and was issued development permits in relation to its proposed development. Tofino's staff was satisfied that the proposed development met the requirements for the development permit areas applicable to the lands, which as mentioned earlier were zoned for the proposed use. Notably, the applicable development permit areas dealt with commercial revitalization and natural and ecological protections, but did not directly deal with service capacity concerns. The development permit application did include a water modelling report that considered whether Tofino's water system was capable

of supporting the proposed development, but expressly noted that a detailed review of Tofino's water supply capacity was not conducted.

In the summer of 2023, Tofino experienced another severe water shortage, which led Tofino to implement stage three water restrictions. All outdoor water use was prohibited, many public washroom facilities were closed, and even the rinsing of wetsuits was restricted to "sanitation purposes." Ultimately, the water shortage was resolved by heavy rainfall, but the summer of 2023 was a reminder of Tofino's water scarcity issues during prolonged periods of dry weather.

In December 2023, just a few months after the 2023 water shortage, CSB applied to Tofino for building permits to construct a 46-suite hotel and lodge building, a restaurant, a spa, and employee housing.

In February 2024, Tofino introduced the District of Tofino Water Master Plan (the "Water Master Plan"), which incorporated the results of the studies of Tofino's water system that had previously been commissioned, and provided a 20-year plan to manage development, water conservation, and emergency water management in light of the available water supply. Among other things, the Water Master Plan projected Tofino's Average Day Demand ("ADD") and Maximum Day Demand ("MDD") for cubic metres of water, based on differing levels of development in the future and accounting for extreme summer weather conditions. It also projected the available water supply via Tofino's flow through system.

The purpose of the Water Master Plan was to inform Tofino's development planning in light of the limited capacity of Tofino's water system, and to allow Tofino's staff to determine whether a given proposed development would place an unacceptable strain on the water system. Municipalities with larger reservoirs can afford to permit development based on ADD calculations, because a system with large reservoirs of water is more resilient to dry spells of weather. The Water Master Plan noted that a flow through system such as Tofino's with a water supply lower than MDD "risks drawing down potable water reservoirs during extended dry periods". The Water Master Plan further noted that Tofino's MDD already exceeded its raw water supply and recommended obtaining additional supplementary water sources. The implication of this was that Tofino staff were cognizant that risks were associated with approving developments that would bring Tofino's MDD further in excess of the raw water supply.

In assessing the building permit application, Tofino's building inspector referred the application to Tofino's Director of Infrastructure and Public Works (the "Director"), who considered section 4.5 of the 2015 Water Utility Bylaw. The Director denied a water connection for CSB's proposed development due to the risk of adverse effects to other users posed by the fact that approval of a connection for the proposed development would result in a 14% increase in Tofino's MDD deficit.

In light of the Director's denial of a water connection for CSB's proposed development under section 4.5 of the Water Utility Bylaw, Tofino's building inspector deferred consideration of CSB's building permit applications pending CSB obtaining approval for an alternate water system for its proposed development.

C. The Court's Decision

1. Section 8(7)(c) of the *Community Charter*

In the petition, CSB accepted that Tofino had included in the Water Utility Bylaw the authority of the Director to deny a connection to Tofino's water system but asserted that authority could not be exercised in relation to CSB's application for a connection as a result of section 8(7)(c) of the *Community Charter*.

Section 8(7)(c) of the *Community Charter* provides that the powers under subsections (3) to (6) to regulate, prohibit and impose requirements, as applicable, in relation to a matter … may not be used to do anything that a council is specifically authorized to do under Part 14 [*Planning and Land Use Management*] or Part 15 [*Heritage Conservation*] of the *Local Government Act*.

CSB argued that:

- The regulation of the use of land is specifically authorized under section 479 of the *Local Government Act* (which is found in Part 14 of the Act);
- The denial by the Director of a connection for CSB's proposed development to Tofino's water system had the effect of prohibiting the use of CSB's lands for the proposed development; and
- Section 8(7)(c) of the *Community Charter* provided that the prohibition of the use of CSB's lands for the proposed development could only be effected by an amendment to Tofino's zoning bylaw under section 479 of the *Local Government Act* and not through the exercise of the broad power to regulate in relation to services under section 8(3)(a) of the *Community Charter*.

Ultimately, the Court rejected CSB's argument in this regard and held that section 4.5 of the Water Utility Bylaw was lawful and could be relied upon by the Director in denying CSB's application for a connection to Tofino's water system even if it had the effect of preventing CSB from proceeding with its proposed development.

2. The Language of the Water Utility Bylaw

In the alternative, CSB asserted that the specific language of the section 4.5 of the Water Utility Bylaw did not authorize the Director to deny CSB's application for a connection to Tofino's water system.

Section 4.5(a) of the Water Utility Bylaw provided that the Director could "for the purposes of protecting the District Water System and preventing adverse effects on other users … limit the number, size, and capacity of connections to the District Water System". However, in other subsections, the bylaw expressly stated that the Director could "refuse water Service main service extension or Service enlargements", as well as "refuse to provide Service where the District Water System is not effectively protected from any actual or potential Cross Connection".

Based on the language of section 4.5(a) of the Water Utility Bylaw, CSB argued that the bylaw only permitted the Director to "refuse" an application to extend a water main or enlarge a service connection associated with Tofino's water system, or where there was a risk of a cross connection. For water connections, CSB argued that the Director could only "limit" the number, size, and capacity of connections to prevent adverse effects on other users; the Director could not outright refuse a connection to the water system.

The Court rejected CSB's argument, being satisfied that section 4.5(a) of the Water Utility Bylaw makes clear that the Director had the authority to limit the size and capacity of the water service connection sought by CSB. The Court went on to say that, in refusing a water service connection to CSB to supply 101 m^3 MDD water for the proposed development, the Director was limiting the connection available to the CSB Land; the Director did not consider a connection of the size and capacity sought by CSB to be appropriate given his concern that it would have an adverse impact on the other users of Tofino's water system. The Court went on to find that the Director's denial of the connection sought by CSB did not preclude the Director from approving a connection having a lesser size and capacity, nor did it preclude CSB from finding an alternative water source.

3. The Reasonableness of the Director's Decision

In the further alternative, CSB argued that the Director's decision to deny CSB a connection to Tofino's water system on the basis of MDD was unreasonable in light of a policy that had subsequently been adopted by Tofino's Council wherein the Council had indicated that, in its view, there were 300 m^3 ADD of available water capacity in the water system and had indicated that available capacity should be allocated on the basis of 150 m^3 ADD to residential development and 150 m^3 ADD to development by First Nations. CSB argued that the Council's policy was clear evidence that ADD was the proper measure for available capacity in the water system, there was 300 m^3 ADD of water capacity available – which was in excess of the capacity required for CSB's proposed development, and Tofino could not by a policy effect a land use decision, preferring residential development or development by First Nations over commercial development such as CSB's proposed development.

Ultimately, the Court agreed with Tofino and upheld the Director's decision to deny CSB a connection to Tofino's water system for CSB's proposed development on the basis that the system was over-subscribed on the basis of MDD and permitting additional MDD would have an adverse impact on existing users. The Court concluded that there was no evidence that the

Director had blindly followed the policy of Tofino's Council that residential development be preferred over commercial development when considering the allocation of ADD capacity in the water system or that the Director denied the CSB's application for a connection on the basis that its proposed development was commercial in nature.

III. THE AVAILABLE TOOLS FOR ADDRESSING SERVICING CAPACITY CONSTRAINTS

A. Evidencing Servicing Capacity Constraints

As can be seen from *Capilano Suspension Bridge Holdings Ltd.*, any decision by a municipality to deny a landowner access to municipal services for a proposed development that is permitted under existing development rights (e.g., zoning) on the basis of servicing capacity constraints is likely to result in legal proceedings. This is so because such a denial may very well require the proposed development to be downsized significantly or may prevent the proposed development from proceeding at all. Regardless of which results, there may be significant financial implications for the landowner. In addition, in many circumstances where zoning has been in place for years, but development rights have not yet been used, the landowner will have been paying property value taxes on the basis of the highest and best use of the lands (i.e., on the development potential of the lands and not on the basis of their actual use) and may even have been paying parcel taxes in relation to the municipal services that are now being denied, where those parcel taxes were calculated on the basis of the development potential of the lands (e.g., as was the case in *O'Flanagan v. Rossland (City)*, 2009 BCCA 182).

Needless to say, in circumstances as described above, the landowner may very well believe that they have an entitlement to their proposed development being connected to municipal services. Moreover, the courts may conclude that it is unreasonable for the municipality to deny access to municipal services in such circumstances.

In this regard, what *Capilano Suspension Bridge Holdings Ltd.* teaches us is that, to be in a position to effectively address capacity constraints in municipal services, a municipality should have a clear and documented understanding of those constraints. The municipality should have sufficiently investigated the available capacity of its municipal services and be in a position to accurately assess the impact of approving access for a proposed development to those services. Often times, this investigation will require having third-party consultants prepare models for existing municipal services that can be run to determine the impact of proposed development on the existing users of the services. When having these models prepared, it will be critical that the third-party consultants have a clear understanding of existing development connected to the municipal services, development that is actually under construction and will be connecting to the services, and development that is approved for construction and connection to the services. In addition, for planning purposes, municipalities may direct their third-party consultants to include an allocation of capacity to development on the basis of development rights available under existing zoning, considering that allocated capacity to be encumbered and unavailable in the context of applications for new development rights (i.e., rezoning applications).

B. Servicing Capacity Constraints and Building Permit Issuance

Service capacity constraints in municipal services generally do not pose an issue once a proposed development has reached the stage of building permit applications. However, as *Capilano Suspension Bridge Holdings Ltd.* demonstrates, that is not always the case. A building inspector may receive a building permit application for construction in relation to a use that has an extraordinary or otherwise significant demand for water. For example, a parcel that has been zoned for apartment use for years, may now be ripe for development for 100 equivalent residential dwelling units.

Where a municipality has evidenced servicing capacity constraints in circumstances where existing development rights could be exercised solely through the making of a building permit application, the municipality should ensure that it has put into place the appropriate regulatory scheme to afford its building department the authority to deny a building permit on the basis of lack of servicing capacity. In this regard, the regulatory scheme should include the following:

- The municipality's building bylaw should expressly require as part of the building permit application proof of an approved application to connect the proposed construction to all required municipal services; and

- The regulatory bylaws in relation to the municipal services should expressly provide for the refusal of an application for a connection to the services where the services do not have sufficient available capacity (e.g., quantity, flow, or pressure) to serve the proposed development.

Capilano Suspension Bridge Holdings Ltd. makes clear what we always believed, a municipality's regulatory powers under section 8(3)(a) of the *Community Charter* in relation to municipal services includes the power to refuse a service connection for lack of available capacity. What we learned from the arguments made by CSB in the case is that the language in municipal bylaws authorizing an application for a connection for services to be refused should be clear and unequivocal; the language should expressly provide for the "refusal" or "denial" of the connection.

C. Servicing Capacity Constraints and Subdivision Approval

When a municipality has evidenced servicing capacity constraints in circumstances where existing development rights could be exercised solely through the making of a subdivision application, the municipality should ensure that the municipal approving officer is aware of those servicing constraints so that they can be factored by them into their decision as to whether to approve the subdivision.

Sections 86(1)(c)(viii) and 85(3) of the *Land Title Act* respectively confer on the municipal approving officer the authority to refuse a subdivision where:

- The cost to the municipality of providing public utilities or other works or services would be excessive; and
- The approving officer considers that the subdivision is against the public interest.

Notably, the authority of the municipal approving officer to refuse a subdivision under either of these sections is exercisable even though the proposed subdivision otherwise complies with the municipality's bylaws regulating the subdivision of land and zoning.

Municipal approving officers will generally refer subdivision applications to the municipality's engineering or operations department for comment in relation to servicing issues. Municipalities should ensure that any servicing capacity constraints affecting the proposed subdivision are clearly communicated to the approving officer as part of this referral process, with a recommendation that the subdivision either be refused or that it be approved subject to a covenant being registered against the lots to be created by the subdivision restricting their use until such time as the servicing capacity constraints have been addressed and the lots can be connected to municipal services.

In addition, as part of their broad public interest jurisdiction, municipal approving officers are entitled to take into account municipal policies as an expression of the public interest. Where a municipality has evidenced servicing capacity constraints for municipal services, it is advisable that the municipality's council consider the adoption of a policy resolution to the effect that, as a result of servicing capacity constraints, the council does not believe it to be in the public interest for the municipal approving officer to approve further subdivision or, if a subdivision is to be approved, it be approved subject to a covenant being registered against the lots to be created by the subdivision restricting their use until such time as the servicing capacity constraints have been addressed and the lots can be connected to municipal services. While such a policy resolution from the council would not be binding on the approving officer, it would certainly be persuasive on the issue.

D. Servicing Capacity Constraints and Zoning Approval

Notwithstanding the decision of the Court in *Capilano Suspension Bridge Holdings Ltd.* that a municipality may, even where a proposed development is fully compliant with the applicable zoning bylaw, refuse an application to connect the development to municipal services when faced with servicing capacity constraints, that case demonstrates the legal issues that can arise when that is done. As mentioned earlier, the significant financial ramifications that a landowner may experience where that occurs can easily justify the landowner resorting to the courts to be able to proceed with their development. Even where the municipality is successful in defending the legal proceedings, the legal costs and administrative time can be significant and can be an unnecessary distraction from municipal priorities.

Where a municipality has evidenced servicing capacity constraints in circumstances where existing development rights can readily be exercised through a building permit or subdivision application, the municipality may be well served by considering whether to rezone properties having unrealized development rights to maintain the status quo pending the resolution of the servicing capacity constraints. There is little question that a municipal council may use its zoning powers to restrict the use of land to those uses for which the municipality has available municipal services. In this regard, we note that the municipal council could do so on its own initiative. Notably, in *Capilano Suspension Bridge Holdings Ltd.*, CSB accepted that Tofino had the authority to rezone CSB's lands to take away its ability to proceed with its proposed development. In fact, CSB argued that is exactly what Tofino's Council should have done.

Where a municipal council is concerned that a particular development proposal may be brought forward on the basis of existing development rights, and that development would be subject to servicing capacity constraints, the municipality could avail itself of section 463 of the *Local Government Act*. Section 463 provides as follows:

> 463(1) A local government may direct that a building permit be withheld for a period of 30 days, beginning on the day the application for the permit was made, if it passes a resolution identifying what it considers to be a conflict between a development proposed in the application for a building permit and
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> (a) an official community plan that is under preparation, or
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> (b) a bylaw, under any of the following, that is under preparation:
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> (i) Division 5 [*Zoning Bylaws*] ….
>
> (2) Subsection (1) does not apply unless a local government has, by resolution at least 7 days before the application for a building permit, begun the preparation of a plan or bylaw that is in conflict with the application.
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> (3) During the 30 day period referred to in subsection (1), the local government must consider the application for the permit and may
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> (i) direct the permit be withheld for a further 60 days, or
>
> (ii) grant the permit, but impose conditions in it that would be in the public interest, having regard to the plan or bylaw that is under preparation.
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> (4) If the local government does not adopt a plan or bylaw referred to in subsection (1) within the 60 day period, the owners of the land for which a building permit was withheld under this section are entitled to compensation for damages arising from the withholding of the building permit.

> (5) For the purposes of subsection (4),
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> …
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> (b) Division 4 [*Expropriation and Compensation*] of Part 3 [*Additional Powers and Limits on Powers*] of the *Community Charter* applies in relation to a municipality.
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> (6) In relation to land that is subject to a resolution under subsection (1), the council may direct that a business licence in respect of the same land be withheld for a period not longer than 90 days, if the council considers that the use to which the land would be put and to which the business licence application relates would be contrary to the use that would be permitted by the bylaw that is under preparation.
>
> (7) Any requirement to approve a permit or licence under this section is subject to section 557 [*Environmental Management Act requirements*].

As can be seen from its language, section 463 of the *Local Government Act* is a significant tool available to a municipal council to preclude further development where that development would be inconsistent with a zoning amendment bylaw under preparation.

If a municipal council were to pass a resolution (the "Resolution") directing that a zoning bylaw amendment be prepared (the "Bylaw Under Preparation") to rezone lands and remove development rights to manage the municipality's limited municipal services, the council could direct that any building permit application received on the eighth day after the Resolution was passed be brought to the council for consideration of whether the application was inconsistent with the Bylaw Under Preparation. If the council were to determine that the application was inconsistent with the Bylaw Under Preparation, the council could direct that the building permit be withheld for a period of 30 days from the date of the application. The council could thereafter, but within that 30-day period, direct that the building permit be withheld for a further period of 60 days. In addition, the council could direct that a business licence be withheld for a period of 90 days from the date of the application. By doing so, the council will have afforded itself a minimum 90 days to consider the adoption of the Bylaw Under Preparation before having to issue a building permit and/or business licence for a use that is inconsistent with the Bylaw Under Preparation.

In the event that the municipal council ultimately adopts the Bylaw Under Preparation, the municipality would be in a position to deny the application for the building permit and/or business licence. However, should council not adopt the Bylaw Under Preparation in the 90 days, the municipality would be required to issue the building permit and/or business licence. In addition, to the extent that the council had availed itself of the further 60 days to withhold the building permit, the municipality would be liable to the applicant for any damages they suffered relating to the withholding of the building permit.

Ultimately, when it comes to rezoning properties having unrealized development rights to maintain the status quo pending the resolution of the servicing capacity constraints, the race is to the swift. Section 463 of the *Local Government Act* provides the municipality with a statutory advantage in that race.

Finally, with respect to zoning approval, although it likely goes without saying, a municipal council has the authority in the context of an application to rezone land to refuse the application where the council is of the view that municipal services have insufficient capacity to serve the uses that would be permitted if the application were approved.

Where a municipality has evidenced servicing capacity constraints, the municipal council should refuse applications to rezone land for a use that cannot be adequately served by the municipal services. Alternatively, the council could approve the rezoning subject to a covenant being registered against the rezoned lands restricting their use until such time as the servicing capacity constraints have been addressed and the lands can be adequately serviced by municipal services.

IV. CONCLUSION

In conclusion, municipalities are best served addressing servicing capacity constraints using their zoning powers, limiting development rights to only those that can reasonably be served by existing municipal services. It would be prudent for municipalities to consider whether development rights under existing zoning exceed existing servicing capacity. Knowing the answer to that question is both instructive when considering whether to approve new rezoning applications affording increased development rights requiring municipal services and when considering whether to unilaterally rezone lands to remove existing development rights to maintain the status quo.

Alternatively, it is essential that regulatory bylaws for municipal services provide express authority for applications for connection to municipal services to be denied where there are servicing capacity constraints in relation to those services.

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