

Canada

Eran Kaplinsky, Faculty of Law, University of Alberta

Is there legislation concerning the initiative and/or the drafting of zoning plans and other equivalent documents by private entities? What is the procedure in that legislation and does it guarantee municipal control of planning powers? How is public participation organized in this procedure?

Jurisdiction matters. The power to regulate the use and development of land in Canada is divided between the different orders of government in accordance with the system of federalism established by the *Constitution Act*, 1867.¹ The provincial legislatures are given exclusive jurisdiction over "Property and Civil Rights in the Province" and over "Local Works and Undertakings"², while the federal Parliament is given exclusive jurisdiction over federal Crown lands,³ ports and harbours pursuant to the federal power over shipping and navigation,⁴ lands reserved for Indians,⁵ and matters (including, importantly, aeronautics⁶) falling under the power of Parliament to make laws for the peace, order and good government of Canada.⁷ Thus with very few exceptions, the regulation of urban land falls to the provinces. However, much of that responsibility has been delegated to local governments. Canadian municipalities are "creatures of the province" with no independent constitutional status,⁸ and all of their powers are necessarily derived from enabling provincial legislation.⁹ The legislation governing the drafting of statutory plans, zoning bylaws, and related instruments, depends therefore on the applicable jurisdiction (federal or provincial). Moreover, the statutory arrangements vary not only from province to

¹ The Constitution Act, 1867, 30 & 31 Vict, c 3, originally enacted as the *British North America Act* [BNA Act].

² BNA Act, s 92(13) and s 92(10).

³ BNA Act, s 91(1A).

⁴ BNA Act, s 92(10).

⁵ BNA Act, s 91(24).

⁶ See, for example, *Johannesson v Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292.

⁷ BNA Act, s 91.

⁸ That is to say, Canadian municipalities do not enjoy "home rule" as do some American cities.

⁹ Following the American "Dillon's Rule", Canadian municipalities are said to possess "only those powers

expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation": *R. v Sharma*, [1993] 1 S.C.R. 650, at 668.

province, but sometimes within the provinces too. For example, Toronto and Vancouver draw from legislation uniquely tailored to them powers and responsibilities not given to their smaller sisters in Ontario and British Columbia.¹⁰ In some, although the various statutes share a common tradition and fundamental principles, it is difficult to speak about a Canadian national planning law.

Plan-making and zoning a legislative function. Under the enabling planning statutes of the various provinces, the promulgation of binding planning instruments (specifically, statutory plans and zoning regulations) is a legislative function which is exercisable by a bylaw of Council. The procedures and technical requirements for adopting or amending a statutory plan or zoning bylaw are enumerated in the enabling legislation and typically include notice and public participation requirements. Any violation of the statutory procedure or technical requirements provide grounds for judicial review of the bylaw and a potential finding of *ultra vires*.

Presumption against fettering and delegation. The jurisprudence recognizes that as elected governments, municipalities are entitled to a generous and deferential approach to the interpretation of the scope of their powers.¹¹ Nevertheless, under general principles municipalities may not delegate their legislative responsibilities unless expressly authorized by statute. To date, none of the enabling statutes have authorized the delegation of local bylaw-making powers – on the contrary, some statutes expressly prohibit any such delegation.¹² Furthermore, the case law makes it clear that in the absence of express authority, a municipality has no power to enter into a contract the effect of which is to restrict Council in the exercise of its legislative powers.¹³ Accordingly, the Supreme Court of Canada held in a majority decision that the City of Victoria could not rely on an implied power in the enabling legislation to enter into a contract with a developer that would prevent the city from rezoning certain parcels in exchange for public amenities provided by the developer. The Court held also that an implied contractual term to compensate the

¹⁰ See *Vancouver Charter*, SBC 1953, c 55; *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A.

¹¹ see, e.g., *Nanaimo (City) v Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13.

¹² For example, the *City of Toronto Act*, aims to provide Council with broad powers of a natural person, yet specifically prohibits the delegation of Council's power to adopt or amend an official plan or zoning bylaw: see s 22(1).

¹³ See, for example, *Town of Eastview v Roman Catholic Episcopal Corporation of Ottawa* (1918), 44 O.L.R. 284 (S.C., App. Div.), at pp. 297-98 ("Our municipal councils are just as truly legislative bodies within the ambit of their jurisdiction as Parliament or the Legislature; and any contract which would interfere with the due exercise of the discretion and judgment of a member of such a council must equally be void as against public policy"); *Capital Regional District v District of Saanich* (1980), 115 D.L.R. (3d) 596 (B.C.S.C.), at 605 ("[M]unicipalities must be free to amend or alter their by-laws as circumstances dictate. They cannot bind themselves or their successors by contract with a third party to the status quo").

developer if the municipality down-zoned the lands before the expiration of a reasonable period of time would be contrary to public policy and ultra vires the municipality.¹⁴ “In the absence of provincial legislation implementing a different public policy,” the Court wrote, “municipalities cannot sell zoning.”¹⁵

Limited role for private entities in the planning process. While privatization by way of delegation of Council’s plan-making and zoning powers is not authorized in any of the provinces, the law does contemplate the delegation of administrative aspects of the planning process – typically to a committee of Council or a designated officer of the municipality, but in some cases to a third party which may be a private entity. For example, the *Municipal Government Act* of Alberta requires the council of every municipality to designate by bylaw a development authority to exercise development powers and duties on behalf of the municipality, and provides explicitly that such a development authority may consist of “any other person or organization”¹⁶.

To be clear, nothing in the law prohibits private entities from *drafting* land use regulations. This allows local governments (especially smaller, under-staffed municipalities) to acquire high-quality planning services from professional consultants. But regardless of whether the initiative is private or public, a vote of Council is required and all the statutory requirements must be met for such regulations to have any binding effect. Local councils may also, in keeping with the enabling statute, delegate certain aspects of the development approval process to third parties as a cost-saving measure, including the processing and issuance of permits in accordance with the municipality’s land use bylaws. Certain enforcement duties may also be delegated to third parties. For example, the issuance of a stop-work or demolition order can be entrusted to a private law firm, as can legal prosecution on behalf of the municipality of those found in infringement of the local regulations.¹⁷

Is there legislation concerning the private management of urban infrastructures and public spaces? Is this legislation restricted to single infrastructures and spaces or does it provide a legal framework for the private management of entire neighborhoods and other urban areas? Is the management of those neighborhood and areas restricted to owners or

¹⁴ *Pacific National Investments Ltd. v Victoria (City)*, [2000] 2 S.C.R. 919.

¹⁵ *Ibid.* at para. 57.

¹⁶ *Municipal Government Act*, RSA 2000, c M 26, s 624(1). A similar provision exists for the local subdivision authority, which handles all applications for the subdivision of land.

¹⁷ Note, however, that enforcement by the physical entry to land or by demolition must be carried out by a designated employee of the municipality, and not a third party or private entity: see, e.g., *City of Toronto Act*, s 375; *Municipal Government Act*, RSA 2000, c M 26, ss 210 and 645.

neighbors associations or can concessionaires or other private commercial companies perform it? How does it guarantee municipal or public control of management decisions?

There is no legislation in Canada concerning the private management of urban infrastructures and public spaces. The private management of entire neighbourhoods or other urban areas by owners or by private commercial companies is (with the possible exception of areas contained entirely within a gated community or condominium) unknown in Canada. There are, however, numerous examples of management and governance structures sanctioned by municipalities which are entrusted with limited powers and responsibilities over public spaces or facilities.

Business Improvement Areas are reputed to be a Canadian invention (Toronto became in 1970 the first city in the world to sanction a business improvement area, after it was granted the requisite powers by an amendment to provincial legislation) and can be found in many Canadian cities. BIAs are local territorial districts in which business properties are subject to a special levy to pay for services beyond those provided by the municipality. BIAs are established by the local government and their boundaries are defined by bylaw, typically with the initiative or consent of the majority of businesses in the area. A management board which is accountable to Council is responsible for the administration of the budget and carrying out the functions and activities of the BIA. The various statutes that authorize local BIAs in Canada do not give them any powers to regulate land use or public access.

Less known than BIAs are community-based associations. In the city of Edmonton, for example, these associations have operated for over a century and are known as "Community Leagues". Community leagues are incorporated as nonprofit organizations with the goal of improving the quality of life within the neighbourhood. Community leagues operate on a volunteer basis. They help organize sport, cultural, social, and recreational programs; help organize public meetings on proposed neighbourhood development; and lobby the city for planning-related matters and neighbourhood improvements. Importantly, community leagues are licensed by the city (pursuant to an agreement between the city, the local school boards, and an umbrella organization for all community leagues in the city) to manage and operate public facilities, including community halls, skating rinks, school gymnasiums, and outdoor sports fields, for the benefit of the community league's members.

An example of a public space under the management and control of a public-private partnership is Yonge-Dundas Square in the city of Toronto. This large (one acre) public square is located in the City's downtown commercial centre, across from the Eaton Centre shopping mall. The square was proposed in 1996 as part of the regeneration of the area and as a joint venture of the City with, among others, the local Business and Resident Association, and the Downtown Yonge Business Improvement Area. The construction of the square required the expropriation and demolition of existing businesses and properties,

which were seen as undesirable. The Toronto Municipal Code was amended by Council to establish a separate Board of Management which is responsible for the maintenance, operation and control of the Square as a commercial venture. In addition to prescribing the uses and activities permitted on the square, the amended bylaw sets out the Board's powers and duties, including the power to establish booking policies and to issue permits for activities on the square.¹⁸

¹⁸ *Toronto Municipal Code*, chapter 636.