CASCADIA LAW INITIATIVE

Comparison of British Columbia and Washington State City Powers
Cascadia Urban Analytics Cooperative (CUAC)

2020

Peter A. Allard School of Law
University of British Columbia

Professor Margot Young
Justin Choi
Kate Gotziaman

University of Washington School of Law

Professor Hugh Spitzer
Greyson Blue
Dylan Olson

CHAPTER I: INTRODUCTION AND OVERVIEW 3
I. Overview 3
II. Introduction to this Project 4
III. Cities in the Cascadia Innovation Corridor 6
IV. This Memo 6
V. Focus Topics 8
VI. Chapter Structure 10
CHAPTER II: CITY POWERS IN BRITISH COLUMBIA 12
I. General Structure of Local Government Power in British Columbia 12
II. Defining Municipalities 13
III. Municipalities in Canadian Federalism 14
III. Sources of Local Governments' Power in British Columbia 18
IV. Tools Available to Municipalities in British Columbia 24
V. Business Regulation 37
VI. Acquiring Financial Resources 38
VII. Application of Tools by Topic 44
CHAPTER III: CITY POWERS IN WASHINGTON STATE 53
I. General Structure of Local Government Power in Washington State 53
II. Sources of Local Governments' Power in Washington State 55
III. Tools Available to Cities in Washington 59
IV. Resources 64
V. Application of Tools by Topic 67
CHAPTER IV: COMPARING MUNICIPAL POWERS IN B.C. AND WASHINGTON STATE 86
(Plus a Cross-border Excursion in an Autonomous Vehicle Lane) 86
I. Federalism in Canada and the United States 86
II. Provincial Power in Canada versus State Power in the United States 89
III. Sources of Local Government Power in Canada versus the United States 90
V. Designing, Building and Operating a Cross-Border Autonomous Vehicle Lane 96
AV Lane: A Complexity of Jurisdictions and Laws 104

CHAPTER I: INTRODUCTION AND OVERVIEW

I. Overview

This paper is the product of a cooperative venture of faculty and students from the University of British Columbia Peter A. Allard School of Law and the University of Washington School of Law. The paper compares basic legal powers available to cities in British Columbia and Washington State. The respective powers of municipalities in each jurisdiction are key to these urban communities' abilities to effectively address problems common across the border—particularly those related to transportation, housing, and the opioid crisis.

More broadly, this project is part of the Cascadia Urban Analytics Cooperative (CUAC), an "applied, interdisciplinary, regional venture that brings together academic researchers, students, and public stakeholder groups" to address issues affecting residents of the Cascadia region.[1] A joint initiative between Microsoft, the University of Washington, and the University of British Columbia, CUAC seeks to use data science to inform and fuel social objectives in urban contexts. CUAC projects cover a broad range of topics but CUAC specifically endeavors to address issues related to "equitable transportation, housing stability, population health and responsible data science" throughout Cascadia.[2]

For purposes of this project, "Cascadia" references that area of the Pacific Northwest that includes southwest mainland British Columbia, western Washington and northwest Oregon. The region takes its name from the Cascades mountain range that spans the border. On the American side lie the cities of Seattle and Bellevue, Washington and Portland, Oregon. North of the border is Greater Vancouver, British Columbia. These urban centres, and their universities, anchor the

[1] Cascadia Urban Analytics Cooperative, HTTP://CASCADIADATA.ORG .
[2] Cascadia Urban Analytics Cooperative.

project. While CUAC ultimately aims to increase collaboration throughout Cascadia, its initial scope is more narrowly focused on developing a 'Cascadia Innovation Corridor'. The Cascadia Innovation Corridor initiative mainly addresses the connections between Vancouver and Seattle but also includes nearby cities.

Cascadian cities are well known for skilled workforces, educated populations, and progressive public policies. Partly for this reason, a variety of multinational, sector-leading companies are based in the region. Microsoft, a key partner in CUAC, is the most prominent of these, but others include Amazon and Boeing. This blend of common characteristics fosters an atmosphere that encourages collaborative innovation.

In sum, a central objective underlying CUAC is to increase the level of integration among these Cascadian cities. By harnessing insight from the innovative use of data science, Cascadian cities can look to other cities within the region to examine strengths, weaknesses, and opportunities for growth and development. It is CUAC's goal to foster collaboration and develop partnerships among stakeholders throughout the Cascadia region, and, importantly, across the border.

II. Introduction to this Project

Creating effective binational, multi-city data science partnerships requires an understanding of the legal frameworks in which these partnerships operate and the legal structures that both limit and open up policy possibilities. The Cascadia Law Initiative (CLI) thus has the specific goal of setting out the legal background information necessary for effective collaboration on urban analytics projects throughout the Cascadia Innovation Corridor.

Indeed, as a joint effort between law faculty and students at the University of Washington (UW) and the University of British Columbia (UBC), the CLI models well the exciting opportunities offered by cross-border collaboration. This project brings together different

knowledge sets and legal perspectives on urban policy initiatives, in the process strengthening connections between the two law schools. It has, in fact, been effective in modeling a Cascadian legal scholarship community, one that we anticipate would pay dividends on future concrete policy studies.

The primary goal of CLI is to map the municipal legal landscapes of cities in the two metro areas (and by implication, Portland as well), identifying potential legal barriers to, and legal tools available for, cross-city initiatives arising out of urban analytics research collaboration. Effective cross-border cooperation requires clear understanding of similarities and differences in legal jurisdiction and corresponding municipal policy opportunities. The United States and Canada are both complex federal states, and placing municipal policies and legal systems in context is critical to grasping what is and isn't possible at the level of local government initiatives.

Senior law students from UW and UBC set out on this task by assessing relevant municipal law differences between classes of cities, focusing on four specific cities in the Cascadia Innovation Corridor: Vancouver, Surrey, Seattle, and Bellevue. The students used this research to write a practical guide to the differences and similarities between the legal frameworks governing these jurisdictions, with particular reference to the municipal power needed to take action on homelessness, affordable housing, and transportation. These areas of focus were identified by the larger CUAC project. The guidance this paper offers will be available as a resource for other CUAC researchers and will serve as a foundation for future work by the CLI. There is much that the law schools across the Cascadia Corridor can offer to help catalyze the policy and science research of the other disciplines involved in CUAC.

In sum, this project marks an exciting and productive collaboration between representatives of two law schools across an international border. Despite their geographic proximity, the

responses of the four cities to their common social and policy issues reflect their different national and provincial/state contexts. Shared analysis promises valuable collaborative solutions.

III. Cities in the Cascadia Innovation Corridor

This project focuses on two cities in Metro Vancouver[3] (Vancouver and Surrey) and two in Metro Seattle (Seattle and Bellevue). All four are situated on land that was originally occupied by Salish people: xwməθkwəy̓əm (Musqueam), Skwxwú7mesh (Squamish), Stó:lō and Sḵwx̱wú7mesh/Selilwitulh (Tsleil-Waututh) First Nations[4] for Vancouver; Katzie, sc̓əwaθen (Tsawwassen), and W̱SÁNEĆ First Nations for Surrey[5]; and the Dkhw'Duw'Absh (Duwamish) Tribe[6] for Seattle and Bellevue. All four cities lie in the Cascadia Corridor and share common attributes including strong technology sectors, a shortage of affordable housing, and unusually high levels of homelessness for cities in developed countries. The following table provides basic information about the geography and demographics of the four cities.

City	Population (1,000s)	Area (km^2)	Population Rank	Notes
Vancouver, BC (2016 data)	631	114	#1 in BC	Densest city in Canada[7]
Surrey, BC (2016 data)	518	316	#2 in BC	Much less dense than Vancouver
Seattle, WA (2017 data)	714	217	#1 in WA	Fastest growing US city
Bellevue, WA (2017 data)	141	83	#3 in Seattle Metro	

IV. This Memo

This guide outlines the basic legal framework of cities in British Columbia and Washington by explaining the relationship between cities and other levels of government, the structure and

[3] *See*, http://www.metrovancouver.org/.
[4] "Vancouver, British Columbia" <https://native-land.ca/>.
[5] "Surrey, British Columbia" <https://native-land.ca/>.
[6] "Seattle, Washington" <https://native-land.ca/>.
[7] *See*, http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=307&SR=1&S=10&O=D.

sources of municipal authority, and the legislative and policy tools available to cities. Both Canada and the United States operate under a federal system of government; however, in Canadian federalism unenumerated or residual powers are held by the federal government, while American federalism assumes that these powers are within the jurisdictions of the state governments. While this difference is conceptually substantial, it is less significant in practice. Judicial interpretation of the countries' respective constitutions has broadened the scope of *provincial* authority in Canada and of *federal* authority in the United States. It is an interesting switch; the initial opposite constitutional alignment between the two levels of government has been retained, simply now in a different direction.

In both British Columbia and Washington, however, cities derive all their power and authority from the provincial or state governments. Municipal governments thus lie under regional (provincial or state) authority and are not constitutionally distinct levels of government. In both countries, the powers cities possess are a result of delegation from their regional (state or provincial) government.

The character and extent of that delegation varies—both between and within the countries. In general, cities in Washington are granted exceptionally broad powers and authority by both the Washington State Constitution and state statutes. American state constitutions, which have no functional counterparts in Canadian provinces, play a strong role in defining both the structure and powers of local governments. As a result, cities are presumed to have the authority to take any action not in conflict with state law, even without a specific grant of such authority by a state statute. In British Columbia, cities are not granted a comparable, all-encompassing authority. Rather, they rely on provincial laws outlining specific authority for the cities. Thus, delegation of powers to the Canadian cities is narrow and specific, rather than broad and general. As a result, if

a city would like to act in a substantive area that is not specifically provided for in provincial or state law, those in British Columbia must seek enactment of a provincial law to gain this authority; in contrast, Washington cities may act without seeking a change in state law, as long as there is no existing state law excluding such action. This is a key distinction between municipal legal structures in the two countries across the Cascadian region.

Chapter 2 of the guide elaborates on each legal framework. First, however, we touch on four key topics to which we apply the legal discussion.

V. Focus Topics

As cities grow in political and social influence, old problems may require new approaches and new problems demand novel innovation. This memo discusses some of the legal constraints on how municipalities address long-standing and emergent issues in the areas of transit, housing, the opioid crisis, and the environment.

Transit systems physically shape any city. Public transit infrastructure is instrumental in how populations move themselves across different regions within and around the city, as well as in determining future development. Urban transit is currently undergoing a transformation with the introduction of cell phone based ride-hailing platforms such as Uber and car-shares like EVO and is certain to undergo even further transformation with the advent of autonomous vehicles. These new tech-enabled modes raise questions about data ownership. For both Washington and B.C., transit is a complex topic that requires cooperation among different levels of government.

Housing has emerged as a critical urban issue across the continent, especially in the past decade. Big cities have borne the brunt of the housing crisis, resulting in pressure on city governments to address this problem. Cities in both Washington and British Columbia have been

attempting to respond to rising housing prices by encouraging private developers to increase supply. Cities have done this by a variety of policy instruments, including leveraging the municipal land use powers, such as zoning and the power to charge (or not charge) fees on development. Notably, Vancouver has worked with the provincial government to impose new taxes on foreign property purchasers, vacant and unused properties, and speculation.

The **opioid crisis** has resulted in the deaths of many people in both the United States and Canada. While state/provincial and federal responses have been slow, some cities have been nimbler in their responses. Cities have a special role in the opioid crisis as providers of first response services and as the physical sites of the crisis. Vancouver has responded by raising property taxes and using the revenue to fund first responder services and various harm reduction initiatives such as pop-up overdose prevention centres as well as North America's first legally sanctioned supervised injection site. These actions result from collaborations between cities and other levels of government. Washington cities have sued pharmaceutical companies for "pushing" prescription opioids on doctors and patients. A similar suit is contemplated by the British Columbia provincial government.

The **environment** is another area of critical relevance to cities. Both Washington and B.C cities have responded to the climate change issue primarily through land use regulations. In B.C., all levels of land-use planning (Regional Growth Strategies, Official Community Plans, zoning, development permits, and building codes) can and are used to promote environmental protection and sustainability. In Washington, environmental protection is done mostly through state-enacted legislation.

VI. Chapter Structure

This memo begins by providing an overview of the powers of cities in the jurisdictions of B.C. and Washington and then concludes with a comparison of the two jurisdictions. Chapters 2 and 3 explore local government law in British Columbia and the State of Washington, respectively. Chapter Four provides a comparison across both jurisdictions.

More specifically, **Chapter 2** begins with an overview of the source of legal authority for B.C.'s cities, which is rooted in federalism. Understanding this origin is crucial to a knowledge of the extent, scope, and limitations on cities' powers. The memo then explains the various tools these cities have at their disposal to achieve their goals. Broadly speaking, cities have the power to make rules, provide services, and collect resources to fund or otherwise provide for their operation. The chapter ends with an in-depth look at the relevance of this legal information for the four focus topics outlined above: transit, housing, the opioid crisis, and the environment.

Chapter 3 follows the same structure as Chapter 2 but concentrates on legal powers of Washington's cities, focusing on Seattle and Bellevue.

Chapter 4 highlights the differences between the two jurisdictions. Generally, cities in Washington enjoy a broader range of powers than their counterparts in B.C., partly due to their greater taxation powers. However, cities in B.C. also have the potential for significant innovation. As cities rise in political and social prominence, they will be able to push boundaries and expand their powers in new areas. Chapter 4 also considers the example of a hypothetical Autonomous Vehicle Lane (AV Lane) from City Hall in Vancouver, through Surrey and Seattle, ending at Bellevue City Hall. This imaginary journey highlights the governmental and legal complexity inherent in any such substantial cross-border initiative. It suggests that the undertaking might

involve international agreement, federal legislation adopted in both countries, oversight by roughly a dozen federal agencies from each country, at least five provincial/state ministries/departments in each jurisdiction, several regional governmental entities in British Columbia and Washington, three B.C. cities, four Washington counties and 16 Washington cities. This might seem challenging, but the authors conclude that the residents of Cascadia and their governments are up to the task.

CHAPTER II: CITY POWERS IN BRITISH COLUMBIA

I. General Structure of Local Government Power in British Columbia

This chapter is an overview of the legislative and policy jurisdiction (*i.e.*, sources of legal authority)[8] of two Canadian cities: Surrey and Vancouver. Both of these cities are in the "Cascadia Innovation Corridor," as explained in the introductory chapter. The following overview of municipal civic policy and law-making powers clarifies the legal framework for innovative policy solutions at the level of Canadian civic government. Increasingly, municipal governments are sites for transformative law and policy. After all, cities are where some of the most intransigent issues plaguing Canadian society occur. Over seventy percent[9] of Canadians live in cities, making the urban policy environment a key focus for almost any progressive law reform.

With the exception of Vancouver, all cities in British Columbia have the same legal grounding and, therefore, the same jurisdictional legal boundaries. Vancouver is a special case. The statute that provides its basic authority predates most other British Columbian cities. The province has allowed Vancouver to keep this statute rather than joining the more recent framework that applies to other cities. A comparison between Surrey—as representative of British Columbian cities generally—and Vancouver—as a unique case—provides an overview of the general range of legal profiles of cities in British Columbia.[10]

[8] Jurisdiction is the power of an entity (such as a government or a court) to exercise legitimate legal authority over a person, subject matter, or territory.
[9] Statistics Canada, Population of Census Metropolitan Areas, online: (March 18, 2018):<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo05a-eng.htm>.
[10] This comparison is not a full overview of all types of local government that operate in British Columbia. Regional districts are not fully addressed by this comparison. Regional districts can be composed of municipalities, or they can operate independently on land that is not incorporated into a municipality. Vancouver and Surrey are members of a regional district, and so the comparison between them addresses the first type of regional district but not the latter type. In addition, there are various types of uncommon local governments – such as improvement districts.

II. Defining Municipalities

Municipalities such as Vancouver and Surrey are the most local form of government in British Columbia. A municipality is a corporation that has legal authority with respect to a specific geographic area and to the people in that area.[11] This lends the term 'municipality' two senses: it signals both a place and a legal entity. The term is often used interchangeably for both of these meanings in Canadian law.[12]

Municipalities may also participate in a slightly larger scale of local government called a "regional district." Regional districts are federations of municipalities and electoral areas (which are typically sparsely populated rural regions). A regional district may be composed of either municipalities or electoral areas, or a combination of both.[13] For example, Metro Vancouver, formally called the Greater Vancouver Regional District ("GVRD"), is comprised of 21 municipalities (including Vancouver and Surrey), Tsawwassen First Nation, and one electoral area.[14] British Columbia's *Local Government Act* provides the statutory authority and framework for such a regional organization.[15]

---

[11] *Community Charter*, SBC 2003, c 26, sched. s 1.
[12] *Barclay v Darlington (Township)* (1853), 1854 CarswellOnt 159 (UC QB).
[13] *Local Government Act*, RSBC 2015, c 1 s 41.
[14] Metro Vancouver's website states: "Metro Vancouver is a federation of 21 municipalities, one Electoral Area and one Treaty First Nation that collaboratively plans for and delivers regional-scale services. Its core services are drinking water, wastewater treatment and solid waste management. Metro Vancouver also regulates air quality, plans for urban growth, manages a regional parks system and provides affordable housing. The regional district is governed by a Board of Directors of elected officials from each local authority." *See*, http://www.metrovancouver.org/.
[15] *Local Government Act*.

III. Municipalities in Canadian Federalism

Canadian Federalism

Before examining the sources of jurisdiction for municipalities, it is useful to situate cities within Canada's general legal framework. Canada is a federal state, with two levels of government provided by the *Constitution Act, 1867*[16] ("*CA1867"*): a federal government and ten provincial governments. Many Indigenous governments and communities with independent sources of authority are also important presences in the land that is now called Canada, with varying degrees of recognition by the Canadian state. The traditional division of powers between federal and provincial governments is under active strain as Canada grapples with pressure to recognize Indigenous sovereignty and to move beyond colonial relations with Indigenous people.

Canada's federal and provincial governments derive their lawmaking powers from Canada's constitution. While provinces also each have their own constitution acts, these do not have anywhere near the same legal impact as a smaller group of key texts of the Canadian constitution. The provincial constitutions essentially structure entry of the relevant province into Confederation.

The *CA1867*, one of the central documents of Canada's constitutional structure, assigns different jurisdictions to the federal and provincial governments. This means that neither level of government has unlimited lawmaking powers. Instead, valid legislation is legislation that falls within the jurisdiction of the enacting government. Canadian constitutional law understands the federal government and the provincial governments to each be equal and supreme within their relevant jurisdictional grants.

[16] *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 ss 91 and 92.

The Division of Powers Between Federal and Provincial Governments

The following chart illustrates a selection of the different 'heads of power' that the *Constitution Act, 1867* assigns to the federal and provincial governments. A head of power is a source of jurisdiction, an area of lawmaking authority. Interpretation by courts determines the precise contours of these jurisdictions, and, as a result, their exact scope is never fully settled, nor literally apparent from the text alone, although there is nonetheless a great deal of certainty.

Federal[17]	**Provincial**[18]
Laws for the peace, order, and good government of Canada	Generally all Matters of a merely local or private Nature in the Province
The Public Debt and Property	Property and Civil Rights in the Province
The Regulation of Trade and Commerce	Municipal Institutions in the Province
The raising of Money by any Mode or System of Taxation	Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes
The borrowing of Money on the Public Credit	The borrowing of Money on the sole Credit of the Province
Militia, Military and Naval Service, and Defence	Local Works and Undertakings
Navigation and Shipping	The Establishment, Maintenance, and Management of Hospital. . . and Eleemosynary Institutions in and for the Province, other than Marine Hospitals
Banking, Incorporation of Banks, and the Issue of Paper Money	The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
Indians, and Lands reserved for the Indians	The Incorporation of Companies with Provincial Objects
Naturalization and Aliens	The Solemnization of Marriage in the Province
The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters	The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section

[17] *Constitution Act*, 1867 s 91.
[18] *Constitution Act*, 1867 s 92.

Canadian law has developed a number of doctrines to deal with the inevitable overlap and necessary coordination between federal and provincial governments. The current judicial mood is to encourage a doctrine that is known as 'cooperative federalism,' which recognizes that complex policy problems may require coordinated action across all levels of government.[19] The Supreme Court of Canada has stated that, where possible, "courts should allow both levels of government to jointly regulate areas that fall within their jurisdiction" to allow for intergovernmental problem-solving.[20] This understanding of federalism is key to analysis of the kinds of problems we examine in relation to urban centres. That is, the dominant approach at the moment in Canadian legal culture is one where collaborative, cooperative efforts across all levels of government are encouraged.

The Role of Local Governments in Canadian Federalism

In Canada's federal construct, local governments are unique, as compared to federal and provincial governments. The Canadian constitution does not directly assign powers and responsibilities to cities and other forms of local government. Instead, section 92(8) of the *CA1867* provides provincial governments with authority over "Municipal Institutions in the Province."[21] This provision allows provincial governments to delegate (within some limits) provincial powers and responsibilities to local governments. As a result, local governments depend on provincial statutes to define and to empower their abilities and limitations. Cities, thus, are emanations of provincial jurisdiction and, consequently, limited to the kinds of powers and jurisdiction that provinces have. They thus both come within and come from provincial jurisdiction.

[19] *Canada (Attorney General) v. PHS Community Services Society,* 2011 SCC 44, [2011] 3 S.C.R. 134.
[20] *Canada (Attorney General) v. PHS Community Services Society* at paras 12, 63.
[21] *See* also, *Constitution Act*, 1867 ss 92(8), 92(10), 92(16).

The jurisdiction of local governments must also be framed by consideration of Canada's treatment of Indigenous communities and of the ongoing issues of reconciliation and redressing historical and ongoing harms of settler colonialism. Canada's constitutional structure and law is marked by, and perpetuates, settler colonialism. Section 91(24) provides the federal government with lawmaking authority over "Indians, and Lands reserved for the Indians."[22] This "authority" has resulted in a long history of oppression: disrupted traditions and culture and stolen lands. Indeed, the land on which the Canadian cities under study sit is unceded, traditional, and historic territory of the local Indigenous peoples. Ongoing land claims and political questions about justice for Indigenous peoples thus should inform every key issue in these cities.

The authority of Indigenous governments is rooted in Indigenous sovereignty and the historic and ongoing legal orders that are grounded in this sovereignty. Many of these Indigenous legal orders have been harmed by the Canadian state's attempts to eradicate them to further the settler colonial project, but strong revitalization efforts are underway. Although Canadian law may recognize (or, more often, mis-recognize) the authority of Indigenous governments, the Canadian constitution is not the true source of their authority. In contrast to Canadian law's recognition of Indigenous authority, which includes limited rights to self-governance and land, the authority of local governments (like municipalities) depend fully on Canadian law that is grounded in the constitution. This is an important distinction because, while Indigenous nations and local governments may be similar in size and may both participate in regional districts, they are fundamentally different types of political and legal entities. Failing to recognize key differences between Indigenous governments and Canadian local governments would perpetuate settler

[22] *Constitution Act*, 1867 s 91(24).

colonialism by assuming the constitution is the source of all forms of law and legal authority in this land.

III. Sources of Local Governments' Power in British Columbia

Having situated local governments within a broader Canadian historical and legal landscape, we now turn to examining local governments' specific sources of legal authority. In Canada, two factors determine the scope of any legal authority, including the jurisdiction of local governments in BC: the statute(s) that enable that power, and the way these statutes are interpreted by courts. Both of these factors have worked together in BC to provide local governments with an evolving jurisdiction that has grown over the last two decades.[23]

Approaches to Statutory Interpretation

Interpretation of statutes impacts jurisdiction because the same statutory provision may provide a local government with different abilities depending on the approach taken to interpreting the statutory text. In Canada, courts have interpreted local government enabling statutes using two general approaches: narrow and broad. Understanding the way courts interpret these statutes is important because it teaches the rest of us how we should read these statutes. Statutory language is by necessity general and courts are assigned the task of interpreting that language when it must be applied to specific circumstances. Courts are guided in that task by a variety of rules and norms about statutory interpretation.

For most of the twentieth century, Canadian courts construed the powers of local governments using a "narrow approach."[24] This narrow approach is also known as 'Dillon's Rule', which states that a municipality may exercise only those powers expressly conferred by statute,

[23] Donald Lidstone, Recent British Columbia Legislation at 402.
[24] Donald Lidstone, Recent British Columbia Legislation at 402.

those powers necessarily or fairly implied by the express power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the municipal corporation."[25] Narrow interpretation of statutes contributed to local governments having relatively limited authority.[26]

Example of Narrow Interpretation

For illustration of this approach, taking a narrow approach to interpreting the statement "people should only eat ice cream" would lead one to conclude that the statement does not also include similar foods like gelato or frozen yoghurt. A narrow approach assumes that gelato and frozen yoghurt would be explicitly identified in the statement if they were meant to be included in it.

From the late twentieth century to the present, Canadian courts shifted to interpreting local governments' enabling statutes using a "broad approach."[27] This new approach to interpreting the enabling statutes of local governments moves beyond the explicit terms of a statute to also take purpose and context into account.[28] In *Spraytech*,[29] a Supreme Court of Canada decision, the Court solidified the new approach to interpreting the bounds of municipal authority. The Court supported the broad approach by noting that "law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, and to population diversity."[30] This is the principle of subsidiarity. A broad approach to interpretation allows local governments to be more responsive to the needs of their residents by not limiting municipal powers to a strict interpretation of the express terms of

[25] Stanley M. Makuch, Neil Craik & Signe B. Leisk, Canadian Municipal and Planning Law, 2d ed. (Toronto: Carswell, 1984) at 84, as cited by Donald Lidstone, Recent British Columbia Legislation at 402.
[26] Donald Lidstone, Recent British Columbia Legislation at 401.
[27] Donald Lidstone, Recent British Columbia Legislation at 402.
[28] Donald Lidstone, Recent British Columbia Legislation at 405.
[29] *114957 Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville)* (2001), 2001 CarswellQue 1268 (S.C.C.)
[30] Spraytech at para 3.

enabling statutes. In the municipal context, a broad approach to interpretation contributes to local governments having greater and more flexible authority.[31] Thus it supports local lawmaking ability.

Example of Broad Approach

A broad approach to interpretation could lead one to conclude that gelato and frozen yoghurt are close enough to ice cream in the current social context. Individuals would be given agency to eat any of those frozen desserts, even though all are not explicitly mentioned in the statement "people should eat only ice cream."

Why Do We Care About Interpretation?

The case of *Shell Canada Products Ltd. v. Vancouver (City)* ("*Shell*")[32] illustrates well the practical importance of different approaches to interpretation. In *Shell*, the Court considered whether the City of Vancouver had the authority to pass a resolution to boycott Shell because of Shell's business in apartheid South Africa. The Court's majority used a narrow interpretation of Vancouver's enabling statute to hold that this was outside the bounds of Vancouver's statutorily granted power. In particular, the court noted that the city's actions targeted affairs outside of the city—by attempting to challenge apartheid in South Africa—and the statute did not expressly confer power to act beyond the city in this manner.

In contrast, a minority of judges in *Shell* wrote a dissenting opinion that asserted these actions were within Vancouver's authority based on a broad interpretation of the statute. (A minority dissenting opinion allows judges to express their disagreement with their own court's holding but does not impact the practical outcome of the case.) The dissent in *Shell* argued that

[31] Donald Lidstone, Recent British Columbia Legislation at 401.
[32] *Shell Canada Products Ltd v Vancouver (City),* [1994] 1 SCR 231.

the city's boycott resolution should be upheld under the city's general commercial and business power interpreted broadly. This case shows that, depending on the court's approach to interpretation, the same statute can either grant or not grant a city the authority to boycott a company acting beyond the city in a politically offensive manner. As is often the case, this dissent has become more important than the majority ruling. It "contained the seeds of the new Supreme Court of Canada direction in reviewing the municipal exercise of statutory powers," and, as a result, "the Vancouver resolution referred to in *Shell* would likely be upheld today."[33] The dominant approach to statutory interpretation today is the one that characterized the dissent in *Shell*: courts give statutes broad and generous interpretations, taking wider context into account. *Shell* illustrates the practical importance of the recent change in interpretive approach to the enabling statutes of local governments. In sum, the interpretive stance matters.

Statutory Sources of Local Governments' Jurisdiction

While a shift in interpretation method has expanded the bounds of municipal powers, these powers must still be delegated by the province through legislation. Interpretation cannot construct jurisdiction out of nothing;[34] therefore, enabling statutes are the initial source of local governments' jurisdiction. It is this initial grant of power—through the statutory form—that courts interpret.

In British Columbia, the powers, duties, and functions of municipalities are set out by three statutes passed by the provincial legislature: *Vancouver Charter ("VC")*, *Community Charter ("CC")*, and *Local Government Act* ("*LGA*"). Before 2003, municipalities in British Columbia

[33] Donald Lidstone, Recent British Columbia Legislation at p 406.
[34] *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 1997 CarswellOnt 3270 (Ont. C.A.); 114957 *Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville)* (2001), 2001 CarswellQue 1268 (S.C.C.); *Guignard c. St-Hyacinthe (Ville)* (2002), 2002 CarswellQue 140 (S.C.C.).

were enabled by only two main statutes: the *VC*, which established and granted powers to the city of Vancouver, and the *LGA*, which did the same for all other British Columbian municipalities. The third statute, the *CC*, was enacted in 2003 to subsume parts of the *LGA*, giving broader and more flexible powers to municipalities than the *LGA* did. However, the *LGA* still remains in effect for matters that are not covered by the *CC*. Notably, land-use planning is still regulated under the provisions in the *LGA*. The *LGA* also remains the primary legislation for regional districts, which are federations of municipalities and surrounding suburban/rural areas. Thus, the *LGA*, the *CC*, and the *VC*, collectively, are the source of local government powers in British Columbia.

Form is a key difference between the *VC* and the *CC*. The bulk of legal authority in the *CC* is granted through identifying "spheres of authority" and abilities that are attached to them. These general spheres of authority mimic (in form) the heads of power that are the sources of federal and provincial authority.[35] In contrast, the bulk of legal authority provided by the *VC* is granted through provisions that explicitly identify specific powers. For comparison, the *CC* establishes that a "municipality has the capacity, rights, powers and privileges of a natural person of full capacity," while the *VC* gets to the same result by giving Vancouver specific capacities, rights, etc. that a natural person would have: the power to sign cheques,[36] the ability to join a labour organization,[37] and the ability to enter contracts,[38] among others.[39] Under both statutes, municipalities have the powers of a natural person, but the two statutes achieve this result in different ways. Thus, it is generally true that the *VC* provides the same powers as the *CC*, although there are some differences both textually and in substance.

[35] Donald Lidstone, Recent British Columbia Legislation at p 411.
[36] *VC s* 170.
[37] *VC s* 175A.
[38] *VC* s 169.
[39] Donald Lidstone, Recent British Columbia Legislation at p 416.

Limits on Local Governments' Jurisdiction

Although municipalities have broad powers, they remain constrained in important ways. A full account of these limits is outside the scope of this guide, but some general limits will be identified.

Municipalities must not act outside of the powers conferred on them by their enabling statutes. The Supreme Court of Canada has cautioned that even the broad approach to interpretation of open-ended provisions does "not confer an unlimited power. Rather, courts faced with an impugned by-law enacted under an "omnibus" provision. . .must be vigilant in scrutinizing the true purpose of the by-law."[40] The true purpose of the law must fall within the authority granted to the municipality by its enabling statute. Although broad interpretation widens the scope of municipal authority, interpretation cannot create municipal authority out of thin air—a power must be delegated by the province before it may be interpreted broadly.[41] A municipal bylaw that is found to be outside these bounds will be quashed (voided).

In addition, municipal bylaws (ordinances) must not conflict with provincial or federal laws. The Supreme Court of Canada has recognized two levels of unconstitutional conflict: an impossibility of compliance with one law without disobeying the other and/or inconsistency with the intent of the federal or provincial law in question.[42] A bylaw that is found to be in conflict will become inoperable. This is a reflection of the notion that provincial law is paramount (supreme) over municipal law in the case of a conflict.

---

[40] *Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville)* (2001) at para 20.
[41] *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 1997 CarswellOnt 3270 (Ont. C.A.); 114957 *Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville) (2001)*, 2001 CarswellQue 1268 (S.C.C.); *Guignard c. St-Hyacinthe (Ville)* (2002), 2002 CarswellQue 140 (S.C.C.).
[42] *Rothmans, Benson & Hedges Inc v Saskatchewan*, [2005] 1 SCR 188, 2005 SCC 13 at paras 11-14, *Canadian Western Bank v Alberta*, [2007] 2 SCR 3, 2007 SCC 22 at paras 72-75, a discussion of how this doctrine applies to bylaws in particular is available in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, (2001) 2 SCR 241, 2001 SCC 40 at paras 35-36.

Municipal bylaws and actions must be consistent with the *Canadian Charter of Rights and Freedoms* ("*Charter*").[43] The *Charter* protects fundamental rights and freedoms—such as those related to equality, expression, and mobility—from unjust limitation by any level of government or any government actor: federal, provincial, and municipal.[44] A bylaw that is found to be inconsistent with the *Charter* has no legal effect and will be quashed.

Municipal laws also must meet a variety of other more intuitive requirements. For example, municipal laws must not be enacted in bad faith or be too vague.[45] Anderson Young's *An Introduction to British Columbia Local Government Law*, available online, provides a practical guide to these limits.[46]

Municipalities must act within these, and other,[47] limits in order to create valid and enforceable laws. However, it is practically possible that municipalities may sometimes create and use bylaws that are outside of these limits without consequences. This is because laws are often only invalid or unusable once they are determined to be such by a court. If a law is not brought before a court, it may remain in use despite, arguably, being outside of the limits of municipal powers.

IV. Tools Available to Municipalities in British Columbia

Having established the general landscape in which local governments operate and the sources of their powers, we are now better situated to outline the content of these powers. This section addresses two main questions about the tools available to municipalities: what can

[43] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
[44] *Godbout v Longueuil (City)*, [1997] 3 SCR 844.
[45] Anderson Young, An Introduction to British Columbia Local Government Law, (Kelowna: Municipal Administration Training Institute, 2012). .http://www.lgma.ca/assets/Programs~and~Events/MATI~Programs/MATI~Foundations/2012~Presentations/REECE%20HARDING%20-%20Introduction%20to%20BC%20Local%20Government%20Law.pdf.
[46]Anderson Young, An Introduction to British Columbia Local Government Law at pp 28-32.
[47] More detailed information about limits on municipal powers is available in Anderson Young, An Introduction to British Columbia Local Government Law.

municipalities do, and how can they acquire the necessary resources? To better understand what municipalities can do, this memo outlines their regulatory, planning, and service provision powers. Since the limits on municipal action are not only legal but also material, this guide next outlines the abilities of municipalities to acquire resources.

Providing a full account of municipal powers is outside the scope of this guide. The enabling statutes of Vancouver and Surrey are quite long; the *VC* contains 622 provisions, while the *CC* contains 292 provisions. Rather than examining each of these provisions in detail, this section aims to provide a broad overview only of the content of municipal powers.

Regulating, Planning, and Providing Services

It is helpful to distinguish between two categories of municipal power granting provisions: general and specific. As discussed above, the bulk of legal powers in the *CC* are conferred by general provisions—for example, by providing municipalities with the legal abilities of a natural person—while the *VC* is largely composed of specific provisions. However, each statute contains both types of provisions. This section will first examine the general provisions in each, and then explore a selection of their specific provisions.

General Provisions

Community Charter

The *CC* provides the municipalities that are enabled by it, like Surrey, with broad powers in a section of provisions titled "Fundamental Powers."[48] These fundamental powers are divided into three categories of provisions: the natural person provision, the services provision, and the spheres of authority provisions.

[48] *CC* s 8.

Natural Person Provision

Surrey has "the capacity, rights, powers and privileges of a natural person of full capacity."[49] This has been interpreted broadly to include all the legal abilities of a natural person that are not inconsistent with the legislation.[50]

Service Provision

Section 8(2) stipulates that Surrey "may provide any service that the council considers necessary or desirable."[51] Providing a service under this provision does not allow the city to regulate, prohibit, or impose requirements, as opposed to straightforward provision of services, such as water management, waste management, or snow clearance. [52] Therefore, if a city wishes to regulate, prohibit, or impose requirements, it must do so under other sections of the statute, more specifically, the spheres of authority provisions.

Cities are enabled by the *CC* to provide services outside of the municipal borders.[53] Cities, however, tend to be cautious about providing services beyond their boundaries because if a city begins providing a service to a party, it will generally be required to continue providing the service unless it gives the party receiving the service sufficient time to arrange for an alternative provider.[54]

Spheres of authority

Sections 8(3) to 8(6) provide Surrey with the ability to regulate, prohibit, and impose requirements within a variety of "spheres" of authority.[55] A sphere is an area or topic in relation to which a municipality may legislate. Municipalities under the *CC* are granted varying powers depending on the sphere at issue. For example, municipalities have a general power only to

[49] *C C* s 8(1).
[50] *Kitimat (District) v. Alcan Inc*. 2005 BCSC 44, 2005 CarswellBC 60.
[51] *CCr* s 8(2).
[52] *C C*s 8(11)(a).
[53] *CC* s 13.
[54] Maegen Giltrow, Lidstone and Company Law Letter, p 7.
[55] *CCr* ss 8(3)-(6).

regulate in the sphere of "business,"[56] but they have a general power to regulate, prohibit, and impose requirements in relation to the sphere of "trees."[57] The chart below sets out the spheres of authority and identifies which powers municipalities are granted in relation to each sphere.

Spheres of Authority: *Community Charter* Sections 8(3) to 8(6)					
Section	**Sphere**	Is the Sphere **Not Concurrent**	Authority to **Regulate**	Authority to **Prohibit**	Authority to **Impose Requirements**
8(3)(a)	Municipal services	Yes	Yes	Yes	Yes
8(3)(b)	Public places	Yes	Yes	Yes	Yes
8(3)(c)	Trees	Yes	Yes	Yes	Yes
8(3)(d)	Firecrackers, fireworks and explosives	Yes	Yes	Yes	Yes
8(3)(e)	Bows and arrows, knives and other weapons not referred to in subsection (5)	Yes	Yes	Yes	Yes
8(3)(f)	Cemeteries, crematoriums, columbariums and mausoleums and the interment or other disposition of the dead	Yes	Yes	Yes	Yes
8(3)(g)	The health, safety or protection of persons or property in relation to matters referred to in section 63 *[protection of persons and property]*	Yes	Yes	Yes	Yes
8(3)(h)	The protection and enhancement of the well-being of its community in relation to the matters referred to in section 64 *[nuisances, disturbances and other objectionable*	Yes	Yes	Yes	Yes

[56] *CC* s 8(6).
[57] *CC* s 8(3)(c).

	situations]				
8(3)(i)	Public health	No	Yes	Yes	Yes
8(3)(j)	Protection of the natural environment	No	Yes	Yes	Yes
8(3)(k)	Animals	No	Yes	Yes	Yes
8(3)(l)	Buildings and other structures	Yes	Yes	Yes	Yes
8(3)(m)	The removal of soil and the deposit of soil or other material	No	Yes	Yes	Yes
8(4)	Matters referred to in section 65 *[signs and other advertising]*	Yes	Yes	No	Yes
8(5)	Discharge of firearms	Yes	Yes	Yes	No
8(6)	Business	Yes	Yes	No	No

Concurrent Spheres

Municipalities must meet additional requirements in order to legislate in certain spheres. These are called "concurrent spheres."[58] Municipalities cannot enact bylaws in a concurrent sphere unless the bylaw is also approved by the relevant provincial minister,[59] or is in accordance with a provincial regulation[60] or agreement.[61] Thus, authority in these spheres is concurrent with retained authority by the provincial government: acting in these spheres requires concurrent approval from or alignment with the provincial government in some form. This requirement does not apply if a bylaw was created under another nonconcurrent sphere, even if it *could also* have been authorized under a concurrent sphere.[62] The chart above identifies which spheres of authority are concurrent and which are not. However, it is also important to remember that municipalities do not have

[58] *CC* s 9.
[59] *CC* s 9(3)(c).
[60] *CC* s 9(3)(a).
[61] *CC* s 9(3)(b).
[62] *CC* s 9(2).

exclusive jurisdiction in non-concurrent spheres because the province may always legislate in relation to any of these spheres, invoking provincial paramountcy over the municipal law. This results from the fact that all municipal authority flows from (is delegated from) provincial government primary authority.

Vancouver Charter

Two key provisions in the *VC* work together to grant broad powers to Vancouver. Section 189 states that "[t]he Council may provide for the good rule and government of the city."[63] The exact extent of this power is unclear because "[f]ew authorities have considered the scope of s. 189, and most of those predate the more modern approach to municipal jurisdiction."[64] Some guidance may be provided by the dissent in *Shell*[65] because that dissent was cited favourably by the SCC in the more recent case of *Southern Alberta v Calgary,*[66] but this latter case is not binding legal authority for British Columbian legislation (it was in reference to Alberta legislation) and, therefore, that case is not a definitive indication. The dissent in *Shell* argued that s. 189 and other "provisions in municipal Acts for the 'good government' or general welfare of the citizens….found their origin in the desire of legislatures to prevent the decisions of municipal councilors being struck down by the courts."[67] Therefore, "[i]f the courts interpret them narrowly, they will defeat

[63] *VC* , SBC 1953, c 55 s 189. The legal history of the term "good government" in the Canadian context also indicates that this provision is meant to establish broad and flexible powers. Provision 91 of the *CA1867* establishes particular federal heads of power (areas and forms of legislation that a government has power over) but also gives the federal government power "to make Laws for the Peace, Order, and good Government of Canada." This phrase has a rich history of interpretation by Canadian courts (and the English Privy Council before 1949) and its meaning has changed significantly over the course of the last century. Presently, Canada's Supreme Court interprets "peace, order and good government" to provide the federal government with three branches of powers: the residual branch, the emergency branch, and the national concern branch. This interpretation of the term "good government" does not apply to Vancouver's ability to provide for the good rule and government of the city. However, understanding the significance of this term in constitutional law helps explain why courts have held that the good government provision in the *VC* provides the Council with broad and flexible powers.
[64] *Imperial Oil Ltd v Vancouver (City),* 2005 BCSC 387 at para 58.
[65] *Shell Canada Products Ltd v Vancouver (City),* [1994] 1 SCR 231.
[66] *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City),* 2004 SCC 19 at para 6.
[67] *Shell Canada Products Ltd v Vancouver (City),* [1994] 1 SCR 231 at para 91.

the very purpose for which these provisions were enacted."[68] Current courts may find this reasoning persuasive. Thus, although the exact contours of Vancouver's powers under s. 189 are not established, it is reasonably likely that the section provides Vancouver with broad powers that are similar to those that the *CC* authorizes for other local governments.

In addition, s. 199 gives the Council the "power to do all such things as are incidental or conducive to the exercise of the allotted powers."[69] This provision gives Vancouver powers that are not explicitly allotted to it but that are required to exercise its other, allotted, powers. The dissent in *Shell* asserted that s.199 provides further support for taking a "broad approach to the powers of the City."[70]

Taken together, s. 189 and s. 199 likely provide fairly broad and flexible powers to Vancouver. However, the extent of these powers is not settled. It is also important to remember that any powers granted by s. 189 and s. 199 are constrained by the express terms of the *VC* and the other limits discussed in section two of this guide.

Specific Powers

In addition to the general powers described above, the three statutes grant British Columbian cities specific powers, which allow cities to exercise their power in areas that are not included in the general grant of authority with the caveat that they cannot exceed what is explicitly set out in the statute. Although there are a number of these specific powers, this memo will focus on those related to two city functions: land use and planning; and business regulation.

i. Land Use and Planning

[68] *Shell Canada Products Ltd v Vancouver (City),* [1994] 1 SCR 231 at para 91.
[69] *VC* s 199.
[70] *Shell Canada Products Ltd v Vancouver (City),* [1994] 1 SCR 231 at para 87.

Cities achieve land use and planning objectives by means of a number of legal tools of varying specificity. These tools allow cities to set strategy for the entire region (Regional Growth Strategies), define neighbourhoods (Official Community Plans) and zones (zoning) within cities, and even impose requirements on construction of individual buildings (development permits). Let us take "protection of the environment" as a goal. Municipalities may collectively agree that the protection of the environment is a goal in the Metro Vancouver regional strategy (as it currently is). This becomes reflected in Official Community Plans for individual cities in the form of, for example, a commitment to X square metres of green space. The zoning bylaws of individual cities could specify that all single-family dwellings in a zone must have a certain square footage of yard space. Finally, a city may withhold a building permit unless the developer agrees to build the building according to a certain environmental standard. These tools provide the city with flexible, variable, and wide-reaching power in regulating land use within city boundaries.

Long Term Planning Strategies

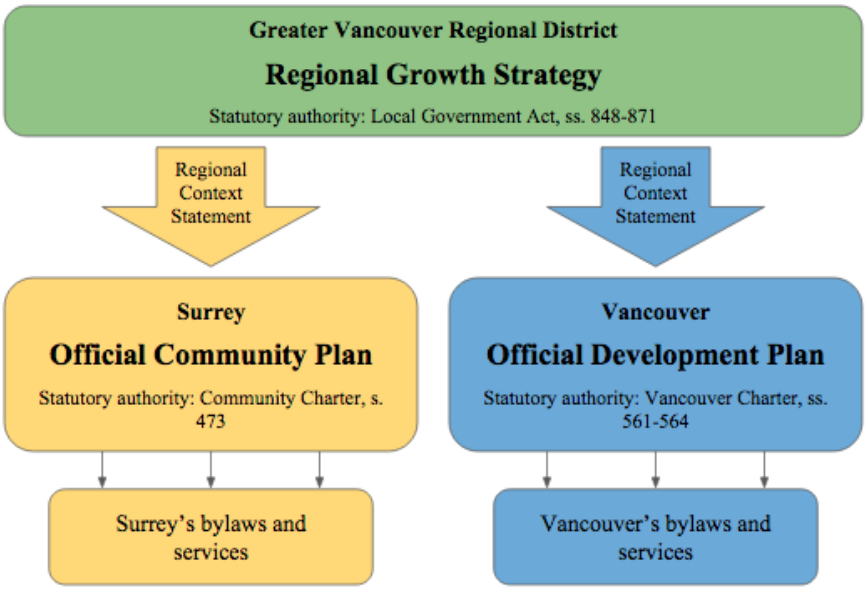
Greater Vancouver Regional District

Municipalities and regional districts in British Columbia have the ability to create planning instruments that establish the government's policies and objectives well into the future. At the regional district level, these plans are called Regional Growth Strategies ("Regional Strategy"). Regional districts do not have to create a Regional Strategy, but if they do then all of the regional

district's bylaws and services must be consistent with the Regional Strategy.[71] A Regional Strategy should provide a comprehensive statement of policies and objectives for twenty years.[72]

Because both Surrey and Vancouver are members of Metro Vancouver, their planning instruments must conform to Metro's Regional Strategy. The current Regional Strategy was created in 2011 and extends to 2040.[73] The main objectives and policies it identifies relate to urban development, the regional economy, the environment and climate change, housing and community amenities, and integrating land use and transportation.[74] In order to ensure their planning instruments follow their region's Regional Strategy, each municipality must include a regional context statement in their planning instruments that describes how they conform, or will be changed to conform, with the Regional Strategy.[75] The following chart illustrates the relationship between the Regional Strategy and relevant municipal planning instruments.

[71] Deborah Carlson, Preparing for Climate Change: An Implementation Guide for Local Governments in British Columbia, (Vancouver: West Coast Environmental Law, 2012) at p29.
[72] Deborah Carlson, Preparing for Climate Change: An Implementation Guide for Local Governments in British Columbiaat p 29'
[73] *Regional Growth Strategy* [*Metro Vancouver 2040 Shaping Our Future*], Greater Vancouver Regional District Bylaw No.1136, 2010'
[74] *Regional Growth Strategy* [*Metro Vancouver 2040 Shaping Our Future*], Greater Vancouver Regional District Bylaw No.1136, 2010 at p 7.
[75] Deborah Carlson, Preparing for Climate Change: An Implementation Guide for Local Governments in British Columbia at p 29.



Surrey

Surrey, and other municipalities established by the *CC*, have access to a planning instrument called an Official Community Plan ("OCP").[76] OCPs set the overall development strategy over an area within the municipality, and must reflect the goals of the Regional Strategy. OCPs specifically designate zones for various uses such as residential, commercial, industrial, and agricultural,[77] and may reflect such things as housing policy goals[78] and greenhouse gas reduction goals[79] of the municipality. OCPs are made after consultation with various stakeholders, such as school boards, provincial and federal governments, First Nations, business associations, and residents of the area. After adopting an OCP, all new bylaws regarding the area must be in conformity with the OCP. Furthermore, an OCP sets out all development permit zones within an area, to which any proposal for development must conform.

[76] *LGA* ss 471-478.
[77] *LGA* ss 473(1)(a),(b).
[78] *LGA* s 473(2).
[79] *LGA* s 473(3).

Vancouver

Official Development Plans ("Development Plans") are the Vancouver equivalent to OCPs. Like OCPs, Development Plans should conform to the GVRD's Regional Strategy and include a regional context statement that explains how the Development Plan achieves conformity.[80] The *VC* establishes that a Development Plan *must* include housing policies respecting affordable housing, rental housing and special needs housing,[81] and greenhouse gas emissions targets.[82] Development Plans *may* include policies relating to social needs and development, and preservation and restoration of the natural environment.[83] The Vancouver city council has the power to revise Development Plans,[84] but if the revision relates to the plan's regional context statement then it must be referred to the GVRD for comment first.[85]

In addition to creating Development Plans, the *VC* also contains a provision that authorizes social planning.[86] This is a more open-ended power that allows the city to "provide for social planning to be undertaken, including research, analysis and coordination relating to social needs, social well-being and social development in the city."[87]

Zoning

Zoning allows cities to regulate what kinds of development will be allowed in particular areas of the city. The *LGA* gives cities the power to regulate the height and depth of a zone;[88] use of land, building, and structures;[89] the density of use, building, and structures;[90] the siting, size,

[80] *VC* s 561(c).
[81] *VC* s 561(3).
[82] *VC* s 562.01.
[83] *VC* s 561(4).
[84] *VC* s 561(4)(1).
[85] *VC* s 562 (2).
[86] *VC* s 202 A.
[87] *VC* s 202 A.
[88] *LGA* s 479(1)(b).
[89] *LGA* s 479(1)(c)(i).
[90] *LGA* s 479(1)(c)(ii).

and dimension of buildings and structures;[91] and the area, shape, and dimension of parcels created by subdivision.[92] A zoning bylaw may make different provisions for different zones,[93] different uses within a zone,[94] different locations within a zone,[95] and different standards of works and services provided.[96] However, similar uses within the same zone must be treated similarly.[97]

The *VC* has similar provisions.[98] However, the *VC* gives Vancouver more flexibility in its zoning power. Section 565.A(e) gives the Council the authority to "relax" the provisions of a zoning bylaw in special circumstances. This allows Council to grant exceptions to a zoning bylaw for specific properties, which means that the property does not have to follow the zoning requirements for use, building regulations, and so on without having to go through the process for making or amending zoning bylaws. This creates the practice of "spot zoning." However, the relaxation does not allow a change in density.[99] Council may grant this exception for a number of reasons which include hardship, contributing to conserving heritage property, provision of public space or activities, and development of low-cost housing, among others.[100]

Development permits

Community Charter Cities

An OCP may set out "development permit areas"[101] for a variety of reasons, such as the protection of the natural environment, protection from hazardous conditions, revitalization of a

[91] *LGA* s 479(1)(c)(iii).
[92] *LGA* s 479(1)(d).
[93] *LGA* s 479(4)(a).
[94] *LGA* s 479(4)(b).
[95] *LGA* s 479(4)(c).
[96] *LGA* s 479(4)(d).
[97] UBCM Factsheet #25 p 4, https://www.ubcm.ca/assets/Services/Publications/2018/2018_UBCM_FactSheets.pdf.
[98] *VC* s 565.
[99] *VC* s 565.A(e).
[100] *VC* s 565.A(e)(i)-(iv).
[101] *LGA* s 488.

commercial area, establishment for form and character of residential developments, commercial development, and industrial development.[102] Owners of lands within these areas must obtain development permits from the city if they wish to subdivide the lot, or construct or add to or alter a building.[103] This means that cities can regulate not only the design of a project, but also the sequence and timing of construction. The development permit can vary or supplement a land use regulation or bylaw, impose requirements and conditions, or set specific standards.[104] However, a development permit cannot vary the use or density of the land; such changes must be made through the zoning bylaw.[105]

Vancouver

Vancouver has broader powers than other cities in BC when it comes to development permits. First, Vancouver has the power to require development permits even in the absence of a Development Plan.[106] Furthermore, the director of planning has the power to refuse a development permit if the proposed action would detract from the heritage value or heritage character of a protected heritage property.[107] Council may issue a development permit subject to conditions.[108] These conditions must be related only to the development in question. For example, in *Imperial Oil*, it was ruled that the City of Vancouver could not impose the condition that Imperial Oil clean up the oil that had leaked into surrounding lots, as this condition was not directly related to the development in question. It could only order the clean-up of the lot on which the development was proposed.[109]

---

[102] *LGA* s. 488 (1).
[103] *LGA* s. 489 (1).
[104] *LGA* s 490 (1).
[105] *LGA* s 490 (3).
[106] *Imperial Oil*, at para 28.
[107] *VC* s. 565.A(d.1).
[108] *VC* s. 565.A(b).
[109] *Imperial Oil* at para 37.

V. Business Regulation

Community Charter Cities

Cities can grant or withhold business licenses from businesses within their boundaries. The power to regulate businesses, business activities, and persons engaged in business can be found in sections 8(6) and 59 of the *CC*. Notably, the *CC* gives cities power to regulate businesses, but not to prohibit or impose requirements on them. While cities cannot enact a blanket prohibition on a certain kind of business, they can make licensing requirements which all businesses of a class must follow.[110] The city may suspend or cancel a license for reasonable cause,[111] which includes a failure to follow regulations imposed by bylaw.[112] However, the license holder must be given notice and an opportunity to be heard.[113]

Vancouver

Vancouver has similar powers.[114] It can make bylaws providing for the licensing of any person carrying on any business, trade, profession, or other occupation.[115] It has the authority to license every person using any street and vehicle for the purposes of any business.[116] The city can refuse, revoke or suspend a license at its discretion without giving reasons.[117] Notably, unlike the *CC* cities, Vancouver's city council has the power to prohibit businesses. This power can only be exercised by the unanimous vote of the members present.[118]

---

[110] *CC* s 15.
[111] *CC* s 60(2).
[112] *CC* s. 15(1)(e)(i).
[113] *CC* s 60(3).
[114] *VC* s 273(1).
[115] *VC* s 272(1)(a).
[116] *VC* s. 272(1)(e).
[117] *VC* s.275.
[118] *VC* s 203(d).

VI. Acquiring Financial Resources

Cities in British Columbia raise revenues by three main mechanisms: taxes, fees, and grants from other levels of government. This section will examine taxes and fees. Generally, municipal taxation powers are construed narrowly. This means that cities have taxation powers that are only explicitly granted to them. However, taxes can be used as a source of general revenue; that is, they can be used for purposes that are not related to the tax. For example, the revenue from property tax does not have to go toward providing services related to property: it can be used for a completely unrelated, but legitimate purpose. Fees, however, are payments for a service provided by the city, and can only be used to fund the service from which the fee was generated.

Taxation

The taxation-related powers of municipalities in BC are limited to those enumerated in the relevant statutes.[119] As cities do not have the power to amend their own enabling statutes, this means that cities cannot introduce new forms of taxes. However, cities do have the power to adjust the rate of taxation.

Section 192 of the *CC* lists the areas of taxation that are open to cities: property value taxes, parcel taxes, local service taxes, and taxation of utility company property. Out of these, property value taxes are the most important source of revenue. Property values are determined by BC Assessment, an independent provincial body.[120] Based on the information of the value of all the property in its boundary, the city council sets the taxation rate for the year. The *CC* allows for variable rate taxation, which means that a city governed by this legislation can set different rates for different classes of property.[121] For example, the city can tax commercial properties at $50 per

[119] *CC* s 193.
[120] *See*, https://www.bcassessment.ca/.
[121] *CC* s 197(3),(4).

every $1,000 of its assessment value, while taxing residential properties at $5 per $1,000. The city is given a high level of deference in setting the rates; a court will only reject a council's decision over a tax rate if it finds that no reasonable, informed body could have made that decision.[122] This, however, does not mean that a city council has free, unimpeded reign over property tax rates; the provincial Cabinet may, by regulation, prescribe limits on tax rates or set the relationships between tax rates.[123] Again, this is a reminder that ultimate authority resides at the provincial level.

Part XX of the *VC* sets out the taxation powers available to the city of Vancouver. Section 396(1) grants the power to tax all real property in the city, subject to various exceptions such as in relation to Crown and city-owned land, charitable institutions, certain schools and hospitals, religious institutions, heritage property, etc. Like the *CC*, utility property and parcels are subject to taxation as well.[124] Also like the *CC*, Vancouver also has a variable property tax rate system that can be regulated by the provincial Cabinet.[125] Vancouver has the power to tax businesses based on the annual rental value of the real property occupied by the business, which is a power that is not found in the *CC*.[126]

Outstanding taxes can be recovered by a legal action in debt.[127] They can become a lien on the building.[128] The tax collector may also seize the property of the person whose taxes are outstanding.[129] Cities may also recover delinquent taxes through the annual tax sale of properties in default.[130]

---

[122] *Catalyst Paper Corporation v. North Cowichan (District),* 2012 SCC 2.
[123] *CC* s 199.
[124] *VC* ss 398, 373.
[125] *VC* s 374.2(1), 374.3.
[126] *VC* s 279AA.
[127] *CC* s 231.
[128] *VC* s 414.
[129] *CC* s 252.
[130] *LGA* ss 406, 407, *VC* 422. *See*, for example, https://vancouver.ca/home-property-development/auction-of-tax-sale-property.aspx.

Fees, Levies, and other sources of funds

Fees and Charges

Another big source of revenue for municipalities is service fees and charges. Municipalities may impose fees in respect of services, the use of municipal property, and the exercise of authority to regulate, prohibit, or impose requirements.[131] Municipalities are prohibited from imposing a highway toll unless specifically provided by a provincial or federal enactment.[132] If the fee was for work done or services provided to land or to improvement of land, the fee gains special status as taxes, and can become charges or liens on the land if payment is not made.[133] This means that the property in relation to which these fees are charged may be subject to a tax sale if the property owner fails to pay the fees. Fees cannot be arbitrary; they must relate to the actual cost of providing a service.[134] If they are found to be too high, courts may find that they are taxes in disguise and quash them (*i.e.*, render them void).[135]

Financing

Financing for municipalities is a complex topic. Please reference the *Local Government Fact Sheets* for an overview.[136] There are significant limits on the borrowing capabilities of cities. Vancouver is unique in that it can levy special taxes for the purpose of paying off debt, and issue

[131] *CC* s 194(1).
[132] *CC* s 194(5).
[133] *CC* s 258.
[134] *Re: Eurig Estate*, [1998] 2 S.C.R. 565.
[135] *Re: Eurig Estate*.
[136] *Local Government Fact Sheets* pp 45 to 53; https://www.ubcm.ca/assets/Services/Publications/2018/2018_UBCM_FactSheets.pdf.

securities for the same purpose.[137] Most British Columbian municipalities borrow funds through the B.C. Municipal Authority.[138]

CC cities cannot incur a capital liability if that would cause total annual debt servicing cost to exceed 25% of municipal revenues. However, they may exceed this limit with prior approval of the Inspector of Municipalities, who is a provincial officer.[139]

Development Cost Charges and Community Amenity Contributions

New developments can be either a liability or an asset for municipal governments. The city must expend resources on extending services, such as water and roads, to the new development. On the other hand, developments often generate a lift in land value, into which the municipality may tap. In order to cover the costs of extending services, municipalities employ Development Cost Charges (or DCCs).[140] A municipality may impose DCCs when someone obtains approval of a subdivision or a building permit.[141] DCCs are limited in their use in that they can only be used to fund the capital costs for providing, constructing, altering or expanding waterworks, sewer trunks, treatment plans and related infrastructure, drainage works, major roads, and park land.[142] These services must be in relation to the development in question. DCCs may be waived or reduced

[137] *VC* s. 236(1), 239.
[138]This is described as: "The Municipal Finance Authority of British Columbia (MFA) was created in 1970 to contribute to the financial well-being of local governments throughout BC. The MFA pools the borrowing and investment needs of BC communities through a collective structure and is able to provide a range of low cost and flexible financial services to our clients equally, regardless of the size of the community. The MFA is independent from the Province of British Columbia and operates under the governance of a Board of Members appointed from the various Regional Districts within the province." *See*, https://mfa.bc.ca/.
[139] "The Inspector of Municipalities, appointed by the Lieutenant Governor in Council, is responsible for oversight of local government financial matters and approval of certain local government decisions to ensure consistency with provincial legislation "*See*, https://www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/provincial-local-government-relations/inspector-of-municipalities.
[140] *LGA* Div. 19. (DCCs are roughly comparable to "growth charges" in Washington State).
[141] *LGA* s. 559(1).
[142] *LGA* s. 559(2).

for affordable or non-profit rental housing.[143] When determining the rates for DCCs, local governments must consider factors such as future land use,[144] and the possibility of deterring development or construction of affordable housing.[145] DCCs must be set out in a bylaw, which must be approved by the (provincial) Ministry of Community, Sport and Cultural Development.[146]

Vancouver

The *VC* gives the City of Vancouver a roughly equivalent power called Development Cost Levies ("DCL").[147] DCLs have some differences and advantages over the DCCs. In addition to all the possible uses of the DCC, such as sewage and water, DCLs can fund day care facilities.[148] Furthermore, the *VC* gives the Vancouver City Council the right to impose a DCL for the purpose of providing what is called "Replacement Housing."[149] "Replacement Housing" refers to housing that may potentially have to be built in order to house people who are displaced as a result of a new development.[150]

Community Amenity Contributions, or CACs, are usually discussed in conjunction with DCCs. However, they differ in many important aspects. Crudely put, CACs are a way for cities to leverage their zoning power to obtain benefits such as green space, affordable housing, or funds for other purposes from developers. Those who wish to develop a property in a way that the current zoning laws do not allow (e.g., building more housing units, exceeding height restrictions) can petition the municipality to change zoning with respect to that property. To "sweeten the deal,"

[143] *LGA* s. 563(1).
[144] *LGA* s. 564 (4) (a).
[145] *LGA* s. 564 (4) (f).
[146] *LGA* s. 564, 560.
[147] *VC* Part XXIV-A.
[148] *VC* s. 523D (1), (2.1).
[149] *VC* s. 523D (2.1).
[150] *VC* s. 523D (2.2).

the developer can "offer" to contribute "community amenities," such as units of affordable housing or libraries or funding towards such amenities, if the zoning bylaw were to be changed. If the offerings are to the municipal government's liking, the council may go ahead with the process of changing the bylaw and collecting what then become known as CACs. The law does not allow zoning to be "sold," neither can a council impose conditions for passing a re-zoning bylaw.[151] Therefore, it is important that this process be framed as the developer voluntarily offering benefits, and the city council taking the offering as one of the conditions that it considers in its deliberations.[152] The council cannot guarantee that the bylaw will be passed; it must take into account all the other factors that go into making a bylaw, such as due process and public input.[153] The process must be one of negotiation with the developer not imposition.

CACs have several strengths. Their uses are not as limited as those of DCCs, so they can be used to fund things such as community centres, art installations, or affordable housing.[154] Funds raised by DCCs can only be used for providing services for that development. DCCs' rates are set out in bylaw, so they cannot be changed easily (especially for *CC* cities, which must seek provincial approval) or be varied within the same class. Since CACs are the result of individual negotiations, they are highly flexible; they can be different from building to building. Cities have increasingly turned to CACs as a way of securing below-market rate housing without having to build it themselves.

[151] Ministry of Community, Sport and Cultural Development. Community Amenity Contributions: Balancing Community Planning, Public Benefits and Housing Affordability p 6; https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/local-governments/planning-land-use/community_amenity_contributions_guide.pdf .
[152] Ministry of Community, Sport and Cultural Development. Community Amenity Contributions: Balancing Community Planning, Public Benefits and Housing Affordability.
[153] Ministry of Community, Sport and Cultural Development. Community Amenity Contributions: Balancing Community Planning, Public Benefits and Housing Affordability p 8.
[154] Ministry of Community, Sport and Cultural Development. Community Amenity Contributions: Balancing Community Planning, Public Benefits and Housing Affordability p 3.

The power to carry out CAC agreements is not expressly provided for in statutes. Rather, they are a consequence of city councils' discretionary powers to either grant or not grant a proposed change in zoning, and the power to enter into agreements.[155]

Spot rezoning, however, is not without its controversies. Some argue that CACs make housing less affordable, as their costs may get passed on to buyers or tenants.[156] Developers complain that CACs introduce more uncertainties into the process. However, others argue that developers are free to build within the allowed zoning capacity, so if they enter into CAC agreements it is because they stand to gain from them.

VII. Application of Tools by Topic

Transit

Surrey and Vancouver have relatively little power over transportation. Instead, Metro Vancouver's regional transport authority, Translink,[157] holds most of the power over transportation in both cities. Translink's powers come from a provincial statute[158] rather than from the local governments it serves, although mayors within Metro Vancouver do get to sit on the Mayor's Council for Regional Transportation that makes some transportation decisions.[159] Translink's governance structure is a source of contention[160] for Metro mayors because the structure grants ultimate authority for important policy decisions—for example, over finance and planning—to

[155] Ministry of Community, Sport and Cultural Development. Community Amenity Contributions: Balancing Community Planning, Public Benefits and Housing Affordability p 6.
[156] Ministry of Community, Sport and Cultural Development. Community Amenity Contributions: Balancing Community Planning, Public Benefits and Housing Affordability p 14.
[157] *See*, https://www.translink.ca/.
[158] *South Coast British Columbia Transportation Authority Act*, SBC 1998 c 30.
[159] *South Coast British Columbia Transportation Authority Act* ss 208-234.
[160] The Mayor's Council has resolved to ask the Province to announce that it will review the statutory source of Translink's powers and consider governance changes: http://vancouversun.com/news/local-news/metro-vancouver-mayors-renew-call-for-translink-governance-review.

Translink's unelected Board of Directors.[161] Members of this Board are appointed by the provincial government.

Translink's statutory purpose is to provide a regional transportation system.[162] This includes, but is not limited to, ferries, cycling path networks, custom transit services, bus transportation systems, rail transportation systems, and the Major Road Network.[163]

In order to achieve this purpose, Translink has a range of powers that is in many ways similar to those of a municipality. In relation to property, Translink can expropriate,[164] acquire,[165] hold, manage, develop, and dispose of land.[166] More generally, Translink can make bylaws in reference to its transportation systems[167] and has the power to create taxes, levies, and fees.[168]

Translink also has planning responsibilities. It must create a long term transportation strategy that extends thirty years into the future[169] and supports the GVRD's regional growth strategy.[170] The current long term transportation strategy, *Transport 2040*, was created in 2008 and extends to 2040.[171] Translink also published a strategic report[172] about Intelligent Transportation Systems in 2013, but this does not appear to be a "long term transportation strategy"[173] as defined by Translink's enabling statute, and therefore may have limited legal value.

---

[161] Metro Vancouver, *Backgrounder: Transportation Planning and Governance Review* https://www.richmond.ca/__shared/assets/transportation43120.pdf'.
[162] *South Coast British Columbia Transportation Authority Act*, SBC 1998 c 30 s 3.
[163] *South Coast British Columbia Transportation Authority Act*, SBC 1998 c 30 s 1, "regional transportation system". The Major Road Network is a network of more than 600 kilometres of major arterial roads within Metro.
[164] *South Coast British Columbia Transportation Authority Act*, SBC 1998 c 30 s 6(2)(a).
[165] *South Coast British Columbia Transportation Authority Act* s 6(2)(a.1).
[166] *South Coast British Columbia Transportation Authority Act* s 6(2)(a.2).
[167] *South Coast British Columbia Transportation Authority Act* s 6(2)(c).
[168] *South Coast British Columbia Transportation Authority Act* s (6)(2)(b).
[169] *South Coast British Columbia Transportation Authority Act* s 193.
[170] *South Coast British Columbia Transportation Authority Act* s 3(b).
[171] Translink, *Transit 2040* (2008); https://www.translink.ca/~/media/documents/plans_and_projects/regional_transportation_strategy/transport%202040/transport%202040.ashx.'
[172] Translink, *BC Regional ITS Strategic Plan Project* (2013) https://www.translink.ca/-'/media/Documents/plans_and_projects/regional_transportation_strategy/Research/Intelligent_Transportation_Systems.pdf.'
[173] *South Coast British Columbia Transportation Authority Act* s 193'.

While Translink has the bulk of power over transportation in Metro Vancouver, it shares power with Metro municipalities over the Major Road Network and regional cycling infrastructure.[174] Surrey and Vancouver both also have related powers over roads and sidewalks,[175] and street traffic.[176] Further, Vancouver and Surrey may exercise some limited influence over Translink through their contributions to Metro's Regional Growth Strategy that Translink must support.

Housing

Both Surrey and Vancouver have been taking a multi-pronged approach to the affordable housing crisis.[177] Both have also recently elected new city councils so housing strategy may change. One of the primary approaches of these cities to date has been to increase the supply of residential units across income levels. Vancouver has built, and is planning to build, prefabricated "modular housing" on city-owned lots aimed at housing the extremely low-income and/or homeless population. This is the extent of city-built housing, however.

The city has been trying to leverage private development by means of inclusionary zoning, CACs, and density bonusing. For example, new buildings in the Cambie Corridor (a major development area) are required to have 20% of its units be social housing. It has also been trying to address the shortage of rental housing stock by trying to encourage developers to build 100% rental buildings by waiving DCLs, loosening regulations such as parking requirements and minimum unit size, rezoning for higher density, and expedited permit approval process.[178] Surrey

[174] Translink, *About Us* https://www.translink.ca/About-Us.aspx.
[175] *CC* s 35; *VC* ss 289-291.
[176] *CC* s 35; *VC* ss 317-321.
[177] *See*, for example, https://vancouver.ca/people-programs/housing-vancouver-strategy.aspx.
[178] *See*, Laneway Housing How-to Guide, City of Vancouver, October 2018: Amended August 26, 2019, https://bylaws.vancouver.ca/bulletin/bulletin-laneway-housing-guide.pdf ; also, http://vancouver.ca/people-programs/creating-new-market-rental-housing.aspx.

has been providing shelter space for homeless individuals and encouraging developers to build primary rental units. However, it is yet to release a comprehensive housing plan.[179]

The City of Vancouver is also trying to incentivize individual property owners to build more housing supply by means of changes to zoning. Vancouver has recently changed the zoning bylaw to allow "laneway homes" on many residential properties.[180] Laneway homes, also known as "granny flats" or "coach houses," are smaller suites that are detached from the main house on the lot--usually built over the garage. Furthermore, the past city council allowed some formerly single detached residential zones to include duplexes and triplexes. The hope is that the loosening of zoning bylaws that restrict the number of suites or residences on a single lot will encourage individual homeowners to add more housing units.

Another way in which Vancouver is trying to regulate housing supply is by means of regulating AirBnbs.[181] The city's business licensing power has historically regulated hotels and other short-term rental services. Previously, the *Hotels Bylaw* permitted only those with hotel licenses to run a business that rented out rooms for periods of time shorter than 30 days, which meant that most AirBnb owners were operating their businesses illegally. Not only were they illegal, but AirBnbs were thought to be removing rental units from the long-term rental market, thereby decreasing the supply of rental housing. In order to address this problem, the city recently passed a bylaw that legalized AirBnbs starting in April 2018, provided that the owners obtain short-term rental licenses, and are renting out rooms in their principal residence. It is hoped that this will stop units being dedicated entirely and solely to short-term rentals.

[179] *See*, http://www.surrey.ca/community/21810.aspx.
[180] *See*, https://vancouver.ca/people-programs/laneway-houses-and-secondary-suites.aspx.
[181] *See*, http://vancouver.ca/doing-business/short-term-rentals.aspx.

Vancouver is notable in that it is the first city in North America to have an "Empty Homes Tax." This is an extra tax on homes that are left unoccupied for more than six months a year.[182] Although Vancouver can set different tax rates for different classes, it cannot set different tax rates for those in the same class; that is, it cannot tax one residential property at 2% and another at 4%. As empty homes are in the same class as non-empty homes, the city could not, initially, make a bylaw that would impose an extra tax on empty homes only. In order to do this, the City had to convince the provincial legislature to amend the *VC*. The provision can now be found at Part XXX of the *VC.*[183] The Vancouver empty home tax of 1% of assessed value was recently raised to 1.25%.[184]

Response to Opioid Crisis

Healthcare in both cities is provided by provincial healthcare providers: Vancouver Coastal Health and Fraser Health. However, the City of Vancouver has a unique relationship with drug policy. It is home to the first legally sanctioned supervised injection facility in North America, Insite.[185] This facility was the result of a combined push by drug users' groups, health officials, NGOs, and local, provincial, and federal politicians.

Vancouver is home to a high number of illicit drug users. Accordingly, Vancouver has been hit hard by the opioid crisis. In the first half of 2017, there were about 4,000 overdose incidents in Vancouver resulting in 209 overdose deaths, which comprised almost a third of all overdose deaths in the province of BC.

---

[182]This tax has recently increased: https://globalnews.ca/news/6228639/vancouver-hikes-empty-homes-tax/.
[183] *See*, http://www.bclaws.ca/civix/document/id/complete/statreg/vanch_31#partXXX.
[184] *See*, https://www2.gov.bc.ca/gov/content/taxes/property-taxes/property-transfer-tax/understand/additional-property-transfer-tax. The province of British Columbia has also instituted a speculation and vacancy tax: https://www2.gov.bc.ca/gov/content/taxes/speculation-vacancy-tax. Canadian citizens are charged 0.5 per cent and foreign owners and satellite families are charged two per cent of the value of an empty home. The Provincial government has also added a "Foreign Homeowner Tax," which is a 15% tax on residential property transfers where the purchaser is not a Canadian citizen or permanent resident. This tax has recently been raised to 20%.
[185] *See*, http://www.vch.ca/locations-services/result?res_id=964.

Typically, the City of Vancouver does not operate clinics. Its response to the opioid crisis[186] has been by means of first responders and funding various initiatives through tax revenue. On December 13, 2016, the City of Vancouver approved a 0.5 per cent increase in property taxes for the explicit purpose of raising funds to address the opioid crisis.[187] It could to this because setting property tax rates is within the powers of the city council as explained in section 3. Out of the $3.5 million raised by 2017, for example , $1.9 million went to the Vancouver Fire and Rescue service, mainly in establishing a 24/7 temporary medical unit in the Downtown Eastside ("DTES"), an extremely low-income neighbourhood that is sometimes referred to as "North America's biggest open-air drug market" and "North America's poorest postal code."[188] Another $430,000 went to establishing a new community policing centre near the DTES. Additionally, $1.02 million was given out to "high impact projects" led by various community groups and non-profit service providers.[189] Furthermore, the city has helped move an outdoor safe consumption site to an indoor site, funded a fentanyl detecting machine, and funded anti-stigma campaigns.[190] Vancouver has also been collecting data on the opioid crisis, with staff providing weekly updates to City managers. Overall, the bulk of Vancouver's response has been through its first responder services of fire and police. Outside of those, funds have been given to community organizations and non-profit service providers. In both of these approaches, a focus has been the provision of Naloxone, an opioid antagonist pharmaceutical that reverses the effects of an overdose.

---

[186] *See*, https://vancouver.ca/people-programs/drugs.asp; https://globalnews.ca/news/3626797/city-of-vancouver-approves-new-opiod-crisis-grants/.
[187] *See*, https://vancouversun.com/news/local-news/dan-fumano-vancouvers-recent-tax-increases-respond-to-housing-opioid-crises-says-finance-boss/.
[188] *See*, Larry Campbell, Neil Boyd and Lori Culbert, A Thousand Dreams: Vancouver's Downtown Eastside and the Fight for Its Future, Vancouver, Greystone Books 2009; https://vancouver.ca/files/cov/downtown-eastside-plan.pdf; *Canada (Attorney General) v. PHS Community Services Society* [2011] 3 SCR 134, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7960/index.do.
[189] *See*, https://vancouver.ca/people-programs/drugs.aspx.
[190] *See*, for example, http://www.vch.ca/public-health/harm-reduction/supervised-consumption-sites.

The City of Surrey has done roughly the same, although to a much lesser extent.[191] Its response has been focused on providing extra police, bylaw enforcement officers, and nurses to a "tent city" in its city centre. Surrey's first responders have also been giving naloxone to victims of overdose, as well as collecting and using data on overdoses to analyze "hotspots" where many overdoses are happening. Furthermore, the City of Surrey has partnered with Statistics Canada, Fraser Health (a provincial health authority), and others to gather data on the risk factors of an overdose so that effective interventions can be designed. It has also worked with Fraser Health in opening a safe injection site in Surrey in terms of zoning and permits.

Environment

Municipalities have an important role to play in mitigating and adapting to climate change and other environmental challenges. The *CC* identifies "protection of the natural environment"[192] as a municipal sphere of authority, and establishes that "providing for stewardship of the public assets" and "fostering the. . .environmental well-being of its community" are purposes of the municipality.[193] The *VC* does not have similar provisions, but it does establish that "the preservation, protection, restoration and enhancement of the natural environment, its ecosystems and biological diversity"[194] may be addressed in Development Plans, and Development Plans "must include targets for the reduction of greenhouse gas emissions in the area covered by the plan, and policies and actions of the Council proposed with respect to achieving those targets."[195]

[191] *See*, for example, Martha Dow, Larissa Kowalski, Alexis Bee, Darrell Reid, Len Garis, Illicit Drug Overdoses: Fire First Responders on the Front Line in Surrey and Vancouver, British Columbia, April 2018, https://www.surrey.ca/files/Illicit%20Drug%20Overdoses%20April%202018.pdf.
[192] *CC* s 8(3)(j).
[193] *CC* s 7.
[194] *VC* s 561 4(b).
[195] *VC* s 562.01.

Planning tools such as Regional Growth Strategies (Metro Vancouver and other regional districts), Official Community Plans (Surrey and other *CC* municipalities), and Development Plans (Vancouver) allow local governments to create comprehensive plans to address climate change and other environmental challenges using the tools available to them.[196] They are an essential tool because they allow for coordinated responses.

Municipalities may employ a variety of specific tools to address environmental issues. Development Permit Areas allow municipalities to manage land use in areas with environmental hazards.[197] Zoning allows municipalities to decrease density or prevent habitation of high-risk areas.[198] For example, zoning may require buildings be set back from shorelines in order to accommodate sea level rise.[199] Building regulations may be used to mandate sustainable building practices.[200]

Both Vancouver and Surrey have authority over trees. The *CC* establishes that trees are one of Surrey's spheres of authority.[201] The *VC* also provides wide-ranging powers in relation to trees.[202]

[196] Carlson, WCEL Preparing for Climate Change: An Implementation Guide for Local Governments in British Columbia p 29.
[197] Carlson p 35.
[198] Carlson p 40.
[199] Carlson p 40.
[200] Carlson p 69.
[201] *CC* s 8(3)(c).
[202] *VC* ss 607-614.

Glossary

Term	Definition
Bylaw	A legally binding rule created by a local government. It must be voted on by Council. A bylaw is equivalent to an "ordinance" in an American city.
Dissent	The opinion of judges (or a single judge) who does not agree with the decision of the majority of judges. A dissenting opinion is not part of the law of Canada.
Division of powers	The way powers are distributed between federal parliament and provincial legislatures.
Enact	To make a bill or other proposal into a law.
Federalism	The governmental power of a state is distributed between a central (or federal) government and several regional (provincial) governments. Individuals are subject to the laws of both authorities, and the central and regional authorities' powers must be independent from each other and not subject to being taken away, altered, or controlled by the other level. *
Head of power	An area or type of power that is assigned to the federal parliament or provincial legislatures by the Constitution Acts.
Jurisdiction	An area of authority.
Policy	A form of guidance created by a local government that is not legally binding. Although not binding, it may influence court decisions.
Provision	A general term for a section or subjection in a statute.
Separation of powers	The division of the functions of government into executive, legislative, and judicial branches.*
Statute	A bill that has been approved or "read" three times by the Parliament or legislature and signed into law by the queen's representative (the governor general or lieutenant governor).*
Ultra vires	A finding by a court that a statute or public decision is beyond the powers conferred by the Constitution of Canada on the body purporting to make it. The consequence of a finding of ultra vires is invalidity.*
*These definitions come from the glossary in Patrick J Monahan, Constitutional Law, 5th ed (Toronto: Irwin Law, 2017) at pages 529-536	

CHAPTER III: CITY POWERS IN WASHINGTON STATE

I. General Structure of Local Government Power in Washington State

United States Federalism

The United States is a federal country. The United States Constitution (the "Constitution") divides power between the federal government and state governments. Broadly speaking, the Constitution grants the federal government authority to act on matters of national concern. In comparison, state governments focus on issues of local or regional concern. While certain responsibilities are assigned exclusively to the federal government, the Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[203] Thus, residual legislative power ultimately lies at the level of the states. However, many tasks are shared between federal and state governments. In addition, the states and their local governments cannot violate the specific prohibitions in the *Constitution* or violate freedoms guaranteed by the *Bill of Rights*.

The *Constitution* allocates power between each level of government by defining specific powers available to the federal government,[204] prohibiting states from engaging in certain conduct,[205] and reserving all other powers for the states.[206]

[203] U.S. CONST. amend X.
[204] *See, e.g.,* U.S. CONST. art. I, § 8.
[205] *See, e.g.,* U.S. CONST. art. I, § 10.
[206] U.S. CONST. amend X.

The Role of Local Governments in United States Federalism

Because nothing in the Constitution provides otherwise, state governments may establish local governments. Left unaddressed by the national Constitution, local governments are defined, structured, and ultimately established pursuant to state constitutions and statutes. These documents typically detail the methods of creating municipal corporations, how they can be structured, and the powers they possess.[207]

Municipal power in Washington is rooted directly in state jurisdiction and is set out more explicitly in the state constitution.[208] Municipal authority is thus a delegation of state authority; Washington cities must review the state constitution in evaluating municipal authority. This analysis requires an examination of the structure and authority of municipal power in Washington State, as described below.

In addition to examining the contours of municipal authority as delegated by the state constitution, Washington cities must also consider governmental obligations related to state-tribal relations. Tribes are generally recognized as distinct governmental entities within the state.[209] Jurisdiction of the State of Washington—as well as the respective jurisdictions of Washington cities, counties, and other municipalities—overlap with each other and often overlap with the

[207] 2 MCQUILLIN MUN. CORP § 4:3 (3d ed.)(2018).
[208] *See*, WASH. CONST. art. XI, § 10 (establishing legislative control over the formation of local governments and enabling larger communities to create cities and draft city charters); 11 WASH. CONST. art. XI, §11 (granting cities authority to enact and enforce police powers).
[209] *See* Auto. United Trades Org. v. State, 175 Wn.2d 214, 226 (2012) (recognizing tribes as "domestic dependent nations" subject to Congress's plenary authority).

jurisdictions of tribal governments.[210] On this basis, municipal actors must also assess the potential for projects to touch upon matters of tribal governance.[211]

II. Sources of Local Governments' Power in Washington State

The scope and extent of municipal power in Washington State is often puzzling to observers because the breadth of city authority is influenced by conflicting doctrines and is deployed across different categories of cities.[212]

Washington cities are classified based on their population at the time of organization or reorganization.[213] Cities are classified into one of four categories: first class (charter) cities, second class cities, code cities, and towns.[214] First class cities are cities that have adopted a charter that have a population greater than 10,000 at the time of organization or reorganization.[215] First class (charter) cities are unique in that they draft their own charters and are accordingly able to structure their governments however they like. Second class cities are cities with a population greater than 1,500 at the time of organization or reorganization that have not adopted a charter and do not operate as a code city under the Optional Municipal Code, as described below.[216] Towns are cities that have a population of less than 1,500 at the time of organization or reorganization that do not

---

[210] *See*, e.g., Gobin v. Snohomish County, 304 F.3d 909 (2002), cert. denied, 538 U.S. 908 (2003) (Washington counties lack regulatory jurisdiction over land uses of fee simple land within a reservation that is owned by a federally-recognized tribe or its members).

[211] Our analysis primarily addresses considerations for municipal actors in Bellevue, Washington and Seattle, Washington. Given those cities' lack of direct proximity to tribal reservations, more detailed analysis is not included in this paper.

[212] *See* Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" For Washington Cities*, 38 SEATTLE U. L. REV. 809 (2015).

[213] *CITY AND TOWN CLASSIFICATION*, MUNICIPAL RESEARCH AND SERVICES CENTER, http://mrsc.org/getdoc/9ffdd05f-965a-4737-b421-ac4f8749b721/City-and-Town-Classification-Overview.aspx (last visited Mar. 19, 2018).

[214] *Id*.

[215] WASH. REV. CODE § 35.01.010.

[216] WASH. REV. CODE § 35.01.020.

operate as a code city under the Optional Municipal Code.[217] Code cities are cities and towns that have opted to incorporate or reorganize as a code city under the Optional Municipal Code.[218]

While Seattle is a first class (charter) city,[219] Bellevue is a code city.[220] Though each municipality secures its power via distinct legal mechanisms, the Washington State Constitution ultimately treats both cities identically. As discussed in greater detail below, this identical treatment does not apply to second class cities and towns.

Broadly speaking, local government power employs one of two frameworks.[221] Under city "home rule," cities are broadly authorized—constitutionally or by statute—to control matters of local concern as they see fit.[222] Limited only by those powers expressly denied by law, municipal power is sweeping and significant. In contrast, under the 19th century "Dillon's rule," cities possess only those powers expressly granted by the state constitution or by state legislation.[223] In effect, *home rule* authorizes broad powers unless expressly denied, while *Dillon's rule* denies powers not expressly granted.

Expression of home rule and Dillon's rule doctrines in Washington State has been inconsistent, as evidenced by imprecise court decisions and gratuitous legislation. Though the original 1889 state constitution set forth home rule provisions for charter cities like Seattle, courts initially applied the home rule doctrine only to those aspects of municipal authority involving municipal police powers. Turn-of-the-century court decisions narrowly confined home rule to regulatory matters, employing Dillon's rule to evaluate municipal authority for all other city

[217] WASH. REV. CODE § 35.01.040.
[218] Title 35A RCW.
[219] CHARTER OF THE CITY OF SEATTLE PMBL. (1907).
[220] BELLEVUE, WA., CODE CH. 1.01 (1975).
[221] STEVE LUNDIN, THE CLOSEST GOVERNMENTS TO THE PEOPLE: A COMPLETE REFERENCE GUIDE TO LOCAL GOVERNMENT IN WASHINGTON STATE 662 (2007).
[222] Hugh Spitzer, "Home Rule" Vs. "Dillon's Rule" For Washington Cities, 38 SEATTLE U. L. REV. 809 (2015).
[223] *SEE* CITY OF CLINTON V. CEDAR RAPIDS & MO. RIVER R.R. CO., 24 IOWA 455, 475, 479 (1868).

powers. In the following decades, during the "Progressive Era," Washington courts came to entirely reject Dillon's rule for first class (charter) cities. Left largely unaddressed, other classes of cities were presumed subject to Dillon's rule.

In 1967, state legislative enactment of a new "Optional Municipal Code" (Title 35A RCW) allowed a newly-created class of "code cities" (such as Bellevue) to "have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied [by law]."[224] Beyond confirming legislative intent for home rule to apply to code cities, the new statute explicitly indicated that the doctrine would extend beyond regulatory matters.[225] The legislation also included provisions equalizing the powers granted to charter and code cities.[226] In doing so, the legislature solidified the authority for both charter and code cities to exert broad, municipal power under home rule.

However, subsequent legislative grants of express power to charter and code cities have muddled the perceived significance of home rule. While providing assurance to charter and code cities that particular actions are authorized, such legislation under home rule is superfluous. Home rule dictates that extant powers already belong to the cities—thus express grants of already-secured powers serve no useful purpose. First class and code cities contemplating action should accordingly evaluate their position under home rule's broader approach.

Today, home rule affords charter and code cities in Washington State substantial autonomy to manage their affairs: both types of city are authorized to exert all municipal powers not otherwise denied by law. Naturally, the boundaries of charter and code city authority are framed within these limitations.

[224] WASH. REV. CODE § 35A.11.020.
[225] *Id.*
[226] *See* WASH. REV. CODE § 35.22.570.

Express statutory authorization is required for charter and code cities to operate in several areas.[227] These include most actions related to the city's judiciary,[228] eminent domain,[229] annexation,[230] taxation,[231] granting franchises,[232] and incurring debt.[233] A municipal ordinance that addresses one of these subjects must therefore be grounded in a specific state statute. Otherwise, charter and code cities are presumed to have the power to act. Practically speaking, this means that charter and code cities should operate under the assumption that they are authorized to do what they determine to be necessary or appropriate, unless legislative enactments stipulate the contrary.

Importantly, home rule is not applicable to all municipal corporations. Instead, Dillon's rule continues to apply to special purpose districts like ports, school districts, and various utility districts, as well as the state's small number of second class cities and towns.[234] Accordingly, these entities still require expressly granted power to act.

In sum, charter city and code city powers are extensive. Charter and code cities are well-equipped to act in a variety of capacities and their home rule powers sanction broad authority.

---

[227] LUNDIN at 676 –77.
[228] *See, e.g.,* In Re Cloherty, 2 Wash. 137, 146 (1891); MASSIE V. BROWN, 84 Wn.2d 490, 492–93 (1974).
[229] *See, e.g.,* City of Tacoma v. State, 4 Wash. 64, 66–67 (1892); Miller V. City Of Tacoma, 61 Wn.2d 374, 382–83 (1963); City Of Tacoma c. Welcker, 65 Wn.2d 677, 683 (1965).
[230] *See, E.G.,* State Ex Rel. Snell v. Warner, 4 Wash. 773, 776 (1892); State Ex Rel. Bowen v. Kruegel, 67 Wn.2d 673, 676 (1965).
[231] *See, E.G.,* Great Northern Railroad Co. v. Stevens County, 108 Wash. 238, 242-243 (1919); Carkonen v. Williams, 76 Wn.2d 617, 627; Hillis Homes V. Snohomish County, 97 Wn.2d 804, 809 (1982); Tacoma v. Taxpayers, 108 Wn.2d 679, 694 N.8 (1987).
[232] *See, e.g.,* Neils v. Seattle, 185 Wash. 269, 274–75 (1936).
[233] *See, e.g.,* Edwards v. Newton, 67 Wn.2d 598, 601–602 (1965).
[234] *See* Hugh Spitzer, *Washington Cities Have More Power Than We Think*, MRSC INSIGHT BLOG, MUNICIPAL RESEARCH AND SERVICES CENTER (Aug. 25, 2016), http://mrsc.org/Home/Stay-Informed/MRSC-Insight/August-2016/Washington-Cities-Have-More-Powers-Than-We-Think.aspx; Hugh Spitzer, *"Home Rule" Vs. "Dillon's Rule" For Washington Cities*, 38 SEATTLE U. L. REV. 809, 858 (2015).

III. Tools Available to Cities in Washington

As discussed above, cities in the United States derive all their powers from the state government. Thus, to determine if a city has the power and authority to take an action, we must find either a general or a specific grant of power from the state. The Washington Constitution provides broad regulatory power to all cities.[235] Additionally, several state statutes enumerate the other powers of the different types of cities.[236] These statutes include both general and specific provisions. As discussed above, second class cities and towns have only those powers specifically enumerated by statute as well as the broad regulatory power granted to all cities by the state constitution.[237] By contrast, first class cities and code cities are granted extensive home rule powers in addition to the powers conferred by specific provisions.[238]

Regulating, Planning, and Providing Services

Washington Constitution

Regulatory Power

Article XI, Section 11 of the Washington Constitution expressly grants cities broad home rule authority to regulate conduct. Article XI, Section 11 states: "[a]ny county, city, town or

[235] WASH. CONST. art. XI, § 11.
[236] *See* RCW 35.22.280 (first class cities), 35.23.440 (second class cities), 35A.11.020 (code cities), and 35.27.370 (towns). *See* also RCW 35.21 (providing additional powers to the various types of cities and towns.)
[237] *See* Hugh Spitzer, "Home Rule" Vs. "Dillon's Rule" For Washington Cities, 38 SEATTLE U. L. REV. 809, 858 (2015).
[238] RCW 35.22.195 (granting first class cities "all the powers which are conferred upon [classified cities and towns] and all such powers as are usually exercised by municipal corporations of like character and degree."); *See* Winkenwerder v. City of Yakima, 52 Wash. 2d 617, 328 P.2d 873 (1958)(holding that a first class city has as broad legislative powers as the state, except when restricted by enactments of the state legislature); RCW 35A.11.020 (granting code cities "all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law.").

township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." While historically the courts have interpreted the scope of this power to varying degrees, the power has generally been interpreted expansively to allow cities to enact regulatory ordinances that protect the "public health, safety, and welfare" so long as the ordinances do not conflict with state law.[239] The courts have upheld city regulations in a wide variety of subject matter areas including garbage collection,[240] land use,[241] marijuana stores, and historic preservation.

The courts only consider an ordinance to be constitutionally invalid on grounds of a conflict with state law if the ordinance "directly and irreconcilably conflicts with the statute."[242] The court will not find a conflict if the ordinance and statute can be harmonized and the courts have gone to some lengths to harmonize apparently contradictory regulations.[243] The effort to harmonize ordinances and statutes if at all possible is part of a larger interpretive rule that statutes and ordinances are presumed to be constitutional.[244] There is a heavy burden on a person challenging an ordinance to prove that it is unconstitutional beyond a reasonable doubt.[245]

An ordinance "directly and irreconcilably" conflicts with state law when (1) it permits what is forbidden by state law or prohibits what state law permits or (2) the legislature clearly manifests

---

[239] *See* Hugh Spitzer, Municipal Police Power in Washington, 78 WASH. L. REV. 495 (2000), State v. Mountain Timber Co., 75 Wash. 581, 585, 135 P. 645, 647 (1913).
[240] *City of Spokane v. Carlson*, 73 Wn.2d 76, 80, 436 P.2d 454, 457 (1968).
[241] *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 891, 795 P.2d 712, 715 (1990).
[242] *Lawson v. City of Pasco*, 168 Wn.2d 675, 682, 230 P.3d 1038, 1042 (2010).
[243] *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 564, 29 P.3d 709, 713 (2001)(holding that city could define employees' "dependents" to include domestic partners and their children and, thus, could extend health insurance benefits to them when statute authorizing city to provide health insurance benefits to employees and dependents did not define the term even if there is a state interest in and other state statutes regulating familial relationships.)
[244] Id.
[245] Id.

its intent to preempt the field.[246] The legislature might manifest this intent by explicitly stating in a statute that it preempts the field[247] or, where the legislature is silent regarding such intent, by fully occupying the field leaving no room for supplemental regulation.[248] If the Legislature is silent regarding its intent to occupy a given field, the court will refer to the purposes of the particular legislative enactment and to facts and circumstances upon which the statute was intended to operate.[249]

Power to Control Structure of City Government by Charter

The Washington Constitution also grants cities with a population of 10,000 or more the power to structure the city government by creating a city charter.[250]

State Statutes

Several state statutes also grant cities powers through general provisions. Code cities have "all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law."[251] The statute granting this broad power expressly rejected Dillon's rule and provided that:

> The purpose and policy of this title is to confer ... the broadest powers of local self-government consistent with the Constitution of this state. Any specific enumeration of municipal powers contained in this title or in any other general law shall not be construed in any way to limit the general description of power contained in this title, and any such specifically enumerated powers shall be construed as in addition and supplementary to *the powers conferred in general terms* by this title. All grants of municipal power to

[246] *Entm't Indus. Coal. v. Tacoma-Pierce City. Health Dep't*, 153 Wn.2d 657, 105 P.3d 985 (2005)(local ban on indoor smoking held to directly conflict with state law because it imposed a complete ban where the state permitted business owners to designate smoking areas); *City of Spokane v. Portch*, 92 Wn.2d 342, 596 P.2d 1044 (1979) (holding that state obscenity laws preempted the field of criminal penalties on obscenity because it included exceptions not provided for in the local law and uniform laws were necessary to avoid infringement of First Amendment rights.).

[247] RCW 9.*41*.290 ("...Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state…")

[248] *City of Spokane v. Portch*, 92 Wn.2d 342, 596 P.2d 1044 (1979).

[249] Id.

[250] WASH. CONST. art. XI, § 10.

[251] RCW 35A.11.020.

> municipalities electing to be governed under the provisions of this title, whether the grant is in specific terms or in general terms, shall be liberally construed in favor of the municipality.[252]

First class cities have "all the powers which are conferred upon [classified cities and towns] and *all such powers as are usually exercised by municipal corporations of like character and degree*."[253] Thus, first class cities have also been granted the general powers held by code cities.

Second class cities and towns are provided some powers by general provisions; however, the scope of these powers is unclear because they have not been tested in the courts. Second class cities have the power "[t]o provide for the general welfare."[254] Towns have the power to take all actions "not inconsistent with the Constitution and laws of the state ... as may be deemed expedient to maintain the peace, good government and welfare of the town and its trade, commerce and manufacturers."[255] Due to the lack of express anti-Dillon's rule language in the statutes granting these powers, the general provisions may be interpreted narrowly by the courts.[256]

Services Provision

Cities in Washington are authorized by statute to provide a wide range of service such as police and fire, parks, schools, economic development, social services, sports franchises, and utilities. Additionally, first class cities and code cities are broadly authorized to provide any "municipal services commonly or conveniently rendered by cities or towns."[257]

---

[252] RCW 35A.01.010 (emphasis added).
[253] RCW 35.22.195.
[254] RCW 35.23.440(53).
[255] RCW 35.27.370(16).
[256] *See* Hugh Spitzer, "Home Rule" vs. "Dillon's Rule" For Washington Cities, 38 SEATTLE U. L. REV. 809, 858 (2015).
[257] RCW 35A.11.020. Although by its terms this statute only applies to code cities as discussed above, RCW 35.22.195 grants first class cities "all such powers as are usually exercised by municipal corporations of like character and degree."

In Washington, courts make a distinction between "general governmental" services and "proprietary" services. Where a city is acting as a government by providing goods or services to the community at large, the city has authority only to the extent clearly granted by the Washington Constitution or a statute.[258] On the other hand, when a city is acting like a business through "proprietary" powers granted by statute, courts typically extend more flexibility and infer powers related to the expressly granted powers. For example, from the power to acquire and operate electric utilities, the court inferred the power to pay for installation of energy conservation devices in private properties.[259] The idea behind this distinction is that a city should be given the same latitude as a private business to make reasonable business decisions without requesting additional authority from the legislature.[260] Without express statutory authority, cities cannot exercise governmental powers outside of the city's boundaries; however, cities typically can exercise proprietary powers outside their boundaries.[261]

To determine which type of service a city is providing, the courts attempt to determine "whether the act performed is for the common good of all, that is, for the public, or whether it is for the special benefit or profit of the corporate entity."[262] For example, services that benefit the community at large such as parks or police services are typically considered general governmental services whereas services that benefit individuals such as providing electricity to a particular home

[258] *See* Hugh Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE U. L. REV. 173, 181–85 (2016).
[259] *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 692, 743 P.2d 793, 800-01 (1987).
[260] *Id.* ("[W]hen the Legislature authorizes a municipality to engage in a business, '[it] may exercise its business powers very much in the same way as a private individual ....'" (quoting *Pub. Util. Dist. No. 1 v. Town of Newport*, 228 P.2d 766, 771 (Wash. 1951)).
[261] *See* Hugh Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE U. L. REV. 173, 182–83 (2016).
[262] *Stiefel v. City of Kent*, 132 Wn. App. 523, 529, 132 P.3d 1111, 1114 (2006) (quoting *Hagerman v. City of Seattle*, 189 Wash. 694, 701, 66 P.2d 1152 (1937).

are considered proprietary services. This distinction has been applied inconsistently by the courts and has been criticized extensively by legal scholars.[263]

Specific Provisions

In addition to the general grants described above, several state statutes also grant power to cities through specific provisions.[264] For example, second class cities have the power "[t]o have, purchase, hold, use, and enjoy property of every name or kind whatsoever, and to sell, lease, transfer, mortgage, convey, control, or improve the same; to build, erect, or construct houses, buildings, or structures of any kind needful for the use or purposes of such city."[265] In total, these statutes identify hundreds of specific powers. It is outside the scope of this paper to detail each specific grant of power. Rather, this paper addresses the general framework of city powers and identifies relevant portions of the Revised Code of Washington one should review to determine whether a city may act.

IV. Resources

Cities in Washington receive revenue from a variety of local sources including property taxes, excise taxes, and various fees and charges. Cities also receive funding in the form of state and federal allocations and grants.

Taxation

For a city to exercise the power to tax, it must have specific clear statutory or constitutional authority to do so.[266] In Washington, cities are authorized to impose three basic kinds of taxes:

[263] *See* Hugh Spitzer, Realigning the Governmental/Proprietary Distinction in Municipal Law, 40 SEATTLE U. L. REV. 173 (2016).
[264] *See* RCW 35.22.280 (first class cities), 35.23.440 (second class cities), 35A.11.020 (code cities), and 35.27.370 (towns). *See* also RCW 35.21 (providing additional powers to the various types of cities and towns.).
[265] RCW 35.23.440(20).
[266] *Hillis Homes, Inc. v. Snohomish Cty.*, 97 Wn.2d 804, 809, 650 P.2d 193, 195 (1982).

property taxes, sales and use taxes, and business license taxes.[267] Revenue raised by these taxes contributes to the general funds of the city and may be expended for any city purpose. Cities are also authorized to impose specific taxes for more limited purposes.[268] Typically, revenue raised by these more specific taxes are earmarked for expenses with some relation to the subject matter of the tax. Additionally, code cities and first class cities are granted broad home rule taxing power "for local purposes."[269]

Article VII, section 1 of the Washington Constitution limits the property tax power in Washington. This section states that "[a]ll taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only." Under this section, a tax may distinguish between commercial property and residential property, but it could not distinguish between different values of residential property. This section was held to prohibit progressive income taxes.[270] Additionally, article VII, section 2 provides that the "aggregate of all tax levies upon real and personal property by the state and all taxing districts . . . shall not in any year exceed one percent of the true and fair value of such property in money."

[267] STEVE LUNDIN, THE CLOSEST GOVERNMENTS TO THE PEOPLE: A COMPLETE REFERENCE GUIDE TO LOCAL GOVERNMENT IN WASHINGTON STATE 217–33 (2007).

[268] Examples of taxes authorized by statute: leasehold excise tax (RCW 82.29A.040), real estate excise tax (RCW 82.46.010), real property taxes (RCW 35.43.130, 35.56.190, 35.92.080, 82.46.010 and 82.46.035), sales and use taxes (RCW 82.14.030); utility taxes (RCW 35.21.870, 82.04.065), gambling tax (RCW 9.46.110), hotel/motel tax (RCW 67.28), business and occupation tax (RCW 82.04), parking tax (RCW 82.80.030).

[269] RCW 35A.11.020 ("Within constitutional limitations, legislative bodies of code cities shall have within their territorial limits all powers of taxation for local purposes except those which are expressly preempted by the state…").

[270] *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933) (holding that income is property).

Fees and Charges

In addition to taxes, a city may impose regulatory fees under its broad regulatory authority or charges for services provided by the city under its proprietary authority.[271] Unlike taxes, cities cannot use funds raised by fees and charges for general purposes or to pay for general governmental services. Rather, fees and charges must bear a relationship to the cost of providing the service or regulating the subject matter.[272] To determine whether an imposition is a fee or charge rather than a tax, the court looks to the primary purpose of the imposition, the allocation of the funds, and relationship between the imposition and the regulation or service provided.[273]

Under the Washington Growth Management Act, a city may impose a one-time impact fee on a development project to help pay for constructing or expanding public facilities that directly address the increased demand for such facilities by the specific development.[274] Similarly, under the State Environmental Policy Act, a city may impose an impact fee to mitigate conditions relating to a project's environmental impacts.[275]

Financing

Cities in Washington may borrow money by issuing general obligation bonds subject to maximum amounts based on the value of taxable property.[276] Cities may also issue revenue bonds.[277] Cities may also finance specific improvements through assessments to property owners based on the increase in the value of properties by virtue of the improvements.[278]

---

[271] *Teter v. Clark Cty.*, 104 Wn.2d 227, 704 P.2d 1171 (1985) (upholding storm water control fee); *Hillis Homes, Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 105 Wn.2d 288, 714 P.2d 1163 (1986)(upholding charge imposed for connecting new users to a water system).
[272] *Teter v. Clark Cty.*, 104 Wn.2d 227, 234, 704 P.2d 1171, 1178 (1985).
[273] *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324, 327 (1995)
[274] RCW 82.02.020-.110.
[275] RCW 43.21C.065.
[276] *See* RCW 39.36, Wash. Const. art. VIII, § 6.
[277] RCW 35.41.030; RCW 39.46.150; RCW 39.46.160.
[278] RCW 35.43; RCW 35.44.

V. Application of Tools by Topic

Land Use and Planning

Land use is a broad area of law which includes regional planning, zoning, subdivision control, building and development codes, historic preservation, and environmental protection.[279] Any regulation that controls the use or development of property could be characterized as a land use regulation. Land use regulations are exercises of regulatory power to protect against activities that threaten public health, safety, or welfare.[280] These regulations have traditionally been a matter of state law; however, the federal government has also regulated land use in several areas where the federal government is permitted to impose regulations.[281] Land use regulation is limited by the federal and state constitution including procedural and substantive due process, [282] takings, [283] and equal protection limitations.[284]

General Authority

In Washington, as in most other states, the power to regulate land use has been largely

[279] *See* Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law § 1:2 (3d ed. 2013).
[280] *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 s Ct. 114, 71 L. Ed. 303 (1926); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wn.2d 378, 381, 312 P.2d 195 (1957).
[281] The majority of federal land use regulations have been in the area of environmental protection, but the federal government has also regulated in other areas. *See* 42 U.S.C. § 4321 (National Environmental Protection Act), 42 U.S.C. § 7401 (Clean Air Act), 33 U.S.C. § 1251 (Clean Water Act), 42 U.S.C. § 4001 (National Flood Insurance Act and Flood Disaster Protection Act), 16 U.S.C. § 661 (Endangered Species Act), 42 U.S.C. § 9601 (Comprehensive Environmental Response, Compensation and Liability Act); *See also* 42 U.S.C. § 2000cc(a)(1)(religious exercise), 47 U.S.C. § 332 (wireless facilities), 47 U.S.C. § 1455(a)(1)(wireless facilities), 42 U.S.C. §§ 3601-19 (fair housing).
[282] U.S. Const. amend. XIV; Wash. Const. art. I, § 3; *Nectow v. City of Cambridge*, 277 U.S. 183, 48 s Ct. 447, 72 L. Ed. 842 (1928); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002).
[283] U.S. CONST. amend. v; WASH. CONST. art. I, § 16; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 s Ct. 3141, 97 L. Ed. 2d 677 (1987); *Burton v. Clark Cty.*, 91 Wn. App. 505, 958 P.2d 343 (1998).
[284] U.S. CONST. amend. XIV; Wash. Const. art. I, § 12.

delegated to municipal governments.[285] A municipal corporation may regulate land use pursuant to the Washington Constitution's broad grant of regulatory power.[286] Additionally, the legislature has expressly authorized local planning and zoning through three so-called zoning "enabling" acts: RCW 35.63(cities and counties), RCW 35A.63 (code cities), RCW 36.70 (counties).[287] These zoning enabling acts do not preempt municipal zoning under the constitutional grant of regulatory power.[288] Rather, municipal governments may employ either the constitutional or the statutory authority when regulating land use. If a municipality relies on statutory authority, it must conform to the requirements outlined in the statute notwithstanding the broad grant of power under the constitution.[289]

Statewide Land Use and Planning Requirements

In addition to the permissive authority outlined above, the Growth Management Act ("GMA") and the Shoreline Management Act ("SMA") require certain jurisdictions to establish land use regulations.[290] These Acts establish statewide land use goals and impose procedural requirements for adoption of regulations in jurisdictions that meet the thresholds outlined in each respective act.

The GMA establishes statewide land use goals to guide and manage population growth in

[285] Juergensmeyer, *supra* note 1, at § 3:5.
[286] *Nelson v. City of Seattle*, 64 Wn.2d 862, 866, 395 P.2d 82 (1964); *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 891, 795 P.2d 712 (1990).
[287] Zoning "enabling" is a bit of a misnomer because, as discussed above, land use and zoning are exercises of the regulatory power which these entities already possess pursuant to the broad grant of regulatory power in the Washington Constitution.
[288] *Nelson v. City of Seattle*, 64 Wn.2d 862, 395 P.2d 82 (1964) (reasoning that zoning enabling acts are permissive grants of power rather than mandatory limitations of existing powers).
[289] However, this may be limited to jurisdictions that explicitly invoke the statutory authority. *Compare Nelson v. City of Seattle*, 64 Wn.2d 862, 395 P.2d 82 (1964) *with State v. Thomasson*, 61 Wn.2d 425, 378 P.2d 441 (1963) *and Lauterbach v. City of Centralia*, 49 Wn.2d 550, 304 P.2d 656 (1956).
[290] RCW 36.70A (Growth Management Act); RCW 90.58 (Shoreline Management Act).

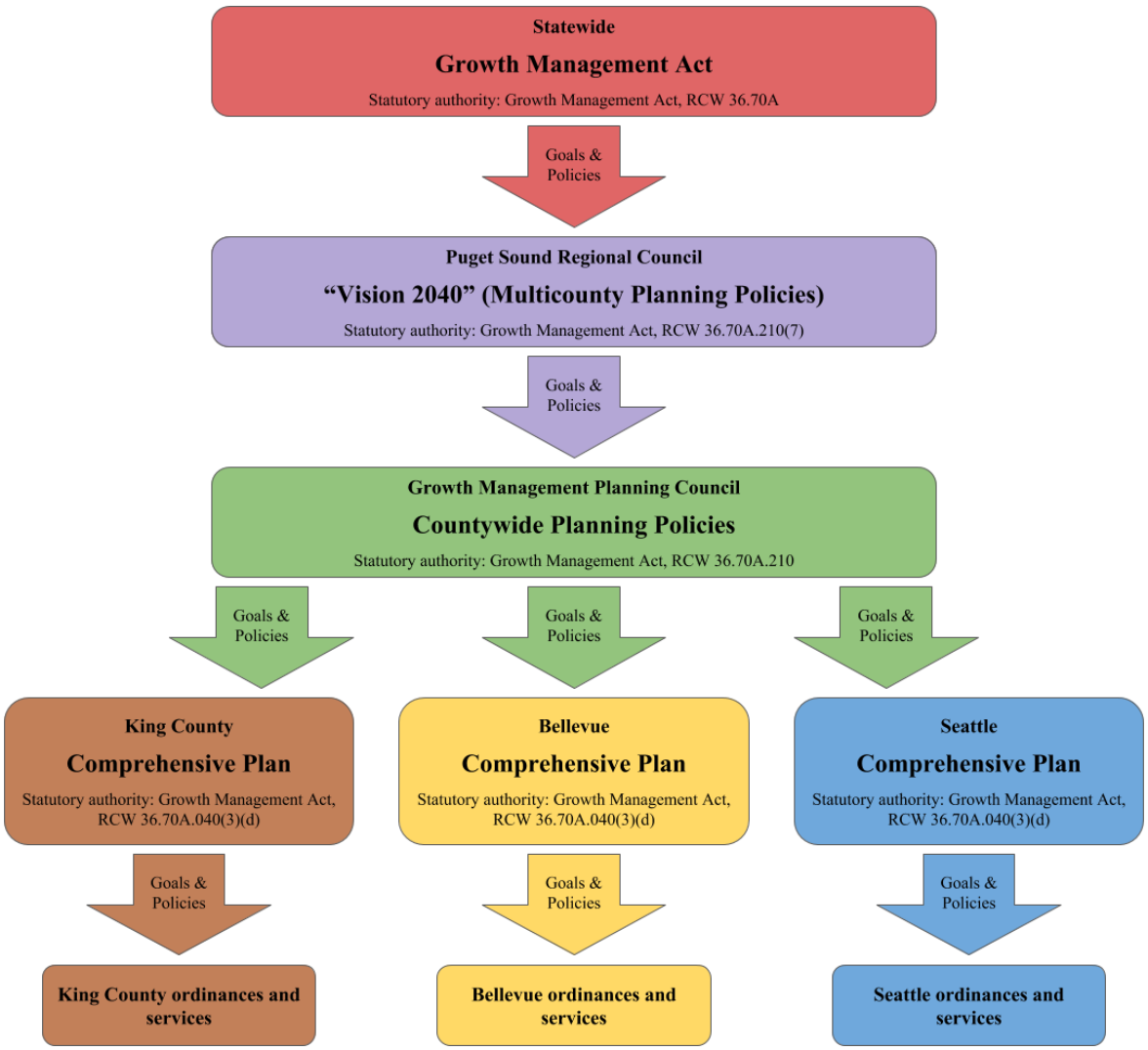
Washington.[291] It emphasizes regional planning, concentrated urban growth, and protection of the environment and natural resources. Counties that meet specified population and rate of growth thresholds are required to plan under the GMA. These counties must work with cities within their borders to establish countywide planning policies.[292] Additionally, adjacent counties that meet specific population thresholds must also coordinate to establish multicounty planning policies.[293] Counties that are required to plan under the GMA and the cities within those counties must each enact a comprehensive plan and land use regulations consistent with that plan.[294] A comprehensive plan is a land use policy statement that articulates long-term goals, policies, and standards to guide local decision-makers. The comprehensive plan must contain specific elements addressing topics such as housing, rural development, and transportation.[295] The policies outlined in each element must be consistent with the policies in other elements. The policies of the comprehensive plan must also be consistent with the goals established by the GMA, the countywide planning policies, and the multicounty planning policies. Counties that do not meet the thresholds may choose to opt-in to the GMA planning framework.[296] Of the 39 counties in Washington, 18 are required to plan under the GMA and 11 have opted-in.

The GMA also mandates that all 39 counties and all cities must identify and take steps to protect critical environmental areas and natural resource lands such as forest, agricultural, and mineral resource lands. The GMA establishes a state Growth Management Hearings Board with authority to review comprehensive plans and land use regulations for compliance with the GMA.

King County is required to plan under the GMA. The Puget Sound Regional Council, an

[291] RCW 36.70A.020.
[292] RCW 36.70A.210
[293] RCW 36.70A.210(7)
[294] RCW 36.70A.040(1).
[295] RCW 36.70A.070
[296] RCW 36.70A.040(2).

intergovernmental organization composed of 80 jurisdictions from King, Pierce, Snohomish and Kitsap counties, adopted multi-county planning policies. King County also established the Growth Management Planning Council, an intergovernmental organization consisting of elected officials from King County and the various other local governments within the county, to adopt countywide planning policies. Because Seattle and Bellevue are both located in King County, they are required to create a comprehensive plan and adopt development regulations. Their development regulations must be consistent with and implement the comprehensive plans which in turn must be consistent with the countywide planning policies, multicounty planning policies, and the GMA.



The Shoreline Management Act (SMA) establishes a cooperative program for management of the state's shorelines.[297] Local governments are primarily responsible for planning and administering regulations, while the state Department of Ecology provides support and reviews local government regulation for compliance with the statewide policies.[298] The SMA requires local governments that have "shorelines of the state" within their boundaries to develop and adopt

[297] RCW 90.50.020; RCW 90.58.050.
[298] *Id.*

Shoreline Master Programs.[299] The Shoreline Master Program must include shoreline-specific planning, zoning, and a development permitting system. All development on the shoreline requires a permit from the local government. Shoreline Master Programs and any amendments to it are effective only after the approval of the Washington Department of Ecology. The SMA also establishes a state Shorelines Hearings Board that hears appeals from permit decisions and from any fines issued under the SMA.

Environmental Review of Land Use Regulations and Decisions

The State Environmental Policy Act (SEPA), discussed below, requires a government to make a threshold determination of whether a land use regulation or decision will have probable and significant adverse environmental impacts.[300] If there will be probable significant impacts, SEPA requires a detailed environmental impact statement and public comment.[301]

Transportation

More forms of governments provide for transportation improvements and services than for any other government function in Washington State.[302] Federal, state, county, and city entities, as well as a range of special purpose districts, coordinate the planning, development, and operation of transportation infrastructure. Within this web of cooperation, cities play a central role.

The function of cities in planning for and providing transportation facilities has evolved significantly since the formation of the State of Washington. In 1854, the first Legislative

[299] RCW 90.58.080; RCW 90.58.030.
[300] WAC 197-11-310.
[301] WAC 197-11-360; WAC 197-11-402; WAC 197-11-500.
[302] STEVE LUNDIN, THE CLOSEST GOVERNMENTS TO THE PEOPLE: A COMPLETE REFERENCE GUIDE TO LOCAL GOVERNMENT IN WASHINGTON STATE 830 (2007).

Assembly of Washington enacted legislation authorizing counties[303] to provide roads[304] and bridges[305] through county-created road districts. Some city lands fell within these road districts, but counties retained a monopoly over road and bridge development. Over the next forty years, the legislature authorized specific cities to provide for and maintain their own road districts.[306] In 1890, immediately following statehood, all classes of cities were granted authority to provide public streets.[307] Marking cities' initial foray into the widespread provision of transportation facilities, this allocation of power paved the way for subsequent legislative delegations that expanded the role of cities in providing transportation facilities.

Today, cities are authorized to provide a broad spectrum of transportation facilities. Even with the grant of broad home rule for charter and code cities, the legislature has statutorily authorized substantial transportation powers in various ways. Though these express grants of authority are arguably superfluous in light of home rule's substantial inherent authority, they reflect a general legislative intent to bestow cities with significant autonomy to carry out transportation-related functions.

Specific transportation powers granted to charter cities include the authority:

---

[303] Counties are regional governments in Washington State. For more information on general characteristics of counties, *See* STEVE LUNDIN, THE CLOSEST GOVERNMENTS TO THE PEOPLE: A COMPLETE REFERENCE GUIDE TO LOCAL GOVERNMENT IN WASHINGTON STATE 29 (2007).

[304] STATUTES OF THE TERRITORY OF WASHINGTON, BEING THE CODE PASSED BY THE LEGISLATIVE ASSEMBLY, AT THEIR FIRST SESSION BEGUN AND HELD AT OLYMPIA, FEBRUARY 28TH, 1854, sec. 1–25, 340–48 (1855).

[305] STATUTES OF THE TERRITORY OF WASHINGTON, sec. 1–22, 358–61.

[306] STEVE LUNDIN, THE CLOSEST GOVERNMENTS TO THE PEOPLE: A COMPLETE REFERENCE GUIDE TO LOCAL GOVERNMENT IN WASHINGTON STATE 834–35 (2007).

[307] 1889–90 WASH. SESS. LAWS ch. 7, § 5(7), page no. 219 (granting first class cities control over their streets); 1889–90 WASH. SESS. LAWS ch. 7, § 38, page no. 152 (granting second class cities control over their streets); 1889–90 WASH. SESS. LAWS ch. 7, § 117(4), page no. 183 (granting third class cities control over their streets); 1889–90 WASH. SESS. LAWS ch. 7, § 154(4), page no. 202 (granting third class cities control over their streets).

- To construct, improve, and regulate the use of "streets, alleys, avenues, sidewalks, wharves, parks, and other public grounds,"[308] as well as "bridges, viaducts, and tunnels;"[309]
- To provide off-street parking facilities,[310] ferries,[311] airports,[312] wharves, moorage and harbor facilities,[313] and public transportation systems;[314]
- To form a city transportation authority to provide a monorail system;[315]
- To participate in the creation of a metropolitan municipal corporation to provide, among other things, regional public transportation;[316]
- To create local improvement districts to finance various kinds of transportation infrastructure, include roads, bridges, systems of underground, surface or elevated transit, and even moving sidewalks.[317]

Both state and federal law impose certain requirements for municipal actors to engage in transportation-related projects. These stipulations generally demand coordinated transportation planning between various government entities.[318] For example, Washington's Growth Management Act heightens the level of intra-governmental coordination required by demanding

[308] WASH. REV. CODE § 35.22.280(7).
[309] WASH. REV. CODE § 35.22.280(12). Chapter 35.23 RCW and Chapter 35.27 RCW include parallel provisions for second-class cities and towns.
[310] WASH. REV. CODE § 35.86–87A; § 35.27.550.
[311] WASH. REV. CODE § 35.21.110.
[312] WASH. REV. CODE § 14.07–08.
[313] WASH. REV. CODE § 35.22.280(7), (25); WASH. REV. CODE § 35.23.440(26); WASH. REV. CODE § 35.23.455; WASH. REV. CODE § 35A.88.020.
[314] WASH. REV. CODE § 35.22.340; WASH. REV. CODE § 35.92.060; WASH. REV. CODE § 35.95.
[315] WASH. REV. CODE § 35.95A.020.
[316] WASH. REV. CODE § 35.58.
[317] WASH. REV. CODE §§ 35.44.042(1), (10), (8), and (16).
[318] LUNDIN at 839. *See* Chapter 35.27 RCW; *See also* 49 U.S.C. § 5303 (2012).

that city transportation improvements are made concurrently with land development.[319] Along with project-specific requirements, cities must consider rules and regulations set forth by the state.

In effect, home rule secures cities broad authority to take on transportation projects. Specific transportation powers granted by the legislature reinforce the notion that cities have strong autonomy to provide and regulate transportation facilities.

A variety of public transportation systems operate throughout Washington State.[320] King County Metro Transit is the public transit authority of King County, serving Bellevue and Seattle.[321] Sound Transit is a Regional Transit Authority ("RTA") that provides light rail, commuter rail, and express bus service to King County, Pierce County and Snohomish County.[322] Sound Transit is the only RTA in the State of Washington.

Housing

Cities in Washington employ a wide variety of tools to promote the development and maintenance of affordable housing including density bonuses, fee waivers, expedited permit review, and other incentive programs. Some cities also allow for alternative housing options such as accessory dwelling units and small lot development.

General City Authority

A Washington city may regulate housing and development to encourage affordable housing pursuant to the state constitution's broad grant of regulatory power.[323] While cities have broad regulatory authority, any such ordinance or rule is subject to express statutory constraints,

---

[319] *See* WASH. REV. CODE § 36.70A.070(6)(b)

[320] A map of public transit authorities is available at http://www.wsdot.wa.gov/NR/rdonlyres/AE566092-D2FF-42CD-BF4E-4CDC17E71DDF/0/TransitAuthorities_2014v3.pdf.

[321] KING CTY. DEPT. OF TRANS. METRO TRANSIT, HTTPS://KINGCOUNTY.GOV/DEPTS/TRANSPORTATION/METRO.ASPX (LAST VISITED MAR. 19, 2018).

[322] *Id*.

[323] WASH. CONST. art. XI, § 11.

preemption by state law, and to the limits of the federal and state constitutions, including procedural and substantive due process,[324] takings, [325] and equal protection limitations.[326]

Cities may provide services related to housing; however, this function is primarily carried out by local housing authorities established by state statute.[327] Although the state constitution prohibits a city from making a gift or loan of public funds to a private entity, affordable housing efforts will typically fit within an exemption for supporting the "poor and infirm."[328] The broad grant of authority to cities is supplemented by development-related statutes specifically intended to increase affordable housing in Washington.[329] For example, one statute expressly authorizes cities to "assist in the development or preservation of publicly or privately owned housing for persons of low income by providing loans or grants of general municipal funds to the owners or developers of the housing."[330] At the same time, the state legislature has imposed some specific limitations on cities in this area. One statute limits the authority of cities to impose taxes, fees, and charges on development.[331] Cities are also expressly prohibited from enacting local rent control ordinances.[332]

Taxing Authority

Washington cities are authorized by statute to impose an affordable housing property tax

[324] U.S. CONST. amend. XIV; Wash. Const. art. I, § 3.
[325] U.S. CONST. amend. V; Wash. Const. art. I, § 16.
[326] U.S. CONST. amend. XIV; Wash. Const. art. I, § 12.
[327] RCW 35.82.
[328] WASH. CONST. art. VIII, § 7, states: "No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm . . . ."
[329] *See* RCW 64.34.440 (conversion condominiums and relocation assistance), RCW 82.02.060 (impact fees), RCW 36.70A (GROWTH MANAGEMENT ACT), RCW 35.92.380 (waiver of water and sewer connection charges).
[330] RCW 35.21.685.
[331] RCW 82.02.020.
[332] RCW 35.21.830.

when authorized by a majority of city voters.[333] Cities may impose up to fifty cents per thousand dollars of assessed property value each year for up to ten years to finance affordable housing for very low-income households.[334] In order to impose this tax, the city must first declare the existence of an affordable housing emergency for very low-income households and adopt an affordable housing financing plan. This taxing authority is split between counties and cities. The combined rate of the tax between the county and city may not exceed fifty cents per thousand dollars in any taxing district.

Washington cities are also authorized by statute to impose an affordable housing sales tax when specifically authorized by a majority of the voters in the taxing district.[335] The rate of the sales tax may not exceed one-tenth of one percent of the selling price. The revenue must be used for construction of affordable housing or mental health-related facilities, or for housing-related programs. This taxing authority is also split between counties and cities.[336] If the county has not imposed the full tax rate, a city in the county may impose the remaining portion of the tax. If a city located within the county has imposed the tax before the county, the county must provide a credit against its tax for the amount imposed by the city.

Washington cities may establish a multifamily housing tax exemption program to stimulate construction of new, rehabilitated, or converted multifamily housing, including affordable housing, in residentially deficient urban centers.[337] This program provides an exemption from property taxes for the value of eligible housing improvements for eight to twelve years. Only multiple-unit projects with four or more units are eligible for the exemption, and only property

[333] RCW 84.52.105.
[334] RCW 84.52.105(3) (defines "very low-income" as below fifty percent of the median income determine by the United States department of housing and urban development)
[335] RCW 82.14.530.
[336] RCW 82.14.530(1).
[337] RCW 84.14.

owners who commit to renting or selling at least 20% of these units to low- and moderate-income households are eligible for the 12-year exemption.

Prohibition on Rent Control

RCW 35.21.830 states that "[t]he imposition of controls on rent is of statewide significance and is preempted by the state." Cities are prohibited from enacting ordinances which "regulate the amount of rent to be charged for single-family or multiple-unit residential rental structures."[338] It is unclear how broadly this prohibition would be interpreted by the courts. The statutes specifically prohibit ordinances regulating the *amount* of rent to be charged but does not make clear if this prohibition extends to ordinances which regulate other "controls on rent" such as the method of payment. At least one city in Washington (Seattle) takes the position that this statute is a narrow prohibition.[339] This statute does not prohibit a city and a private party from entering into a voluntary agreement regulating the amount of rent to be charged.

Preemption of Taxes, Fees, and Charges on Development

RCW 82.02.020 states that ". . . [no] city . . . shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land." This statute limits a city's authority to enact certain kinds of regulations related to affordable housing. A Seattle ordinance that required developers to construct replacement low-income housing or contribute to a fund for such housing was struck down as a "tax" prohibited by this statute.[340]

---

[338] RCW 35.21.830

[339] *See* SEATTLE MUNICIPAL CODE 7.24.036 (providing for installment payments of last month's rent when a landlord wishes to collect it at move-in).

[340] *San Telmo Associates v. City of Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987); *See also R/L Associates, Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989).

Growth Management Act

The Washington Growth Management Act ("GMA") directs cities which are required to plan under the act to establish policies that "[e]ncourage the availability of affordable housing to all economic segments of the population."[341] Such cities must adopt a comprehensive plan and development regulations that identify "sufficient land for housing, including, but not limited to, government-assisted housing, [and] housing for low-income families . . . ."[342]

In addition, the GMA authorizes cities planning under the Act to establish an affordable housing incentive program.[343] An affordable housing incentive program may include density bonuses within urban growth areas, height and bulk bonuses, fee waivers and exemptions, parking reductions, and expedited permitting.[344] Such programs must provide for the development of low-income housing units and must include income guidelines based on local housing needs.[345] The program must include a maximum rent level or sales price for each low-income unit developed under the program.[346] Low-income housing units developed under an affordable housing incentive program must be used for affordable housing for at least 50 years, however, the program may allow the option to make a payment in lieu of continuing affordability.[347]

Inclusionary Zoning

Inclusionary zoning refers to ordinances that require developers to set aside a portion of new construction as affordable housing. Prior to the GMA it was unclear whether a city could require a developer to either provide affordable housing or pay a fee without running afoul of the

[341] RCW 36.70A.020(4)
[342] RCW 36.70A.070(2)(c); RCW 36.70A.040(3)(d).
[343] RCW 36.70A.540; WAC 365-196-870.
[344] *Id.*
[345] RCW 36.70A.540(2).
[346] *Id.*
[347] *Id.*

prohibition of taxes, fees, and charges on development discussed above. In fact, this prohibition was later amended to reference the authority provided under the GMA. The GMA explicitly authorizes cities to establish optional or mandatory requirements for the inclusion of affordable housing through inclusionary zoning.[348] Given the prohibition discussed above, it is likely that a city may only utilize the authority provided in the GMA to enact inclusionary zoning.

A city may require a minimum number of affordable housing units that must be provided by all residential developments in areas where the city decides to increase residential capacity. Before establishing such a requirement, a city must determine that such a zone change would further local growth management and housing policies. Cities may also offer density bonuses or other incentives to offset the developer's project costs and compensate for providing affordable units required by inclusionary zoning. Inclusionary zoning ordinances have not been tested in Washington courts, and depending on how they are structured they might be treated as circumscribed in part by court decisions involving due process or inappropriate taxation.[349]

Impact Fees

The GMA authorizes cities that plan under the GMA to impose impact fees on development activity to help finance related public facilities such as public streets, parks, schools, and fire protection.[350] Funds collected by impact fees may not be directly used to subsidize affordable housing. However, cities may encourage new affordable housing development by providing an exemption to the fees.

[348] RCW 36.70A.540; WAC 365-196-870(2).
[349] *See San Telmo Associates v. City of Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987); *See also R/L Associates, Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989).
[350] RCW 82.02.050.

Response to the Opioid Crisis

Both the Washington State government and local governments within the state have organized reaction measures in response to the developing opioid crisis.[351] Reflecting the broader influence of home rule—and the breadth of autonomy granted therein—efforts to reduce the spread and impact of opioid abuse and addiction have been coordinated at the state, county, and city levels.[352] Because of the broad authority afforded to cities, endeavors at the city level have varied significantly in approach.

So far, the most widely visible effort to combat the opioid epidemic in Washington State has been lawsuits filed against major drug manufacturers. In January 2017, the City of Everett filed a civil lawsuit against Purdue Pharma for "allowing OxyContin to be funneled through the black market, causing the current opioid crisis in Everett."[353] The City of Everett asserted claims of gross negligence, negligence, public nuisance, violations of the state's consumer protection act, and unjust enrichment.[354] In September 2017, the City of Tacoma filed a similar civil lawsuit against Purdue Pharma, Endo Pharmaceuticals, and Janssen Pharmaceuticals.[355] The City of Tacoma reportedly filed suit to hold the companies "accountable for providing false and misleading information to doctors and patients about the safety and efficacy of prescription opioids."[356] In December 2017, the United States Judicial Panel on Multidistrict Litigation ordered

[351] *See* Collins, Flannary, Safe Injection Sites and the Opioid Crisis, MRSC (Sept. 21, 2017), http://mrsc.org/Home/Stay-Informed/MRSC-Insight/September-2017/Safe-Injection-Sites-and-the-Opioid-Crisis.aspx.
[352] *Id*.
[353] CITY OF EVERETT DEP'T OF PUB. HEALTH AND SAFETY, *News Release: Everett Files Lawsuit Against Purdue Pharma* (Jan. 19, 2017), https://everettwa.gov/DocumentCenter/View/9018.
[354] Complaint at 18–26, City of Everett v. Purdue Pharma, No. 2:17-CV-00209-RSM (Oct. 25, 2017).
[355] Complaint, City of Tacoma v. Purdue Pharma, No. 3:17-cv-5737 (Sept. 13, 2017).
[356] CITY OF TACOMA, IN THE NEWS, *City of Tacoma Files Suit Against Three of Top Prescription Opioid Manufacturers* (Sept. 13, 2017), http://www.cityoftacoma.org/cms/One.aspx?portalId=169&pageId=136488.

for both cases to be transferred to the United States District Court for the Northern District of Ohio and to be combined with up to 115 potentially related actions filed against drug manufacturers in district courts across the United States.[357]

The City of Seattle filed a similar lawsuit against several opioid manufacturers for the "deceptive manner in which opioids were marketed to well-intentioned doctors" and for creating a public nuisance in September 2017.[358] Distinct from the actions brought by the City of Everett and the City of Tacoma, this lawsuit was filed in state court, rendering the transfer order mentioned above inapplicable. As of February 2018, the trial was scheduled to begin in September, 2018. [359]

Washington cities have also engaged in more direct efforts to address the opioid crisis. The Arlington, Everett, Lynwood, Marysville, Port Angeles, and Shelton Police Departments[360] have partnered with the Police Assisted Addiction and Recovery Initiative (PAARI) to develop and implement programs that focus on recovery, addiction treatment, and providing other resources to combat opioid addiction rather than traditional incarceration-based methods.[361] Central to these initiatives is the concept that policymakers should shift "the conversation toward the disease of addiction rather than the crime of addiction."[362]

Not all cities have embraced regional opioid response measures. In 2016, city leaders from several cities in western Washington (Seattle, Auburn, and Renton) convened the Heroin and Prescription Opiate Addiction Task Force to develop a regional response to the growing

[357] In *re Nat'l Prescription Opiate Litig*., MDL 2804, 2017 WL 6031547 (J.P.M.L. Dec. 5, 2017).
[358] Complaint, City of Seattle v. Purdue Pharma, No. 2:2017-cv-01577 (Sept. 28, 2017).
[359] Order Setting Civil Case Schedule, City of Seattle v. Purdue Pharma, No. 2:2017-cv-01577 (Sept. 28, 2017).
[360] POLICE ASSISTED ADDICTION AND RECOVERY INITIATIVE, *Our Law Enforcement Partners*, http://paariusa.org/our-partners/ (last visited Feb. 2, 2018).
[361] POLICE ASSISTED ADDICTION AND RECOVERY INITIATIVE, *About Us*, http://paariusa.org/about-us/ (last visited Feb. 2, 2018).
[362] *Id*.

epidemic.[363] Among the task force's recommendations was to establish at least two "Community Health Engagement Locations" (CHEL) in King County to function as safe injection sites.[364] Though the King County Council embraced these recommendations and implemented measures to encourage cities to allow for CHEL sites to be located within city limits, [365] city responses have been less encouraging. Several cities have passed resolutions prohibiting CHEL sites from locating within city limits.[366] On the basis that such sites are "detrimental to the public health, safety, and welfare of city residents,"[367] the cities' actions fit squarely within Washington cities' broad police powers. However, the U.S. Department of Justice has indicated that it will take legal action to block the establishment of safe injection sites in violation of federal law.[368]

Generally speaking, expansive city power enables a wide range of responses to the opioid crisis. Accordingly, local leaders have flexibility in developing measures to combat this growing issue.

Environment

While cities in Washington may regulate the environment pursuant to the Washington Constitution's broad grant of regulatory power, there are several state and federal laws operating

[363] KING COUNTY DEP'T OF COMMUNITY AND HUMAN SERVICES, *Heroin and Prescription Opiate Addiction Task Force*, https://www.kingcounty.gov/depts/community-human-services/mental-health-substance-abuse/task-forces/heroin-opiates-task-force.aspx (last visited Feb. 2, 2018).
[364] KING COUNTY DEP'T OF COMMUNITY AND HUMAN SERVICES, HEROIN AND PRESCRIPTION OPIATE ADDICTION TASK FORCE, *Final Report* at 26 (Sept. 15, 2016), https://www.kingcounty.gov/~/media/depts/community-human-services/behavioral-health/documents/herointf/Final-Heroin-Opiate-Addiction-Task-_Force-Report.ashx?la=en.
[365] King County, Wa., Resolution to Endorse the Heroin and Prescription Opiate Addiction Task Force Final Report and Recommendations, No. 17-01 (Jan. 17, 2017).
[366] Collins, Flannary, Safe Injection Sites and the Opioid Crisis, MRSC (Sept. 21, 2017), http://mrsc.org/Home/Stay-Informed/MRSC-Insight/September-2017/Safe-Injection-Sites-and-the-Opioid-Crisis.aspx.
[367] *Id*.
[368] Mike Carter, Seattle's New U.S. Attorney Says he Won't Allow City to Open Safe-injection Site, Seattle Times (April 4, 2019), https://www.seattletimes.com/seattle-news/seattles-new-u-s-attorney-says-he-wont-allow-city-to-open-safe-injection-site/.

in this area and many city regulations are preempted.[369] Cities protect the environment primarily through land use and planning rather than by imposing environmental protection regulations directly.

State Environmental Policy Act

The State Environmental Policy Act (SEPA), administered by the Washington Department of Ecology, seeks to protect the environment through extensive procedural requirements designed to ensure that environmental impacts are considered when governments make decisions on any action that might impact the environment.[370] The Act applies to both actions proposed by private parties and actions proposed by the government itself including project-specific actions such as permitting and funding decisions as well as non-project actions such as adoption of ordinances, rules, or policies.[371] SEPA requires a government to make a threshold determination of whether the action will have probable and significant adverse environmental impacts.[372] If there will be probable significant impacts, SEPA requires a detailed environmental impact statement and public comment.[373] SEPA authorizes cities to impose an impact fee to mitigate conditions relating to a project's environmental impacts.[374]

Washington Clean Air Act

The Washington Clean Air Act regulates air pollution and establishes regional air pollution control authorities that implement federal and state air pollution regulations.[375] Regulations

[369] *See* RCW 70.94.230(preempting city regulation of air quality), RCW 17.21(preempting city regulation of pesticide use)
[370] RCW 43.21C.
[371] WAC 197-11-704; *See also* WAC 197-11-800 (providing categorical exemptions).
[372] WAC 197-11-310.
[373] WAC 197-11-360; WAC 197-11-402; WAC 197-11-500.
[374] RCW 43.21C.065.
[375] RCW 70.94

adopted by an air pollution control authority preempt local ordinances regulating air pollution.[376] However, cities may regulate public nuisances, workplace health and safety standards, and performance standards, which are no less stringent than those of the authority in zoning ordinances.[377]

Critical Areas

The GMA requires all cities to identify and take steps to protect critical environmental areas and natural resource lands such as forest, agricultural, and mineral resource lands.[378] Critical areas include wetlands, areas with a critical recharging effect on aquifers used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas, and geologically hazardous areas.[379] "In designating and protecting critical areas..., counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas."[380]

Shoreline Management Act

As discussed above, the SMA protects the state shorelines by requiring local governments that have shorelines within their boundaries to develop and adopt Shoreline Master Programs.[381] The Shoreline Master Program must include shoreline-specific planning, zoning, and a development permitting system. All development on the shoreline requires a permit from the local government.

[376] RCW 70.94.230.
[377] *Id.*
[378] RCW 36.70A.060.
[379] RCW 36.70A.030(5).
[380] RCW 36.70A.172(1).
[381] RCW 90.58.080; RCW 90.58.030.

CHAPTER IV: COMPARING MUNICIPAL POWERS IN B.C. AND WASHINGTON STATE

(Plus a Cross-border Excursion in an Autonomous Vehicle Lane)

Municipal authority in Canada and the United States is firmly rooted in each nation's federalism. Section I of this Chapter discusses the parallels between both countries' federalist systems. Section II compares provincial power in Canada to state power in the United States. Section III addresses the extent of municipal authority and available tools in British Columbia and Washington State. Section IV briefly reviews revenue sources available to cities in both jurisdictions. Then, in Section V, the chapter closes with a look forward to a hypothetical cross-border project to improve transportation links between Cascadia cities—an imagined autonomous vehicle (AV) lane from Vancouver to Seattle. The discussion is meant to provide the reader with a sense of the complex, overlapping jurisdictional issues that people in the region must deal with when they work on joint solutions to address common needs.

I. Federalism in Canada and the United States

The federalist systems of Canada and the United States were initially constructed to further different basic goals.[382] Aiming to bolster the strength of one level of government at the expense of the other, both countries' constitutions were designed with distinct visions of the proper role for a national government in a federal system.

[382] Martha A. Field, The Differing Federalisms of Canada and the United States, 55 LAW & CONTEMP. PROBS. 107, 108 (1992).

In 1787, drafters of the United States Constitution intended to preserve states' rights by limiting the powers of the federal government.[383] This is reflected in the structure of state power: The United States Constitution reserves for the states all residual powers not granted to the national government.[384] Practically speaking, this means that states have all authority not given to the federal government by the United States Constitution. Leaving substantial responsibility in the states, the United States Constitution was drafted on the assumption that the federal government should and would play a smaller role than state governments.

In comparison, the drafters of the Canadian Constitution of 1867--particularly John A. Macdonald, the first post-Confederation prime minister--sought to create a strong federal government and weaker provinces.[385] Influenced by what they saw as defects in the American Constitution, framers of the Canadian Constitution desired to impose certain limits on provincial power while providing for relatively broader federal authority.[386] Accordingly, the Canadian Constitution on its face might appear to function in a manner that is structurally the opposite of the United States Constitution: The Canadian Constitution provides both provinces and the federal government with specific, enumerated powers, but on its face functionally reserved most residual powers for the federal government.[387] In effect, both countries' respective governing documents were deliberately drafted to enable the form of government with the residual power to retain a relatively "larger" governance role.

---

[383] *See, e.g.,* U.S. CONST. art. I, § 8.
[384] U.S. CONST. amend X.
[385] Rainier Knopff & Anthony Sayers, Canada, in John Kincaid and G. Alan Tarr, A Global Dialogue on Federalism vol. I at 104,108-09 (McGill-Queen's Univ. Press 2005).
[386] *Id*.
[387] *Constitution Act, 1867*, (UK), 30 & 31 Victoria, c 3 ss 91–92.

Over time, Canadian and American federalism have both morphed substantially. While the fifty American states have ceded powers to an increasingly stronger central government,[388] the ten Canadian provinces have generally seen their powers expand vis-a-vis the national government.[389] In both countries the size of government has expanded at all levels. But most important to this study, the relative power and influence of federal and and sub-national governments have changed to something remarkably different from the plain words of each country's constitution and different from the intent of most of the people who drafted each document. Interestingly, these changes are attributable to the same source—judicial interpretation.

As specific, defined powers are interpreted more broadly by courts, residual power necessarily decreases. For example, the United States Constitution contains a provision authorizing the federal government "[t]o regulate Commerce with foreign Nations, and among the several States."[390] Early courts expanded the conception of the authority to regulate interstate commerce to include the authority to regulate interstate navigation.[391] This later grew to encompass the authority to regulate activities that could affect interstate commerce,[392] as well as the authority to regulate activities taking place within a single state as part of larger legislation intended to regulate interstate commerce, among others.[393] Each instance that a court interprets a specifically-defined power broadly decreases the significance of the residual power. In the United States, this has produced relatively weaker states and a more powerful federal government. In contrast, this trend has cultivated relatively stronger Canadian provinces and a weaker federal government.

---

[388] G. Alan Tar, United States of America, in John Kincaid and G. Alan Tarr, A Global Dialogue on Federalism vol. I at 382, 390-91 (McGill-Queen's Univ. Press 2005).
[389] Jeremy Webber, The Constitution of Canada: A Contextual Analysis 144-45 (Hart Publishing, 2015).
[390] U.S. CONST. art. I, § 8, cl. 3.
[391] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).
[392] *See Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).
[393] *Gonzales v. Raich*, 545 U.S. 1, 30–32 (2005).

In recent decades the legal rights of First Nations/Tribes have gained strength in both Canada and the United States, through both legislative action and court decisions. Most, but by no means all, of those developments have occurred at the federal level in each country. Whether originating by federal policy or judicial action, and whether at the federal or provincial/state level, the increasing voice of various First Nations/Indian Nations has become a force to be reckoned with by regional and local agencies. This is particularly true with respect to major public works projects that could affect natural resources upon which native peoples depend, or projects that might impact locations with historic or spiritual importance.

II. Provincial Power in Canada versus State Power in the United States

Despite the distinctive frameworks enabling state and provincial powers, Canada and the United States foster parallel state and provincial systems. Both forms of government ultimately secure (or retain) authority under the language of a national constitution. Though the manner in which power is conveyed is structurally different, the end result is similar: The United States Constitution and the Canadian Constitution both allocate power to regional governments over matters of local concern.

In Canada, provinces are explicitly provided authority to govern local matters, property and civil rights within the province, municipal institutions within the province, and the incorporation of companies with local ties.[394] Provinces are also authorized to tax, borrow money, and engage in local improvement projects.[395]

Correspondingly, states in the United States retain each of these powers. Because no part of the United States Constitution provides to the contrary, states have substantial authority to control matters within state borders. Though not granted express authority like Canadian

[394] *Constitution Act*, 1867 (UK), 30 & 31 Victoria, c 3 s 92.
[395] *Id*.

provinces, states are allowed to continue to control, engage in, and undertake these same matters and endeavors.

On these principles, municipal governance is reserved for the states and provinces. Since the power to create and control cities and other municipal entities belongs to the states and provinces, cities are required to look to the relevant state or provincial laws for guidance in deciphering the scope of municipal authority.

III. Sources of Local Government Power in Canada versus the United States

Local governments in Canada and the United States play fairly similar roles within each country's overall structure of government, but there are notable differences between both the sources and the extent of their powers. The following comparison will analyze only the relationship between Washington's cities and state government, and between cities and British Columbia's provincial government. This limited scope is necessary because municipal structures and authority vary significantly between different provinces and states within each country; accordingly, it does not make sense to generalize here about each country's municipal law system as a whole.

The authority of local governments in both jurisdictions comes from state or provincial law, but the form of this grant of authority is quite different. In Washington, the state Constitution expressly grants broad regulatory powers to cities, towns and counties. This strong constitutional grant of power allows Washington cities to impose any regulation for the public health, safety, and welfare so long as that regulation does not conflict with state law on the matter. While outside of regulatory activities, cities in Washington must rely on statutory grants of authority, most cities are expressly granted broad authority in other substantive areas as well. In essence, cities begin with very broad authority granted by the Washington Constitution (in relation to regulation) or by

state legislation (in other areas) but state legislation or the state constitution may limit that authority.

British Columbia, in contrast, never grants full presumptive authority over any type of action to local governments. Instead, British Columbia delegates discrete pieces of authority to local governments through various statutes.[396] Local governments in Washington receive their non-regulatory authority in a manner similar to how British Columbian local governments receive all of their authority, but Washingtonian cities are granted very broad authority in these areas as well. The main difference, then, is that when considering the authority of a Washingtonian city one starts with the assumption that the city has this authority unless there is a conflict with state law, but in British Columbia that assumption is never available. In British Columbia, any power that a local government wishes to exercise must be traced to one or more provisions in a provincial statute. While this is technically true in Washington, there are specific provisions in state statutes which grant most cities "all powers possible for a city or town to have under the Constitution of this state, and not specifically denied . . . by law."[397]

Practically speaking, the day-to-day powers exercised by local governments in Washington and British Columbia are more similar than these somewhat opposite starting points would suggest. This is a result of British Columbia enacting statutes with fairly broad enabling provisions, and a shift in the interpretation of local government authority by courts in both countries.

While local governments' powers in British Columbia must always come from specific provisions of a provincial statute, increasingly broad enabling provisions in these statutes give

[396] There are three main statutes that delegate authority to local governments in British Columbia: the *Local Government Act*, the *Community Charte*r, and the *Vancouver Charter*. Please refer to Chapter II of this guide for more information about these statutes.

[397] Although even the ability to regulate continues to be delegated to the cities in various Washington statutes, this is likely not necessary, given that broad regulatory authority is already directly granted to all cities by the Washington Constitution.

local governments in British Columbia a scope of authority that has come closer to Washingtonian's approach than before. For example, the *Community Charter*—a statute granting authority to the majority of local governments in British Columbia—contains a "Fundamental Powers" section that grants local governments authority over broad areas. These "spheres" include matters such as buildings, public spaces, and businesses. In relation to regulation, the authority granted by these provisions is still substantially different from the full authority that Washington grants to local governments. However, these grants do provide a relatively wider scope of authority than previous statutes that only gave authority using quite specific language. The separate statute granting authority to the City of Vancouver is an exception in the sense that it is a holdover from this older style, but it is still interpreted to be generally equivalent to the *Community Charter*.

Changes in approaches to judicial interpretation of statutes have also made the jurisdictions of local government in Washington and British Columbia more similar. This is possible because the extent of a local government's authority is determined by a combination of the content of the grant (the state constitution and various statutes in Washington, and various statutes in British Columbia), and the ways these grants are interpreted by courts.

Courts in Washington and British Columbia have taken two main approaches to interpreting relevant statutes: broad and narrow. In Washington, courts took a narrow approach to interpreting municipal powers in the 19th century and the beginning of the 20th century. This narrow approach, often called "Dillon's Rule," limited the state constitution's grant of power to the narrow areas of municipal police power and regulatory matters. This meant that local governments in Washington had to rely on express grants of power to have authority over any other area.

Starting in the early 20th century, Washington courts changed tack and began interpreting both the state constitution's grant of regulatory authority and the state legislature's grants of other authority more broadly. This approach is called "Home Rule" in Washington. Interpreting grants of power in this broad manner created the situation, discussed above, in which Washington cities are now presumed to have authority to regulate over any given area unless that authority has been explicitly or implicitly blocked by the state, and cities also have been granted broad authority in other areas such as providing services.

British Columbia courts have similarly shifted from a narrow to broad approach in interpreting the enabling statutes of local governments. However, this change in Canada occurred much more recently, in the 1990s. Taking a liberal approach to interpreting these statutes gives local governments in British Columbia a greater range of authority by moving beyond the explicit terms of a statute to also take purpose and context into account.[398] This broad interpretation does not make the scope of authority in British Columbia as expansive as Home Rule in Washington, because any authority still must always be connected to a particular statutory provision.

The practical takeaway from this comparison is that local governments in British Columbia must always look for a positive delegation of authority, while local governments in Washington (particularly cities) must be able to identify positive legislative grants only in areas other than regulation. In relation to regulation (known as "police power"), cities and counties only have to show that a power has not been taken away by the legislature. As a result, working with local governments in British Columbia will likely require examining their enabling statutes closely more often than is necessary in the Washingtonian context. However, given the broad approaches to

[398] Lidstone at 405

interpretation taken by courts in both the state and the province, it is wise to read these enabling statutes generously.

Often the only way to truly know whether an action is within a local government's jurisdiction, in either British Columbia or Washington, is to give it a try by enacting a bylaw/ordinance, and then see if a court quashes/voids that action. A local government's appetite for testing the contours of its jurisdiction will depend on its risk tolerance, particularly in relation to the legal fees and political costs that these experiments might incur. The limits of local government authority are not yet, and likely never will be, fully settled. This unavoidable uncertainty about the exact reach of municipal power is a source of difficulty when attempting to define municipal jurisdiction, but it is also a source of opportunity. Because the contours of their jurisdiction are ever-shifting and generally expanding, local governments may be able to acquire new legal tools as they become necessary to serve their residents.

IV. City Financial Resources in BC and in Washington State

Taxes are highly controlled by upper-level governments in both Washington and BC. In both jurisdictions, city taxing authority is derived from express statutory provisions. As a result, cities generally cannot create new categories of taxes on their own; new taxing powers must be granted by the state or provincial legislatures.[399] Further, legislation often imposes limitations on what specific taxes can be used for. Property taxes are a significant source of general-purpose revenue for cities in both jurisdictions.

[399] It should be noted that in Washington, code cities and first class cities are granted broad home rule taxing power "for local purposes except those which are expressly preempted by the state…." RCW 35A.11.020. The effective legal breadth of this provision is not clear.

In BC, cities can collect property value taxes, parcel taxes, local service taxes, and utility company property taxes. Of these, the property value taxes are the most substantial course of revenue by far. Property value taxes are "variable rate taxation," which means that all properties within a certain class (e.g., residential or industrial) must be taxed at the same rate. However, cities are given a high level of deference in setting the rate of taxation; the courts will overturn a city council's decision regarding the rate of taxation only if the decision is found to be highly unreasonable.

Cities in Washington are authorized to impose a wider variety of taxes than cities in British Columbia. Washington cities are authorized to impose general purpose property taxes; similar to British Columbia, the Washington Constitution requires property taxes to be uniform within property classes. Washington statutes further limit the aggregate amount of property tax different taxing entities may impose. In addition to property taxes, cities in Washington are also authorized to impose general purpose sales and use taxes and business taxes. Washington cities are also granted authority to impose several limited purpose taxes such as the real estate excise tax, gambling tax, hotel/motel tax, and parking tax.

In both British Columbia and Washington, a city may impose regulatory fees under its regulatory authority or charges for services provided by the city under its proprietary authority. However, in Washington, the source of authority may be either a detailed statutory grant or a general grant of home rule authority, whereas in British Columbia, the authority comes from either a sphere of jurisdiction, the broad grant of proprietary authority, or other more specific statutory grant.

Both cities in Washington and in British Columbia may borrow money though the method differs. In Washington, cities may issue both general obligation bonds (generally payable

from taxes) and revenue bonds (payable from non-tax revenues). In British Columbia, municipalities other than Vancouver that wish to borrow participate in pooled borrowings of an intergovernmental body called the Municipal Finance Authority of British Columbia. Vancouver borrows independently on national and international credit markets.

V. Designing, Building and Operating a Cross-Border Autonomous Vehicle Lane

Section V walks (or drives) through the process of using this memo to illuminate the legal implications of a single hypothetical project: a dedicated autonomous vehicle lane in both directions between Vancouver City Hall and Bellevue City Hall. The section first describes the route from Vancouver to the border, highlighting the many governments involved in approving or assisting the project. Next it discusses the international aspects of accomplishing a cross-border venture of this type. Finally, it proceeds through multiple jurisdictions in Washington State to Bellevue. This discussion illustrates the kind of legal issues a project may raise and demonstrates how to use this paper. It also shows the limited scope of this paper--municipal law is but one of many areas of law that may govern a specific subject matter. It is important to be aware of the fact that each project will be subject to action or review by multiple government agencies and will likely trigger its own set of legal issues, many of which are outside the scope of this memo. The bottom line is that if the cities of Vancouver, Surrey, Seattle and Bellevue desired such an AV lane, they lack the legal authority to do it alone. A project such as this one requires the approval and participation of the federal governments of Canada and the United States, the provincial/state governments of British Columbia and Washington, and an array of regional agencies. Depending on the route and the potential impact on the interests of First

Nations on the route, various First Nations will also need to be consulted.[400] While cities in both countries have the legal authority to address an array of problems within their respective boundaries, when they desire to accomplish a major task across those boundaries, they have to obtain additional legal tools and/or the active collaboration of many governments at several levels.

The Route in Canada--and Relevant Provincial and Local Jurisdictions

Imagine that CUAC is considering a proposal for a highway lane that is solely dedicated to autonomous vehicles, starting at Vancouver city hall and passing by the city halls of Surrey and Seattle to terminate in Bellevue. Such an autonomous vehicle lane ("AV lane") may shorten the travel time between the four cities, allowing for greater efficiency in movement of goods and people.

Vancouver city hall is located at the intersection of Cambie street at 12th avenue. A logical route would take the autonomous vehicle along 12th avenue, to Grandview Highway, to Trans-Canada Highway (BC-1), through the City of Burnaby, and then along 108 Avenue to Surrey City Hall. Twelfth avenue is a municipal road, meaning that the City of Vancouver regulates and administers to it; as mentioned in the Transit section of this memo, the city has jurisdiction over municipal roads. Going east, 12th avenue turns into Grandview Highway on Lakeview Drive. As Grandview Highway is a part of the Major Road Network, the vehicle is now under Translink's jurisdiction. Translink (formally the South Coast British Columbia Transportation Authority) has jurisdiction over, and administers, roads in the Major Road Network in conjunction with municipalities.[401] Yet further east, Grandview Highway merges

[400] *See*, *Consulting with First Nations*, B.C. Environmental Protection and Sustainability, https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations.
[401] *See*. https://www.translink.ca/Getting-Around/Driving/Major-Road-Network-and-Bridges.aspx

onto the Trans-Canada Highway, which is a provincial highway and thus in the jurisdiction of the province of B.C. After exiting the Trans-Canada Highway, the vehicle would again be on municipal roads, this time under Surrey's jurisdiction and thus governed by Surrey under the powers vested by the *Community Charter.* After stopping at Surrey City Hall, the lane would follow King George Boulevard--another road in the Major Road Network--before merging onto the provincial Highway 99 to the border.

A project of this magnitude would require extensive consultation and collaboration among all of the players involved. This project would travel through the jurisdictions of the cities of Vancouver, Burnaby, and Surrey, the regional district of TransLink, and the provincial government. At the regional district level, members of the district will have to consider whether the AV Lane fits within the Greater Vancouver Regional District's existing Regional Growth Strategy. At the municipal level, Vancouver, (perhaps Burnaby), and Surrey will need to determine whether the AV Lane fits within the Official Community Plans (or Official Development Plan in Vancouver's case). As explained in chapter 2, this requires considerations such as greenhouse gas emissions, the impact of the project on surrounding lands (such as residential and commercial areas) and roads. The cities may also consider whether a new project such as this might expose them to lawsuits. For example, a person injured by a vehicle travelling in the AV Lane may sue the city for negligence.[402] Those that are negatively affected by the project, such as residents who suffer from increased traffic noises, may sue the city in a nuisance action.[403]

[402] In order to shield itself from a negligence lawsuit, the city will need to adopt a reasonable policy for ensuring safety of the road. *See* p. 35 of the Young Anderson memo.

[403] Municipalities have special defences that shield them from nuisances that are created in the course of exercising their policy-making powers. *See* p. 37 of the Young Anderson memo.

This project could raise a host of corollary concerns. The cities would need to address the potential impact of such a lane on the surrounding land in areas such as noise, impact on businesses, safety, environmental concerns, density, and maintenance costs. These could be addressed through the municipal regulatory tools of land use and zoning, nuisance bylaws, business licensing, and traffic bylaws. Provincial or federal environmental assessment requirements may also be triggered, which are outside the scope of this memo.

Provincial government and its various ministries would have an interest in an AV lane linking the major cities in Cascadia. First, carrying out such a project might need specific legislation enacted by the Legislative Assembly of British Columbia, and it would certainly require the support of the party or parties leading the province's government(s) during the financing and development of the facility. Provincial ministries involved in planning and carrying out a project of this magnitude might include the Ministries of Transportation & Infrastructure, Municipal Affairs & Housing, Jobs, Trade & Technology, and Environment & Climate Change Strategy.

At the Border: Federal and Other Agencies on Both Sides

Our hypothetical AV lane would continue from British Columbia Highway 99 to United States Interstate 5 at Blaine, Washington. As the AV lane crosses the international border from Canada to the United States, the federal governments of both countries would have jurisdiction. In both nations, parallel federal agencies might assert an interest in the systems for managing the vehicles, their passengers and their contents traveling across the border. In Canada there might be interest from Global Affairs Canada (both the Minister of Foreign Affairs and the Minister of International Trade); the Canadian Forces Intelligence Command; the Royal Canadian Mounted

Police; Immigration, Refugees and Citizenship Canada; and certainly the Canada Border Services Agency, which manages day-to-day border security. In the United States there would be similar interest from the United States Department of State; the Department of Defense (and its National Security Agency); the Federal Bureau of Investigation; and the Department of Homeland Security (including the U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, and importantly the U.S. Customs and Border Protection, which manages day-to-day border security). Other federal agencies in Canada and the United States with a potential interest in the development of an AV lane would include: Environment and Climate Change Canada (and the U.S. Environmental Protection Administration); both Transport Canada and Infrastructure Canada (and the U.S. Department of Transportation); Innovation, Science and Economic Development Canada (and the U.S. Department of Commerce). In other words, almost a dozen federal agencies in each country might have jurisdiction or interest over an autonomous vehicle lane that crosses the border into the other nation. This is particularly important to bear in mind because neither the interested cities, nor the respective provincial and state governments, can enter into a cross-border collaborative undertaking such as this one without the cooperation of an array of federal agencies. And, from both a financial and practical standpoint, designing, constructing and operating a transnational AV lane would probably need appropriate legislation from the Parliament of Canada and from the United States Congress, and perhaps a specific international agreement or treaty.

Financing, design, construction and operation of a Cascadia AV lane would need to be carried out in a fashion acceptable to federal government policy makers in each country and to the respective provincial and state governments. Planning, budgeting and building an AV lane could be separately accomplished through different processes in each country, reflecting each

nation's/province's/state's preferences for carrying out major public works projects. Alternatively, financing, construction and even operation could be handled on both sides of the border by an international private company that specializes in major public infrastructure. Conceivably, revenue for the lane could be provided over time by tolls automatically collected from users, based on vehicle weight and distance traveled. All of that would need to be worked out by the multiple levels of government involved.

Finally, however financed, designed and built, and whether managed through mutual legislative enactments, international agreements, cooperative arrangements such as those currently handled by the U.S.-Canada Regulatory Cooperation Council or by semi-private entities such as the International Standards Organization[404] or the American Association of State Highway and Transportation Officials, common technical standards would have to be agreed upon by governments on both side of the border[405]. Those standards would also have to take account of federal, provincial and state laws meant to protect the privacy of vehicle owners and drivers. In Canada, these would include the federal *Privacy Act*[406] and Personal Information Protection and Electronic Documents Act,[407] and British Columbia's Personal Information Protection Act[408] and *Freedom of Information and Protection of Privacy Act*[409]. In the United

[404] The International Standards Organization is a private organization comprised of standards-setting bodies in 161 countries. The ISO, supported by business and governments worldwide, develops standards that are regularly adopted by governments. The ISO is already developing common standards for the creation of AV lanes, related vehicle communications systems, and the interactive communication between vehicles and control systems. *See, for example*, ISO Standard ISO/TR 20545:2017: *Intelligent transport systems -- Vehicle/roadway warning and control systems -- Report on standardisation for vehicle automated driving systems (RoVAS)/Beyond driver assistance systems*, available at: https://www.iso.org/standard/68300.html.

[405] The American Association of State Highway and Transportation Officials is an organization consisting of the departments of transportation of each American state and most Canadian provinces. It sets standards and guidelines for highway design throughout the United States.

[406] *Privacy Act*, (R.S.C., 1985, c. P-21).

[407] SC 2000 c 5

[408] RSBC 2003 c 63

[409] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165.

States, federal agency handling of personal information is governed by the Privacy Act of 1974, [410] among other statutes. In Washington State, some personal information is protected both by Art. I, Sec. 7 of the state constitution and by statute.[411] However, Canadian privacy regulations are generally considered more protective of personal information than the protections afforded by U.S. law. Accordingly, it is probable that common technical standards and protocols adopted for a trans-border AV lane would reflect Canada's strong commitment to the protection of personal privacy.

The Route in the U.S.--and Relevant State and Local Jurisdictions

In Washington State, a wide variety of governments are implicated when considering a cross-border transportation project such as our hypothetical AV lane. As the lane enters Washington on Interstate 5, it would travel south on a piece of the National Interstate Highway System. The Washington State Department of Transportation controls the highways within the state, consistent with state law and with regulations promulgated by the U.S. Department of Transportation that are effective in Washington State as a condition for receiving federal highway funding. Our autonomous vehicle lane would continue south on the I-5 right-of-way, passing through Whatcom, Skagit and Snohomish Counties and then into King County. It would also pass through the Washington cities of Blaine, Ferndale, Bellingham, Burlington, Mount Vernon, Arlington, Marysville, Everett, Mill Creek, Lynnwood, Montlake Terrace, Edmonds, Shoreline, and on into Seattle. In Seattle the lane would leave I-5 via the collector-distributor lane at the Columbia-James exit, and at Cherry Street (under Seattle's legal control) vehicle and

[410] Privacy Act Of 1974, 5 U.S.C. § 552a. The American Privacy Act establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies.

[411] *See*, e.g., RCW 42.56.590 regarding personal information obtained by state agencies.

passengers would be one block east of Seattle City Hall. To continue on to Bellevue, the AV lane would go back onto the collector-distributor lane, take the ramp to Interstate 90, and proceed across Lake Washington on the I-90 bridge, passing through the City of Mercer Island, onward to Bellevue, exiting at Bellevue Way SE (a city street under Bellevue's jurisdiction), then forking right onto 112th Ave SE until it comes at Bellevue City Hall at 112th Ave NE and NE 4th Street. We have arrived!

As in British Columbia, a project of this magnitude in Washington State would require extensive consultation and collaboration among a large number of federal, state, regional and local government bodies. The conversion of a vital piece of the national interstate system to an AV Lane would require the approval of the U.S. Department of Transportation, including its Federal Highway Administration, the National Highway Traffic Safety Administration, and the Federal Motor Carrier Safety Administration.[412] At the state level, there would be a need for state legislation authorizing the AV lane and possibly appropriating money for initial development and/or financing of construction. In Washington, planning and construction would likely be supervised by the Washington State Department of Transportation, and several other state departments would be involved: the Washington State Department of Ecology, the Department of Fish and Wildlife, the Department of Health, and the Department of Commerce. A number of regional bodies would also be engaged. The use of state motor vehicle tax funds and certain federal funds for a highway proposal of this type would be dependent on the inclusion of the project in regional transportation plans approved by regional transportation

[412] *See, e.g.,* USDOT Automated Vehicles Activities, at: https://www.transportation.gov/AV; Roundtable on Data for Automated Vehicle Safety (Jan. 23, 2018), available at: https://www.transportation.gov/sites/dot.gov/files/docs/policy-initiatives/automated-vehicles/304471/roundtable-data-automated-vehicle-safety-report.pdf.

planning organizations (RTPOs) created under state law.[413] For this undertaking, the relevant RTPOs are the Whatcom Council of Governments, the Skagit Council of Governments, and the Puget Sound Regional Council. The Puget Sound Clean Air Agency would also have an interest in the AV Lane. The project would also have to be included in the comprehensive plans developed by each county under Washington's Growth Management Act.[414] Because the project would cross several major salmon-bearing rivers and pass immediately by reservation and tribal trust lands, several Indian tribes would have to be involved in the planning process. Finally, as noted above, the AV Lane would pass through four counties and 16 separate cities, all of which would need to be consulted (with approvals, permits, and rights-of-way required from some of them).

AV Lane: A Complexity of Jurisdictions and Laws

The bottom line is that a major transnational project such as this hypothetical AV lane would not just be a significant engineering, technological, construction and management undertaking. It would also be a substantial legal undertaking that would involve multiple levels and types of government bodies in both countries. The following chart suggests the large number of federal, provincial/state, regional and local governments involved:

[413] RCW Ch. 47.80.
[414] RCW Ch. 36.70A.

Cross-Border AV Lane: Government Agencies Potentially Involved

Canada		United States
Parliament of Canada Global Affairs Canada Canadian Forces Intelligence Command Royal Canadian Mounted Police Immigration, Refugees & Citizenship Canada Canada Border Services Agency Environmental Climate Change Canada Transport Canada Infrastructure Canada Innovation, Science & Economic Dev. Canada	**Federal Government**	U.S. Congress Department of State Department of Commerce Department of Defense Federal Bureau of Investigation Department of Homeland Security ● U.S. Citizenship & Immigration Services ● Immigration & Customs Enforcement ● U.S. Customs & Border Protection Environmental Protection Administration U.S. Dept. of Transportation
Legislative Assembly Ministry of Transportation & Infrastructure Municipal Affairs & Housing Jobs, Trade & Technology Environment & Climate Change Strategy	**Provincial/State Government**	Wash. State Legislation Dept. of Ecology Fish & Wildlife Dept. of Health Dept. of Commerce
Greater Vancouver Regional District Translink	**Regional Government**	Whatcom Council of Governments Skagit Council of Governments Puget Sound Regional Council Puget Sound Clean Air Agency
City of Vancouver City of Burnaby City of Surrey	**Local Governments**	Whatcom County Skagit County Snohomish County King County City of Blaine City of Ferndale City of Bellingham City of Burlington City of Mt. Vernon City of Arlington City of Marysville CIty of Everett City of Mill Creek City of Lynnwood City of Mountlake Terrace City of Edmonds City of Shoreline City of Seattle City of Mercer Island City of Bellevue

Hwlitsum First Nation Kwantlen First Nation Kwikwetlem First Nation Musqueam Indian Band Qayqayt First Nation Semiahmoo First Nation Tsawwassen First Nation	**First Nations/Tribal Governments**	Nooksack Tribe Lummi Nation Swinomish Tribe Stillaguamish Tribe Tulalip Tribes Muckleshoot Tribe

Although the number of agencies participating in a cross-border Cascadia project--and the numerous applicable laws--might seem daunting, the governmental and legal hurdles are not unsurmountable. It simply takes the same high level of legal and political groundwork as the high level of design, engineering and construction management required for a venture of this magnitude. Further, as mentioned above, our cooperating cities of Vancouver, Surrey, Seattle and Bellevue could never link together with an AV lane all by themselves--scores of other governments would have to participate. This might be challenging, but the people of Cascadia and their governments just might be up to the challenge.