COMMUNITY AMENITY CONTRIBUTIONS AND THE LORVAL CASE:

Implications for local governments, applicants and the rule of law

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Community Amenity Contributions and the *Lorval* case: Implications for local governments, applicants, and the rule of law

A. The Lorval case and the context within which it occurred

(a) Community Amenity Contributions

On June 20, 2025, the BC Supreme Court rendered its decision in *Lorval Developments Ltd v Langley (Township)* 2025 BCSC 1148, https://www.bccourts.ca/jdb-txt/sc/25/11/2025BCSC1148cor1.htm. The decision was the first challenge to the legality of a Community Amenity Contribution ("**CAC**") Policy in British Columbia.

That was the case even though hundreds of millions of dollars have been collected by British Columbia local governments by way of Community Amenity Contributions. CACs have been obtained from applicants for rezoning, in many cases on the basis of the increase in land value (known as "**lift**") that the municipality asserted the rezoning produced. CACs proceeded as a matter of local government policy, given that there was no statutory provision authorizing them in municipal legislation.

CACs were controversial not only because they had no statutory basis (and local governments, being creatures of statute, can only act based on statutory authority) but because the 'negotiations' related to them often entailed significant delays in the rezoning process (indeed, the delaying of processing has been a fundamental element of municipal leverage to secure CACs) and because the funds obtained, not being subject to any statutory reserve fund constraint, not infrequently ended up in general municipal revenue rather than being directed to the construction of amenities.

(b) The Province's Housing Statutes

The above factors were discussed in Hansard when the Province enacted legislation in November 2023 that established a detailed scheme that authorized, and set the terms further to which, local governments could collect funds to cover the cost of the share of amenity facilities that resulted from new development. The legislative changes authorized municipalities to enact Amenity Cost Charge ("**ACC**") Bylaws to secure funding for amenities, on terms that required that the funding obtained reflect the impact the development had on the need for amenities (as compared to being based on 'lift' or back of an envelope calculations).

A further discussion of the Province's Housing statutes (Bills 44, 46 and 47) can be found in the January 2024 paper entitled "*The Local Government Act and British Columbia's housing supply problem: How the statute has contributed to the problem, and the Province's recent amendments that seek to address it*" (the "**Housing Statutes Paper**") which can be found on the website www.kenwarddevelopmentlaw.com

(c) Langley's response to the availability of ACC Bylaws

Despite the availability of ACCs and the absence of any statutory authority for CACs, many municipalities continued to obtain amenity funding by way of CAC policies, including the Township of Langley (referred to as "**Langley**" in this paper), which amended its CAC Policy in June 2024 to add $500,000 and $550,000 per acre CACs to 'employment lands' in various Neighbourhood Plan areas.

During the course of processing its CAC Policy amendment, Langley advised Lorval that it could have proceeded by way of an Amenity Cost Charge Bylaw, but had decided to proceed by way of its CAC Policy instead. While Council passed a resolution directing the preparation of an ACC Bylaw, it only did so for a relative minor item, being the 'small scale housing' that municipalities were required to provide for under the Housing Statutes.

(d) The Lorval Group's challenge to Langley's CAC Policy

The eight Petitioners in the legal challenge are part of a family-held group of companies, that build, manage and own industrial, commercial and residential projects in Langley. They are collectively referred to in this paper as the Lorval Group (or "**Lorval"** for convenience).

Lorval had a number of interactions with Langley as regards Langley's CAC Policy.

On December 12, 2022, Langley added a substantial 'lift based' CAC to its CAC Policy, which impacted an industrial project that Lorval was an applicant for in the Gloucester area of Langley. As part of its policy amendment, Langley Council deleted the grandparenting provision that had been in the CAC Policy, and directed staff to 'ensure' a CAC was paid under the amendment.

Lorval responded by refusing to pay the CAC, on the basis that its project

- had been in process for 15 years, and its rezoning had received third reading (approval on conditions) from Council more than 6 months before, and

- the land at issue had been acquired at a price that did not factor in the proposed $16 million CAC, which would reduce Lorval's return on investment to 3% and undermine the financing of the project.

As noted at paragraphs 21 to 26 of the BC Supreme Court decision, and In keeping with the above reference to leverage, Langley replied by sending an email to the effect that, if that was the case, then Lorval's rezoning application could 'just sit'.

The June 2024 amendment of Langley's CAC Policy added a $500,000 + per acre CAC on 'employment lands' in the Williams Neighbourhood Plan area, being the location of a film studio, hotel and other mixed use project the rezoning for which had also previously received third reading and on which Lorval had already spent $26 million on site preparation. The newly added CAC rate would result in an additional cost of between $32 million and $39 million to the project. The same CAC would also apply to employment lands in a number of other areas of the municipality in which Lorval might seek to develop.

Lorval requested the calculations on which the CAC Policy rates were based, and was not provided with Lorval's calculations documents. When Lorval appeared before Council at the meeting at which it had

been told it could make submissions and ask questions, to explain why the employment land CAC was problematic, and some of the Councils asked questions so they could better understand Lorval's submission, the Mayor ruled the questions out of order.

Lorval responded by commencing its challenge to Langley's CAC Policy.

(e) The grounds of challenge

Lorval's challenges to the CAC Policy were on two bases, being first vires, and second substantive reasonableness.

i. Vires

The first issue was whether the CAC Policy was something that a local government could lawfully adopt. The BC Supreme Court described this issue as being whether, as asserted by Langley, the CAC Policy that was challenged

> "goes no further than providing guidance about the non-mandatory contribution targets which it hopes to negotiate in voluntary rezoning agreements with developers. It says that such agreements are authorized under its general power to contract in s. 8(1) of the *Community Charter*"

or whether the CAC Policy amounted to a mandatory payment regime that was not authorized by the *Local Government Act* ("***LGA***"), as asserted by Lorval.

ii. Substantive reasonableness

The second issue, substantive reasonableness, related to whether, if Langley had the authority to adopt the CAC Policy, Langley had exercised that authority reasonably, having regard to the requirements of 'justification, transparency and intelligibility' discussed in the Supreme Court of Canada decision in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65.

(f) The outcome of the Lorval's legal challenge, and Langley's appeal

As noted above, the BC Supreme Court concluded in June 2025 that the CAC Policy was an unlawful mandatory amenity payment regime. Given that finding, the Court decided it did not need to address the substantive reasonableness issue.

Following the BC Supreme Court decision, Langley adopted an Interim CAC Policy in its place. A June 29, 2025 news report commenting on same indicated that Langley had told an applicant who faced CACs under the Interim CAC Policy had the option of

- withdrawing their application, or
- proceeding with a 'voluntary contribution' and providing a release to the municipality.

On July 14, 2025 the Township of Langley appealed the BC Supreme Court decision, and, over the course of the following seven months the parties:

- filed five factums containing 115 pages of argument addressing the various issues;

- filed the record of the facts and evidence in 1000 pages of Appeal Books;

- cited 55 cases to the Court, as well as significant excerpts from *British Columbia Planning Law and Practice* and other texts and secondary sources; and

- set down the hearing of the appeal for June 15 and 16, 2026.

On March 23, 2026, Langley adopted a municipal wide ACC Bylaw, and in doing so advised that its Interim CAC Policy would remain in place alongside the ACC Bylaw.

Then, on May 10, 2026, 90% of the way through the 11 month appeal process, Langley abruptly and unilaterally abandoned its appeal.

A May 15, 2026 press report quoted Langley's Mayor as saying that

> "millions of voluntary contributions have been collected by the Township of Langley since the decision, confirming that it has had little practical meaning",

and as adding that it would have been a waste of taxpayer funds to overturn a decision that hasn't amounted to much. The press report also stated that, at the time of the BC Supreme Court decision, the Mayor called the ruling a "nothingburger", adding that the Township, along with other communities, was set to move to an ACC system in the near future.

A contrary view was expressed in a Planning Institute of British Columbia publication [Housing Advisory Bulletins, Series 02, The Cost of and Funding for Infrastructure and Amenities, Issue 2.2 – Understanding Revenue Tools & Cumulative Impacts] dated April 2026, shortly before Langley's abandonment of its appeal. That publication spoke to the *Lorval* decision as follows:

> In June 2025, in a decision arising from Lorval v. Township of Langley, the BC Supreme Court confirmed that local governments *can only require developers to provide money or amenities if they have clear authority in provincial legislation*. Even when acting through rezoning, local governments cannot impose contributions that function like mandatory charges unless the law expressly allows it.
>
> The Court found that so-called "voluntary" amenity contributions are not lawful if, in practice, a rezoning will not proceed without them. Good planning objectives are not enough on their own—local governments *must rely on legislated tools, not negotiated pressure*….
>
> The key lesson from Lorval Case is not that growth should not help pay for infrastructure and amenities, but that it *must do so through clear, legislated, and transparent mechanisms*. British Columbia's current DCC and ACC framework is best understood as being consistent with this ruling. [emphasis added]

(g) Responses by other municipalities to the availability of ACC Bylaws

Langley was not the only municipality to continue with its CAC Policy and defer adopting an Amenity Cost Charge Bylaw. Langley was simply the first to face the incentive of a legal challenge to its CAC Policy.

Based on a review of municipal websites subsequent to Langley's abandonment of its appeal:

- some municipalities have adopted ACC Bylaws (such as, for example, Burnaby, Coquitlam, the District of North Vancouver, New Westminster, Pitt Meadows and Squamish), but

- a significant number of others have not done so (including Surrey, Richmond, Delta, North Vancouver City, West Vancouver and Kelowna), even though it has now been 2 ½ years since the enabling legislation was enacted.

Further, in various cases the municipalities that have adopted ACC Bylaws also continue to have CAC policies providing for contributions:

- regarding matters not covered by their Amenity Cost Charge Bylaws; and / or

- to collect funds for amenities during the statutory grandparenting period before Amenity Cost Charges can lawfully be collected.

B. <u>The objective of this paper, issues reviewed, and various takeaways</u>

(a) The objective of this paper

As with the January 2024 Kenward Development Law Corporation Housing Statutes Paper, the objective of this paper is to set out general comments by the writer, this time on a variety of issues related to Community Amenity Contributions and Amenity Cost Charges, to add to the public's understanding of what those issues are and why they matter, and ideally lead to more positive outcomes in the broader public interest.

Are Langley's statements at the time its appeal was abandoned all there is to the matter, or are there some much bigger issues and implications at play? The stakes of the subject matter of this paper run in the hundreds of millions of dollars, the number of legal challenges related to that subject matter has been quite limited, and the Lorval / Langley case was vigorously contested up to the point when Langley dropped it. Hence the time seems ripe for such a commentary.

In making the comments set out herein, nothing stated is to be construed as legal advice to anyone about any specific situation. The particulars of each situation always matters, and the law is always evolving, as the impacts of regulatory regimes become better understood, statutes change, and the direction provided by the Supreme Court of Canada evolves. In keeping with that:

- if a rezoning applicant or anyone else having an interest in a matter has a question about how the subject matter of this paper might apply to any specific situation, they must not rely on the

comments in this paper but rather are strongly encouraged to seek the advice of legal counsel experienced in local government and regulatory law, and

- if such parties are contemplating a legal challenge, it is similarly strongly recommended that they seek advice from legal counsel experienced in local government and regulatory law and judicial review.

(b) Issues

This paper reviews the following seven topics:

- the provisions of the applicable BC local government legislation at the time of the Lorval proceeding;

- the Province's 2104 CAC Guide (no longer in effect);

- the Langley CAC Policy that was the subject of the proceeding;

- pertinent practical and public policy considerations, including implications for housing affordability and the viability of employment creating industrial and commercial projects;

- judicial review considerations;

- the case law that was the subject of the legal submissions at the BC Supreme Court and the Court of Appeal, and

- closing remarks, including implications for local governments, rezoning applicants, judicial review and the rule of law.

(c) Takeaways

Subject to the important qualifications set out above, some of the general takeaways that this paper suggests include the following:

- the Court has recognized that local governments do not have the power to require Community Amenity Contributions;
- the Province's former (2014) CAC Guide did not change that fact, and, to the contrary, expressly stated it was not a substitute for provincial legislation. Most municipal CAC Policies have not followed the Guide in any event, by
    - containing 'lift-based' policies, or
    - providing for 'contributions' that are far from 'modest' (being sufficiently high to have an impact on housing affordability or project viability);
- whether a municipality has 'required' CACs in a particular situation, or not, can be a function of one or both of

  - how its CAC Policy is worded; and
  - the facts of how its CAC Policy (whether distributed in published form or not) was or is implemented in a given instance;
- pertinent case law on these issues also indicates that:
  - 'voluntary' payments cannot lawfully be agreed to, or received, by the local government as part of a regulatory approval, unless there is express authority to that effect; and
  - another pertinent factor is whether the statute in question contains provisions regarding the funding of off-site capital works, such that the legislature can be said to have turned its mind to the question of the scope and terms on which the extraction of funds for such capital works is and is not permitted;
- the case law also indicates that even where a statute authorizes a funding mechanism for off-site capital works, the program the municipality establishes can still be held to be invalid, if the municipal program
  - does not meet the terms the statute sets out, or the legal prerequisites to being a valid regulatory charge (rather than a constitutionally invalid indirect tax); or
  - is otherwise adopted without meeting the judicial review requirements of "justification, transparency and intelligibility";
- the 'public interest' at the municipal level is different than the public interest at the Provincial level, in that
  - local governments have tended to focus on imposing costs on new development rather than on property taxpayers (which is not unrelated to the fact that existing property owners have a direct impact on who gets elected to Council, while future potential residents do not), whereas
  - the Housing Statutes (and the 2014 Guide) record a broader focus by the Province on addressing housing affordability relative to incomes (the severe scope of which is reviewed at pages 1, 2 and 25 to 28 of the Housing Statutes Paper) and on the viability of housing and employment producing projects;
- the scope of municipal powers is set by the Province through its statutes, and hence the directive in the judicial review case law that the Courts conduct a 'robust review" of the statutory regime in order to determine the scope of the powers that local governments do and do not have;
- local governments cannot obtain the power to act beyond the terms of their empowering statutes by obtaining a 'release' from an applicant. It is the statute that sets the scope of municipal powers, and that scope cannot be expanded relative to an applicant for rezoning by way of an agreement with that applicant;

- local government policies that seek to evade statutory grandparenting provisions based on a ‘voluntary’ release are of doubtful validity. That would presumably include policies in support of collecting CACs from in-stream rezoning applications during the statutory grandparenting period applicable to Amenity Cost Charges;
- for the reasons set out in the cases, the CAC Policy practices reviewed in this paper entail very significant legal risks at the municipal level; and
- imposing ACCs, and then using a CACs or equivalent to obtain funding for other municipal goals in the absence of a legislative provision authorizing same entail similar legal risks, given the absence of authority for same and the *Local Government Act* provisions noted by the Court in *Lorval.*

Further takeaways are noted in the Closing Remarks.

C. Matters pertinent to the legal challenge

1. Statutory context

Any discussion of the lawfulness of a municipal bylaw, resolution, policy or practice begins with a review of the statutory powers, and constraints on those powers, established by the Province. Being creatures of statute, local governments do not have any inherent authority and must be able to point to a statutory basis for their actions.

(Note: Where a reference is in italics below, the italicization has been added by the author of this paper, to make it easier for the reader to note the pertinent elements.)

(a) Statutory provisions prohibiting charges without authority

The BC Supreme Court in *Lorval* summarized various of the provisions of BC’s *Local Government Act* (“**LGA**”) at paragraphs 27 to 31 of its decision, as follows:

> [27] The Township operates under the *Community Charter* and the *LGA*, both of which limit municipal fees to those expressly provided for by statute.
>
> [28] The *LGA* contains *three sets of provisions enabling local governments to charge for amenities and raise amenity funds*:
>
> - Density bonus bylaws (ss. 482 to 482.6);
> - Phased development agreements (ss. 515 to 522); and
> - Amenity cost charge bylaws, added in November 2023 (ss. 570.1 to 570.95).
>
> [29] Regarding fees being limited to those statutorily authorized, s. 193(1) of the *Community Charter* says this:

Authority for fees and taxes

193 (1) *A municipality may not impose fees or taxes except as expressly authorized* under this or another Act

[30] The definition of "fees" *includes "a fee by any name*, including a charge".

[31] Section 462 of the *LGA* prohibits the imposition of additional charges as a condition of rezoning. It says:

Fees related to applications and inspections

462 (1) A local government may, by bylaw, impose one or more of the following types of fees:

(a) application fees for an application to initiate changes to the provisions of

(i) an official community plan or bylaw under Division 4 [*Official Community Plans*] of this Part,

(ii) a land use regulation bylaw

[…]

(5) *No other fee, charge or tax may be imposed in addition to a fee under subsection (1) as a condition of the matter* referred to in that subsection to which the fee relates.

(6) A local government, the City of Vancouver or an approving officer *must not do either of the following unless authorized* by this Act, by another Act or by a bylaw made under the authority of this Act or another Act:

(a) *impose a fee, charge or tax;*

(b) require a work or service to be provided.

Section 462(2) adds that

"A fee imposed under subsection (1) *must not exceed the estimated average costs of processing,* inspection, advertising and administration that are usually related to the type of application or other matter to which the fee relates."

(Note: while section 462(6) applies to the City of Vancouver, the *Lorval* case did not involve a comprehensive review of the *Vancouver Charter*, and hence this paper does not comment one way or another on the policies and practices of the City of Vancouver as regards CACs.)

(b) Fees and charges that are authorized by statute

Counsel noted three sets of statutory provisions that authorize local governments to impose fees and charges in the land use and development context, all of which are required to be adopted in bylaw form (as compared to a mere resolution or policy).

(i) Development Cost Charges

First, there are the *development cost charge* ("**DCC**") provisions that can be found at sections 558 to 569 of the *Local Government Act,* section 559(2) of which provides that

> (2) Development cost charges may be imposed under subsection (1) for the purpose of providing funds to assist the local government to pay the capital costs of
>
> > (a) providing, constructing, altering or expanding *sewage, water, drainage, fire protection, police, highway and solid waste and recycling facilities*, other than off-street parking facilities, and
> >
> > (b) *providing and improving park land*
>
> to service, directly or indirectly, the development for which the charge is being imposed.

The eleven sections involved establish a comprehensive regime that sets out detailed parameters as to when and how such charges may be imposed, collected and applied.

(ii) School Site Acquisition Charges

Second, there are *school site acquisition charge* provisions at sections 571 to 581 of the *Local Government Act* which authorize the imposition, collection and application of charges for that purpose on terms that are similarly comprehensive.

(iii) Amenity Cost Charges

Third, there are *amenity cost charge* ("**ACC**") provisions at sections 570.1 to 570.95 of the *Community Charter,* which the Court reviewed in part at paragraphs 63 to 66 of the *Lorval J*udgment.

The definition of an "amenity" can be found at section 570.1. That definition applies to most of the amenities that the CAC Policy at issue in the *Lorval* proceeding was said to be collecting funds for.

Many of the provisions of the amenity cost charge regime parallel those for development cost charges. In each case, the legislation provides for the charges to be imposed *at subdivision or building permit*. That:

- reflects that a development only has an impact on services and amenities if it is actually built, and
- avoids the issue of what happens if

- the municipality exercises its discretion to repeal or alter the applicable zoning before the project is built out, or
- some development prerequisite proves not to be achievable, or the project is subsequently abandoned.

Other pertinent provisions include:

- section 570.7(2), which provides that

  Amenity cost charges … must

  (a) be set as a charge (i) *per lot or per unit* in a development, or (ii) *per square metre of floor space* in a development, and

  (b) *be similar for all developments that are expected to result in a similar increase in the population of residents or workers.*

- section 570.3(1), which provides for *consultation with the public* as regards a proposed ACC Bylaw or amendment to such a bylaw,
- section 570.7(7), which provides that

  "A local government must *make available* to the public, on request, *the* considerations, information and *calculations used to determine the schedule" of charges* to be imposed",

- sections 570.1, 570.4 and 570.5, which provide for *exemptions and credits*, on a basis similar to development cost charges,
- section 570.81, which provides that, as with development cost charges, amenity cost charges must be paid into a *statutory reserve fund*,
- section 570.91, which provides for *in-stream grandparenting relative to a newly enacted ACC Bylaw* or an amendment to it, in a fashion that again parallels the provisions for development cost charges,
- section 482.21, which speaks to the *interplay between amenity cost charges and density bonus bylaws,* such that the latter

  "must not establish conditions relating to the conservation or provision of an amenity that is specified in an amenity cost charge bylaw", and

- section 570.95, which provides that

  "the *capital costs of any amenity funded* by an amenity cost charge *must be recovered only once*".

Lorval noted to the Court that the legislation thus speaks to the interplay between the various financing tools, and in each case the provisions establish:

- clear parameters in terms of when, how and the extent to which charges can be imposed, collected and applied, and
- specific procedural requirements,

and that it is accordingly apparent that, where the statute authorizes charges, it does so by way of a comprehensive scheme that sets parameters that reflect the legislature's determinations regarding how to best balance the local government interests, citizen interests and private sector interests, in order to achieve the broader public interest.

(c) Taxes that are authorized by statute

As far as taxes are concerned, the statutes similarly establish comprehensive regimes related to

- property taxes, imposed under sections 197 of the *Community Charter,* in conjunction with *t*he related provisions of the *Assessment Act;* and
- parcel taxes, imposed under section 200 of the *Community Charter.*

(d) The 'natural person' power

Section 8(1) of the *Community Charter* provides that

> "A municipality has the capacity, rights, powers and privileges *of a natural person* of full capacity".

The 'natural person' power refers to the legal capacity of a municipality to exercise the same rights, powers, and privileges as an individual (such as the power to hire employees, or buy or sell real or personal property).

By virtue of the 'natural person' power, a municipality can do the kinds of things an individual can do under the law, except to the extent that such powers are prohibited or constrained elsewhere in the statutes (for example, as regards procurement process requirements).

Section 8(1) does not however provide local government with powers that 'natural persons' do *not* have. Hence it does not convey the power to regulate (including the regulation of land use or development), tax, or impose charges.

2. The Province's 2014 CAC Guide (no longer in effect)

In response to the foregoing, Langley submitted to the Court:

- that CAC policies were in widespread use among other BC municipalities; and
- per paragraphs 7 and 32 of the BC Supreme Court Judgment, that the Township's CAC Policy was 'consistent with' the Provincial Government's 2014 CAC Guide.

Lorval countered that:

- the Township's CAC Policy was *not* consistent with the 2014 Guide, in that the Guide clearly contemplated negotiated, *non-imposed, modest contributions* which were *not based on* the increase in land value from rezoning ("*lift*"); and

- the 2014 Guide was not a statutory authorization to impose charges, and indeed specifically stated that that was the case, and that local governments should consult with legal counsel to ensure that any policy adopted was on a solid legal footing.

A second underpinning of Langley's submission as regards CACs was the proposition that local governments 'create private wealth' through changes in zoning, which will result in 'unearned windfalls' if CAC policies do not convert such windfalls to public benefit.

Lorval responded by referencing what the 2014 Guide said about the impact of CACs from a public policy perspective, as follows

> <u>Are CACs likely to reduce developer profit</u>
>
> "A common assumption is that, if a local government obtains CACs from a developer, it simply reduces the return on investment made by the developer. Real estate market economists and historical evidence indicate that this is unlikely. The cost of development has increased significantly over time, with increases in the cost of land, materials, labour, DCCs, etc. There is no evidence to show that such cost increases have reduced developer profits. In fact, developer profit margins have remained remarkably stable over time. …
>
> … *The reality is that developers and their financial backers only pursue projects if they feel that they can achieve their expected return on investment, which for a typical project is around 15 percent*
>
> It is more logical to assume that if CACs reduce a developer's expected return by a significant amount, they would either *decide not to undertake a project, or would not be able to find investors for the project. The concern with this outcome is that fewer projects/new housing will be built in the community, which in turn will put upwards pressure on housing prices*" (page 14).

The BC Supreme Court comprehensively reviewed the pertinent provisions of the 2014 Guide at paragraphs 3 and 34 to 42 of the Judgment. The Court noted, inter alia, that the 2014 Guide

- was clear that it was not a substitute for Provincial legislation, and that local governments do not have the authority to require CACs as a condition of rezoning;

- indicated that it is vital that Councils not focus on CACs as a revenue source and lose sight of long term planning;

- stated that negotiating CACs based on a lift in land value was inconsistent with the principles set out in the 2014 Guide, as compared to amounts that reflect the impacts of the development being proposed and were modest enough not to affect housing affordability; and

- indicated that CACs that add a significant financial cost to a project entail the risk of preventing projects from proceeding, or putting upward pressure on housing prices.

The 2014 Guide ceased to be Provincial Policy well before Langley's June 2024 CAC Policy amendment. In its place there was the Amenity Cost Charge regime that was statutorily authorized and that provided a direct mechanism for imposing charges that reflected the impact of a development on the need for amenities, and that was required to impose similar charges for developments with similar impacts.

3. Langley's CAC Policy

A copy of the Langley CAC Policy as of June 2024 is attached as a schedule to the BC Supreme Court decision.

Langley adopted the initial version of its CAC Policy in 2018. That Policy established a single municipal-wide 'contribution' per residential unit, depending on the type of unit.

The CAC Policy was then amended nine times in the 6 years between then and the June 2024 iteration, which amendments

- substantially increased the dollar rates the CAC Policy specified,
- added a broad range of lift-based provisions, and
- added a substantial employment lands CACs.

(a) Residential rates

The single municipal-wide 'contribution' in the initial 2018 Policy set rates of between $3000 and $5700 per residential unit, depending on the type of unit.

By June 2024 the residential rates came to range between

- $16,900 and $30,200 per unit for single family,
- $14,400 and $25,000 per unit for townhouse units, and
- $11,000 and $18,500 per unit for apartment units,

with additional lift-based CACs and employment land CACs as set out below.

(b) Lift-based CACs

Between December 2022 and February 2023 Council made amendments to the CAC Policy to add lift-based CACs as regards

- agricultural,

- industrial,
- mixed employment,
- rural, and
- residential

uses that involve increases in density for major Official Community Plan amendments or development applications.

By way of background:

- the December 2022 amendment was the subject of a staff report that acknowledged that the additions to the CAC Policy were designed to “broadly capture increases in land value” commonly referred to as "lift” by way of “a cash contribution proportional to the value being created”; whereas
- the February 2023 amendment proceeded without prior notice or a staff report.

(c) Employment Land rates

In the summer of 2024, Langley added Neighbourhood Plan-specific CACs in six of the neighbourhoods for which it was preparing such Plans (the Williams Neighbourhood Plan area, the Smith Neighbourhood Plan area and three of the Neighbourhood Plan areas in Brookswood-Fernridge).

The CACs rates for employment lands were set at

- $500,000 per acre in the Brookswood-Fernridge Neighbourhood Plan areas, and
- $550,000 per acre in the Williams Neighbourhood Plan area and the Smith Neighbourhood Plan area.

As noted, the $550,000 rate amounted to between $32 million and $39 million for a project of the scale of Lorval’s Williams project.

(d) Other provisions and practices

As can be seen from the Schedule to the Court decision, the Langley CAC Policy that was the subject of the litigation

- was a policy of general application, subject only to five narrow exemptions (applying even to a rezoning by a homeowner to allow a two lot subdivision), and
- provided that the CAC would be increased by an annual inflation factor until it was paid.

While the CAC Policy contained a grandparenting provision, it was one that Council could and did render inapplicable from time to time, given that it was not subject to a statutory grandparenting requirement.

The record in the proceeding also showed that the CAC monies received were recorded under the "Fees, rates and service charges line item under Revenue on the Consolidated Statement of Operations" in Langley's Annual Financial Statements.

4. Practical and public policy considerations

In terms of the impact of CACs, at least four elements have important public policy implications.

(a) The negative impact of CACs on housing affordability, economic viability and jobs

With CACs on rezonings for non-rental residential development, the rezoning can lead to land or unit sales that produce funds that can be used to pay the applicable CAC, albeit

- at the cost, as noted in the 2014 Guide, of reducing the affordability of the units,

- subject to the risks of the construction of the project being blocked by a downzoning between the date of the rezoning and the date of subdivision or building permit, and

- only if the increased cost base is not such as to make financing and construction non-viable.

Another analysis to a similar effect as that mentioned in the 2014 Guide was the May 2021 report to the BC / Federal Expert Panel on Housing Supply and Affordability, entitled "The Economics of Community Amenity Contributions and Real Estate Taxes" in the lead up to the introduction of the ACC provisions. It spoke to the point as follows:

> "Theory suggests that Community Amenity Contributions (CACs) levied as a percentage of the change in land value resulting from rezoning will reduce the supply of new housing and raise house prices relative to conditions if they were not imposed. …" (page 10); and
>
> "Expected developer profit, as captured in developer pro-formas reflect expected costs, revenues, time to develop, and uncertainty in all three. Increasing uncertainty in any of these will increase the developer's minimum expected profit needed to justify doing the development. So, even if the expected CAC charges prior to making an offer for land are unchanged, increased uncertainty to their levels, and to how long the determination of the CACs will take will, in a competitive investment market, increase the expected or minimum hurdle returns for real estate development… If this diminution is sufficiently large, it is possible to make the redevelopment an inferior option to the current use for land acquisition, and thus shut off development completely. (Page 16)

Those considerations are reflected in the statutory requirement that DCCs and ACCs only be paid at subdivision or building permit.

(b) The negative impact of Employment Land CACs

The potential for the crippling or destruction of project viability is not simply an issue for residential projects.

One of Lorval's attempted submissions as regards Langley's employment land CACs was that, unlike rezonings for non-rental residential development, the revenues stream that industrial and commercial projects rely on to be viable accrue over extended periods of operation. Hence the payment of upfront funds for CACs that are only recoverable over the long term is even more likely to make the project non-viable. That matters in terms of the competitiveness of our economy, and the availability of jobs, in an increasingly competitive world.

Adding an upfront cost in the tens of millions of dollars (such as in the case of Lorval's Williams project) can easily destroy the viability of the development, such that the jobs and ongoing property taxes that the project would have produced never happen.

(c) The negative impact of lift-based charges

Noting Langley's argument about excess 'windfall' profits that the municipality "creates" by rezoning, lift-based CACs involve an exercise whereby a municipality determines what it sees as the scale of the "windfall' , and takes the position relative to the rezoning applicant that it is against the public interest for a rezoning to be considered or approved unless that amount is 'contributed' to the municipality 'voluntarily'. The Employment Land CAC rate records the municipality's view of the "windfall' component.

The Province's statement that Langley's 'windfall' theory is fallacious (per the 2014 Guide) has already been noted.

As has also been noted, given the fact that CACs are not authorized by legislation, there are no statutory parameters related to the collection or expenditure of CAC funds, such that, as noted in Hansard, in various instances the municipality diverts the CAC monies collected to general municipal revenue.

Further, as will be spoken to later in this paper, to the extent the funds raised are disconnected from a regulatory regime, issues arise as to whether those funds are properly characterized as unauthorized taxes rather than unauthorized regulatory charges, and indeed as unconstitutional indirect taxes.

One of the statements made repeatedly by Langley leadership at the political level, in justifying its CAC Policy and Interim CAC Policy, has been that ACC Bylaws are "just an optional tool", as if that means that CACs are another option. While it is true that ACCs are optional, in the sense that municipalities do not need to enact an ACC Bylaw if they do not wish to, that does not mean that CACs are a lawful option.

(d) The negative impact of the arbitrary withdrawal of grandparenting from in-stream applications

Another public policy consideration is that adding a CAC after a rezoning has received third reading fundamentally changes the economics on which the project was based, after land acquisition and after substantial time and expense has been spent on the rezoning process.

It is precisely because of that fact that the statutory provisions authorizing Amenity Cost Charges, Development Cost Charges and subdivision contain specific grandparenting provisions for in-stream projects.

As will be seen, there is also case law to the effect that a policy that undercuts statutory grandparenting provisions is unlawful for that reason. An obvious implication is that a CAC policy that applies while the instream protection for ACCs is in effect would also be unlawful. A provision that undercuts statutory grandparenting protection has been held to be unlawful even if 'agreed to' by an applicant, which further suggests that the fact the municipality obtains a release (if it does so) would not matter either.

5. Judicial review considerations

Lorval's legal challenge to Langley's CAC Policy took the form of an application for judicial review. The issues that arise in such a challenge are *not* a matter of

- simply noting statutory provisions, and comparing them to the CAC Policy in question; or
- persuading the Court of the wisdom of setting aside the policy based on pertinent public policy considerations.

While the Courts, through judicial review, have the ability to ensure that delegated legislation (such as a municipal bylaw or policy) comes within the delegate's authority, the exercise is not intuitive without (and in some cases even with) a solid understanding of judicial review principles. This paper is not a paper on judicial review per se, and so it will not attempt to thoroughly cavass the complexities, apart from noting the following basic points.

(a) Challenges to the vires of a bylaw or policy

The Court's treatment of jurisdictional review has changed significantly over the years, and certainly since 1982 when the writer of this paper commenced his practice in local government regulatory law.

For much of the first two decades of that practice, municipal litigation was a matter of submissions by counsel as to whether the administrative action in question (be it a bylaw, resolution or other decision) complied with the statute.

By way of its decision in ***Dunsmuir v New Brunswick*** [2008] 1 S.C.R. 190, the Supreme Court of Canada introduced the concept of 'standard of review' to the analysis, but largely left the vires of delegated legislation to be determined on the 'correctness' standard (ie – such that the issue continued to be whether the bylaw or policy fell within the terms of the statute).

By the mid-2010s however the Supreme Court of Canada indicated that the actions of administrative bodies exercising broadly delegated powers were to be assessed

- not on the 'correctness' standard, but rather
- as against a 'reasonableness' standard that allowed for multiple interpretations of the statute so long as the interpretations in question were held to come within the reasonable range of interpretations.

By that point, challenges to administrative action at the local government level had become increasingly nuanced and increasingly unpredictable. Whereas formerly a disagreement between a municipality and

an applicant could often be resolved fairly easily between experienced counsel without any need to go to Court, because both counsel had a reasonable ability to predict the outcome, one could easily find oneself in a situation where the Courts deferred to a municipality that interpreted in its own interest longstanding and very detailed statutory provisions that the Province had included in the statute to balance municipal interests against impacts on investment viability. That was the cases without any change in the statute and based solely on the change in the Supreme Court of Canada's guidance regarding judicial review.

In late 2019, matters started back on a path to greater predictability as the Supreme Court of Canada further developed its standard of review analysis by way of the 'robust reasonableness' approach it referenced in *Vavilov. Vavilov* further specifically directed that creatures of statute cannot

> "arrogate powers to themselves that they were never intended to have" (para 109).

The Supreme Court of Canada's decision in ***Auer v Auer*** 2024 SCC 36 also underscores that an important aspect of judicial review is to

> "ensure that statutory delegates act within the scope of their lawful authority"

and that delegated legislation (including municipal policies) must be "consistent both with specific provisions of the enabling statute and with its overriding purpose or object" (paras 26, 33 and 64).

Further, since the decision of the Supreme Court of Canada in ***Mason v. Canada (Citizenship and Immigration)*** 2023 SCC 21, there have been a number of cases where the Court has held that "the only reasonable interpretation" of the statutory scheme at issue is that the challenged administrative action (bylaw, policy or decision, etc) is unlawful (para 121).

Thus, the most salient constraint in the Court's reasonableness review on ultra vires issues is the governing statutory scheme, and the limits that it sets on the scope of the local government's authority. Such constraints are also informed by common law principles regarding the nature of statutory powers and principles of statutory interpretation (see *Vavliov* at paras 68, 108, 111, 121, 123; and *Auer* at paras 24, 61-65).

Having said that, there remain important issues where further guidance would be helpful, such as, for example, to provide further clarity regarding how the review of the 'justification, transparency and intelligibility' of the reasons for implementing subordinate legislation will proceed so as to ensure that administrative action accords with the rule of law, and provide effective limits to prevent the abuse of power.

(b) Challenges to the substantive reasonableness of a bylaw or policy

As has been noted, in situations where there *is* authority for a bylaw or policy, that is not the end of the matter. The local government must also establish that it has exercised its authority reasonably having regard to other pertinent constraints identified in *Vavilov,* including

- the impact on those affected;

- the evidence (or lack thereof) before Council;
- the submissions of the parties; and
- past practices.

The *Lorval* challenge succeeded on the basis that the CAC Policy at issue was unlawful, so the Court chose not to address the substantive reasonableness argument.

If the Court had held otherwise on vires however, the CAC Policy could have been set aside as unreasonable on the basis that it failed to meet the requirements of 'justification, transparency and intelligibility'. Examples would include

- the failure to provide meaningful coherent and justifiable backup for the rates set out in Langley's CAC Policy; and
- the fact that the CAC Policy provided for the raising of funds for generic concepts, such as 'climate action', and 'affordable housing'.

On the first point, Langley did not for example prepare a calculation of the amount of money that the lift-based rates, or the employment land rates, in its the CAC Policy would raise in comparison to the cost of the amenities that the policy was supposedly raising funds for.

For the reasons noted later in this paper, it would also not be surprising if a CAC Policy that:

- set out no rates, and
- relied for collection on non-approval and delay in the absence of a CAC, and a practice of requiring a release to 'prove' voluntariness,

would also be held to be ultra vires or substantively unreasonable.

An example of a successful substantive reasonableness challenge to a CAC Policy based on the lack of justification, transparency and intelligibility (and where a return of funds was also ordered) is ***Ladco Company Limited v The City of Winnipeg*** 2020 MBQB 101.

A good deal of effort was undertaken in the pleadings and evidence in the *Lorval* case to create a fulsome record for the Court, so that the Court could understand not only why the statute provides as it does, but to enable the Court to evaluate the substantive reasonableness of the CAC Policy. Discussions with Paul Daly, the writer's co-counsel in this proceeding, as to the interplay between the *Local Government Act* provisions and related case law, on the one hand, and judicial review case law, on the other, were invaluable in that regard.

(c) The significance of the practical and public policy concerns from a judicial review perspective

As has been noted, when the Court conducts a judicial review of a matter like a CAC Policy, it is *not* assessing whether the bylaw or policy the Council has adopted is "good public policy". Some of the

references earlier in this paper to practical and public policy issues were accordingly not referenced in the parties' submissions to the Court.

At the same time, as has also been noted, various of the public policy points *are* pertinent to an understanding of why the statutory provisions read as they do. While

- a municipality may for example consider it to be in the public interest for the municipality to collect funds from a development so that it has money to spend on concepts of interest to the public (such as 'climate action' or 'housing affordability" per sections 5.1(a) and (d) of Langley's CAC Policy);

- a review of the statutory language may reveal that the Province has quite a different set of objectives, including through provisions that are drafted to limit the imposition of charges so as:

    - not to exacerbate the problem that Lower Mainland and other major BC municipalities have close to the worst housing affordability relative to incomes in the world, and

    - not to block or cripple employment producing projects through the imposition of CACs that are not subject to the limits specifically incorporated into the ACC provisions (by way of the definition of amenities, by requiring justification based on development impacts, by precluding lift-based charges and by providing for payment only at building permit or subdivision approval).

While a municipality might want to be able to publicize that it has an 'affordable housing fund' and is making payments from it, its doing so is not helpful from a public policy perspective when it entails revenue extraction practices that make housing less affordable overall.

Given such considerations, it would be problematic if

- the vires of a local government policy under provincial legislation, or

- the substantive reasonableness of such a policy,

was simply assessed based on deference to a local government assertion of some municipal public interest. While municipalities not infrequently submit that that is what the 'deference' aspect of the 'reasonableness' standard of review provides for, it is not what the 'robust reasonableness' approach contemplates, and proceeding in such a fashion would undermine the rule of law, not support it.

Some of the references that were part of the Court record, merely by way of example, included

- the references in the 2014 CAC Guide to lift, housing affordability and project viability, which were pertinent in light of Langley's submission to the effect that its CAC Policy was consistent with the 2014 Guide; and

- the submission regarding the destructive effect of the employment land CACs that Lorval made to Council, which the Mayor ruled Councillors could not ask questions about, which refusal formed part of Lorval's substantive reasonableness challenge.

6. The three lines of ultra vires cases that were raised by Lorval in the legal proceeding

With that review of the matters pertinent to Lorval's legal challenge in hand, this paper will next turn to the ultra vires case law cited to the Court.

While the specific cases referenced to the two levels of Court evolved somewhat over the course of the proceeding (as is typically the case), in each instance Lorval raised the following three inter-related lines of cases in its submissions.

Those three lines of cases are:

- cases requiring explicit statutory authority for so-called policies that are, in reality, disguised regulations because they are 'regulatory in nature';

- cases to the effect that a creature of statute cannot extract a 'cut' of the financial benefits of a regulatory approval, unless the statute specifically provides authority to do so; and

- cases to the effect that administrative action (bylaws, policies and decisions) will be held to be unlawful where it is inconsistent with the text, purpose and context of the enabling statute.

All three lines of cases are a manifestation of the primacy of the statutory scheme.

The cases in each line involve administrative action, in which the administrative decision maker

- is defending actions that are asserted to be outside of the statutory scheme under which it operates; and

- frequently defends those actions on the basis that the regulated party has 'voluntarily' complied with or 'agreed to' what the administrative decision maker (be it a municipality or board) has done.

(a) Cases holding policies to be unlawful where they are 'regulatory in nature'

The first line of cases is policy specific. The cases speak to the factors that enable one to distinguish between

- guidelines that facilitate a public body in carrying out its statutory mandate in a fairer, more open and efficient manner, which are lawful, and

- pronouncements that are "regulatory in nature" and coercive in tone, which are unlawful in the absence of statutory authority.

Core to the line is the proposition that if an authority wishes to regulate, it has to have statutory authority that entitles it to regulate in the fashion it has.

i. Cases

A lead case in this first line is ***Ainsley Financial Corp v Ontario (Securities Commission)*** (1994), 21 O.R. (3d) 104, 1994 CarswellOnt 1021 (Ont. C.A.).

The *Ainsley* case involved a policy document related to the marketing and sale of penny stocks. In defending the policy, the Commission emphasized that the document in question was merely a policy document setting guidelines, and that various elements of its language reflected that formulation. Langley said much the same thing in defense of its CAC Policy.

The Court in *Ainsley* nonetheless held that there was no magic in the use of the word "guideline", but rather the reviewing Court is to consider

- the thrust of the language in its entirety;
- whether the policy takes the form of a minutely detailed regime; and
- "the reality of the regulatory environment in which it is to be implemented", including "the practical effect of failing to comply".

Applying those factors, the Court in *Ainsley* held the policy statement at issue to be unlawful.

A second case in this first line is ***Blueleader Enterprises Ltd. v. Director of Commercial Vehicle Safety*** 2024 BCSC 850. The BC Supreme Court held in that case that a document that was issued as an Information Bulletin constituted a mandatory direction with the same effect as a regulation, without the statutory authority required for a regulation.

Given that the *Vavilov* decision was clear at paragraph 137 that

> "a reviewing court must look to the record as a whole to understand the decision, and … in doing so, the court will often uncover a clear rationale for the decision",

a Court can look beyond the face of a CAC Policy to determine its vires, as the Court did

- in *Ainsley,* in connection with a staff report and
- in ***Ishaq v. Canada (Citizenship and Immigration)*** 2015 FC 156, with other pertinent evidence.

ii. Application of the cases in this line

The BC Supreme Court cited both *Ainsley* and *Blueleader* in support of its decision holding that Langley's CAC Policy was a mandatory amenity payment regime, and unlawful.

The Court commented in *Lorval* that:

- the CAC Policy represents more than administrative guidance. When read as a whole, it indicates a mandatory fee regime, and that the specified contributions will generally be required as a condition of rezoning approval,
- notwithstanding that the CAC Policy described the specified contributions as "*guidelines*" or "*targets"*, and as "*voluntary amenity contributions*" to be achieved in "*site by site negotiations*", including such words in a policy do not necessarily mean that the policy will be found to provide non-mandatory guidance. The issue was the character of the CAC Policy as a whole, and there was a clear implication that the specified contributions would generally be required in order for

a rezoning to be approved, which approval was within the sole discretion and control of Langley; and

- the net effect was accordingly to “coerce developers to make payment of unauthorized levies as a condition of the development process”.

As will inevitably be the case, Langley’s argument that its policy was ‘voluntary’ was at odds with the proposition that the purpose of the CAC Policy was to achieve fair sharing among developments collectively of the cost of a specified set of amenities collectively. In keeping with that, the Court in *Lorval* did not require any evidence of implementation in order to make the finding it did. The statutory context and the character of the policy as a whole was enough.

The Court’s ruling and analysis reflects the practical realities regarding CAC regimes. The leading municipal text in British Columbia, being *British Columbia Planning Law and Practice* (updated November 2025, release 70) states:

> [8.44] During the 1990s local governments, beginning with those in the Lower Mainland, implemented the concept of obtaining community amenities when rezoning applications were approved, by establishing a formal cash contribution regime reminiscent of the “excess servicing cost” levies of the 1970s (see §19.2). *These regimes generally require a rezoning applicant to make a cash contribution, prior to their application being approved by way of a zoning bylaw amendment, based primarily or exclusively on the magnitude and value of the development opportunity afforded by the rezoning*. The funds are then set aside to pay for local community amenities, to be provided by the local government at its discretion….
>
> [8.45.1] The legality of community amenity contribution regimes would eventually be addressed in a 2025 case in which a developer asserted that a CAC policy that a municipality characterized in the litigation as mere administrative guidance was, in law, a mandatory fee regime. *The evidence was that developers in Langley Township (as in many other B.C. municipalities) were under practical compulsion to enter into agreements to pay CACs in order to obtain approval of their rezoning applications*. Under the applicable case law, including the Supreme Court of Canada’s decision in the Pacific National Investments case cited in §8.40, this amounted to the imposition of a fee for which there was no statutory authority. The municipality’s assertion that its policy was consistent with provincial CAC guidelines was, the Court noted, irrelevant to the more basic question of whether the CAC regime was legal.

Based again on a review of municipal websites subsequent to Langley’s abandonment of its appeal, various municipal policies continue to provide for cash contributions of 75% of land lift (Surrey and the District of North Vancouver, for example, although in the latter case now only for projects that are “designated instream”).

(b) Cases to the effect that an authority cannot extract a ‘cut’ of the financial benefit of a regulatory approval unless the statute specifically provides for it

The second line of cases relates to situations where a ‘cut’ of the financial benefit of a regulatory approval is extracted by or provided to the regulatory authority.

The common law courts have long recognized that a public authority cannot require or negotiate a 'cut' of the financial benefits of the exercise of a statutory discretion, in the absence of express authority. The cases to that effect apply the principle to

- bylaws and policies, and
- 'voluntary' agreements and arrangements arrived at in the context of exercises of regulatory powers.

Langley was by no means the first creature of statute to assert that it was merely facilitating a 'voluntary' transaction with a private party. The proposition dates back well over a century.

i. Cases

In its *Lorval* decision, the BC Supreme Court cited ***G. Gordon Foster Developments Ltd. v. Langley (Township)*** (1979), 14 B.C.L.R. 29 (C.A.) from this line.

The Court *in Foster* held that

- a statutory discretion as to whether to approve a subdivision application, and
- a statutory right to refuse a subdivision application based on cost impacts to the municipality for off-site infrastructure works,

does *not* convey a power to impose charges to offset such impacts as a condition of the granting of subdivision approval, in the absence of express statutory language to that effect. The power to regulate and refuse is fundamentally distinct from the right to require or receive a financial payment as part of a regulatory approval.

The line of cases of which *Foster* is a part has a long history.

Earlier cases where 'voluntary arrangements' were held to be unlawful on this basis include:

- ***Attorney General v. Wilts United Dairies Ltd*** [1922] All E.R. Rep. Ext. 845 (U.K.H.L.), 1921) 37 T.L.R. 884 (Eng. C.A.) where, under a broad discretionary power related to the sale of milk, the authority 'negotiated' an arrangement under which the applicant would pay it twopence per gallon for the privilege.

  The Judgments by the Court include the following:

  > "The Crown in my opinion cannot here succeed except by maintaining the proposition that when statutory authority has been given to the Executive to make regulations controlling acts to be done by His Majesty's subjects, or some of them, the Minister may, without express authority so to do, demand and receive money as the price of exercising his power of control in a particular way, such money to be applied to some public purpose to be determined by the Executive. It is impossible to maintain the proposition". [House of Lords, Wrenbury J]; and
  >
  > "It makes no difference that the obligation to pay the money is expressed in the form of an agreement. *It was illegal for the Food Controller to require such an agreement as a*

condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable" [Court of Appeal, Atkin LJ} ;

- ***The Commonwealth and the Central Wool Committee v. The Colonial Combing, Weaving and Spinning Co. Ltd**.* (1923), 29 A.L.R. 138 (Eng. K.B.), where the authority's approval of a licence to sell entailed its receiving a share of the profits of the transaction, which it called a licence fee.

  The Judgments included that

  > "*It was vigorously urged for the Crown that here there was not a "levy" but an "agreement" for consideration. But that is only a recrudescence of the old struggle between the prerogative and the right of Parliamentary control which is often thought to have ended long ago, but which finds its reappearance even to-day, and the ideas by which the supremacy of Parliament was sought to be evaded are curiously found repeated in the Wilt's Case, and even in the present case. It was an early expedient on the part of the Crown in its claim to regulate trade to assert a prerogative "to make agreements apart from Parliament with the merchants'' as a device to cover what was really taxation* [Isaac J]; and

- ***T and J Brocklebank v The King*** 1924), 130 L.T. 824 (Eng. K.B.), aff'd in this respect but rev'd on other grounds [1924] All E.R. Rep. Ext. 882 (Eng. C.A.), where the authority's consent to the sale of a ship was further to an arrangement under which 15% of the price went to the authority.

  The Court held it did not matter that the approval of the sale was within the authority's discretion. *The granting or refusal required the exercise of a discretion that did not allow a condition of payment*.

Canadian cases in this line subsequent to *Foster* include:

- ***Oulton v. The Chicken Farmers of Nova Scotia,*** 2002 NSSC 58, aff'd 2002 NSCA (citing *Wilts*), where the Board at issue was given the power to distribute new quotas for chicken farming on such terms as the Board may decide, and the Board adopted and implemented a policy that provided for a per kilogram amount that would entail a payment of at least $117,500 by a recipient of a new quota.

  The Court held that that the power to levy a fee must be explicitly conferred by legislation, and that the absence of such authority could not be circumvented by proceeding by policy instead. The Court further ordered that the monies be repaid, and rejected the Board's contention that if the monies were to be refunded, the claimant would not be entitled to retain their quota; and

- ***Canadian Broadcasting Corp. v. SODRAC 2003 Inc***., 2015 SCC 57, where the Supreme Court of Canada cited the *Wilts* line for the proposition that no pecuniary burden can be imposed upon the subjects of this country, by whatever name, whether tax, rate or toll, except upon express legal authority.

ii. Application of the cases in this line

Another important factor underlying the *Lorval* judgment was the reality of the regulatory environment within which it operated.

Langley's CAC Policy was a municipal policy regarding the funding of off-site amenities, that

- attributes the need for funding to the impacts of developments *collectively* across the municipality as a whole or an area within a municipality, and

- which are proposed to be funded by such developments *collectively.*

Langley's CAC Policy, as with most CAC policies, does not speak to:

- amenities or facilities provided on the site of the development that is the subject of a rezoning, or

- funding related to the operation of an amenity located on the site being rezoned, or provided in the immediate vicinity of the site to address an impact specific to the development that is the subject of the rezoning.

Rather Langley's CAC Policy sought a payment in the context of the consideration and granting of a discretionary rezoning approval, including by way of its 'lift' provisions, to fund amenities in respect of the collective impacts of multiple rezonings, in a context where the *Local Government Act*:

- specifically precludes imposing a charge "*by any name*" as regards the consideration of a zoning application, other than the application fee,

- clearly outlines the mechanisms further to which local governments can raise funds to recover the cost of off-site works and amenities, which mechanisms do not include CACs, and

- includes a specific comprehensive mechanism for the funding of area-wide and municipal-wide amenities from multiple developments collectively, being the ACC Bylaw provisions.

The reason the Court in *Lorval* cited the *Foster* decision as a basis for its decision was that the powers at issue in the *Foster* case were simply powers to approve or refuse an application, which is a very distinct matter from a power to collect funds.

The cases in the second line support the proposition that regulatory powers are not something local governments can use as a mechanism to extract 'voluntary' contributions. If a regulatory power is to be used to raise funds, the statute must specifically authorize same.

The *Local Government Act* does not do that – quite the opposite.

(c) Cases to the effect that administrative action is not lawful where it is not "consistent with the text, purpose and context of the enabling statute"

The third line of cases directly considers the fit between the administrative action at issue (in *Lorval* being the CAC Policy) and the statutory regime.

i. Case law

The BC Supreme Court referenced in support of its decision three of the cases from this third line that Lorval's counsel referenced as foreclosing the prospect for

- obtaining contributions outside of the express mechanisms the statutory scheme provides for, or

- sidestepping the applicable statutory prohibitions.

Those three cases are:

- ***Pacific National Investments Ltd. v. Victoria (City)*** 2000 SCC 64, where the Supreme Court of Canada held that

  > "the basic position in Canadian law is that municipalities cannot zone in exchange for amenities without some specific statutory authority for such arrangements",

  and which referenced as an example the *Local Government Act's* 'density bonus zoning' provisions.

  The Court thus held that

  - the fact that the *Local Government Act* established the density bonus zoning mechanism for amenities to be provided for by development

  was inconsistent with

  - providing for amenities by way of agreement in the context of a standard rezoning (being a rezoning that did not proceed under the *Local Government Act's* density bonus zoning provisions).

Similarly, the fact that the *Local Government Act* has since been expanded to provide specifically for:

  - amenities to be provided for by way of Phased Development Agreement Bylaw (subject to the prerequisites to entering into such agreements), as a result of changes to the statute between 2007 and 2020, and

  - amenity funding to be provided for by way of an Amenity Cost Charge Bylaw, subject to the prerequisites for doing so, which came to be authorized by changes to the statute in November 2023;

  underscores the point further;

- ***Prairie Communities Development Corp. v. Okotoks (Town)*** 2011 ABCA 315, which related to a scheme similar to CACs under Alberta's *Municipal Government Act*. As the *Local Government Act* did at the time as regards development cost charges, the Alberta statute authorized off-site levies to be imposed by bylaw as regards specified categories of off-site infrastructure associated with a development.

The municipality enacted

- an off-site levy bylaw, in keeping with the Alberta statute, and

- in addition prepared, and approved by resolution, a 'Contribution Agreement' under which applicants would be responsible for costs that went beyond what the Alberta statute authorized municipalities to recover.

In defending its contribution agreement, Okotoks submitted that:

- it was appropriate in the public interest that the costs referenced in the 'Contribution Agreement' be borne by those advancing a development, and

- the contracts were 'voluntarily" entered into by the private party and by the municipality under 'natural person' power provided for in the Alberta statute (much as Langley argued at the BC Supreme Court in respect of section 8(1) of the *Community Charter*).

The Alberta Court of Appeal rejected that argument, noting that 'natural persons' do not have the power to impose fees or charges, or to set terms for rezonings, subdivisions or development approvals.

The Court of Appeal further held that the 'Contribution Agreements' at issue were not truly voluntary, and that self-serving language cannot be relied upon to obscure the true purpose of what Okotoks had advanced. Rather, the Court held that the resolution the municipality adopted was a "colourable attempt to impose unauthorized off-site levies" by way of supposedly voluntary agreements. It stated:

> *The self-serving form and language of the Contribution Agreement* cannot be allowed to obscure its purpose of compelling the payment of unauthorized off-site levies. *The [Municipal Government Act] spells out the facilities and infrastructure for which off-site levies may only be made. The natural person powers cannot be used to impose levies on other facilities and infrastructure;* and

- ***Gardner Construction Ltd v Parksville,*** (1995), 8 B.C.L.R. (3d) 223 (C.A.) where the municipality required an applicant, as a condition of having a subdivision application processed, to sign an agreement that waived the grandparenting protection that the statute provided for as regards increases in DCCs.

  The municipality defended its requirement on that basis that

  - applicants had a second processing option under which the waiver of grandparenting was not required (being to submit surveyed plans without a preliminary assessment and approval), and

  - the processing option that involved the waiver was not a necessary step for obtaining subdivision approval, but rather was merely a convenience offered by the municipality if the municipality's view of the public interest was met.

In rejecting that argument, the Court

- held that a municipality cannot condition processing on the waiving of a statutory grandparenting provision, and

- added that an agreement conditioned on a waiver is "no agreement at all."

Two other decisions cited to the Court also demonstrate that where a subject matter is dealt with by way of an express statutory provision, the Court will not imply a power to address the subject matter on other terms.

Those decisions are:

- ***1582235 Ontario Limited v. Ontario,*** 2020 ONSC 1279, where Ontario's Health Ministry imposed a set off in response to what it saw as over-billing by a doctor. The Ministry submitted that authority to impose a set off was implied in such a situation, notwithstanding that the statute provided that a set off could be charged for a reason prescribed by regulations, and no regulation had been passed.

  The Court rejected the submission, commenting that

  > "[t]he Legislature cannot be taken to have created a scheme where implied powers may replace the express language of the statute"; and

- ***Paynter v School District No. 6,*** 2022 BCSC 1671], where a Board suspended two trustees for the remainder of their term, arguing that the statute implied a right to suspend, and that the Board had the benefit of the natural person power and was entitled to deference.

  The Court disagreed, holding that suspension amounted to a removal, which was authorized by statute but not in the present circumstances, and a power cannot be implied to sidestep the provisions applicable to a matter

  > "to which the legislature has clearly turned its mind."

ii. Application of the cases in this line

As has been noted, three cases from this third line were cited by the BC Supreme Court as providing 'helpful guidance' and 'being instructive' in connection with its decision that the CAC Policy amounted to a mandatory amenity payment regime that had no statutory authority.

As a result of all of the foregoing cases collectively, the Court held that using a policy form and sprinkling in words like 'voluntary' was far from determinative, as compared to

- the character of the policy as a whole, and

- the context of the statutory regime in within which it was applied.

Those elements included the sections of the *Local Government Act* noted under heading C1 of this paper, including its terms

- prohibiting fees except as expressly authorized,
- establishing the tools by which amenities can be secured, and the parameters governing the use of those tools, and
- establishing the tools by which funds can be required from development, and the parameters governing the use of those tools.

It is also not hard to see that a regime that funded area-wide amenities collectively from municipal-wide or area-wide development would undermine the Amenity Cost Charge sections of the statute given that:

- the developments that pay ACCs are often *the same developments* as are the subject of the rezoning that CACs are drawn from, with the difference being that CACs are paid at the zoning stage (unless delayed with a letter of credit provided), and ACCs are paid at the building or subdivision stage;

- the rationale for the statute's providing for payment at subdivision or building permit rather than at rezoning is obvious, given that that projects that obtain rezoning not infrequently do not proceed, and there is no need to provide amenities for projects that do not proceed;

- as was illustrated by the Gloucester example and the references to delay in the Hansard debates, the leverage municipalities have to obtain CAC funds is delaying the processing of the rezoning (having projects "just sit"), which, along with the additional costs having to be incurred to obtain approval, renders projects less economic and less likely to proceed. That undercuts the housing affordability and project viability goals that were the basis for the Housing Statutes;

- the use of the CAC Policy mechanism in place of ACCs would also allow local governments to evade the disclosure, public input, grandparenting and reserve fund parameters that the Legislature has determined is appropriate; and

- given that the 'negotiations' that CAC Policies entail in many cases relate to the municipality's assertions about the 'lift' impact of a rezoning and the level of 'unearned windfall' associated with the rezoning in question, such negotiations are at odds with the nexus and proportionality provisions set by the Legislature in its ACC provisions. Those provisions require that amenity rates

  > "be similar for all developments that are expected to result in a similar increase"

  in population, that they be set on a lot, unit or floor area basis, and that they be paid at building permit or subdivision.

As an aside, the *Gardner* decision is also pertinent to local government efforts to use CAC policies to sidestep the mandatory grandparenting that is provided to in-stream applicants by section 570.91 of the ACC provisions of the *Local Government Act*.

That is so because, if (as *Gardner* provides) a municipality cannot lawfully sidestep a statutory grandparenting provision as regards instream subdivision applications, there is no reason why the same

principle should not apply to in-stream rezoning applications. There would be no point to exempting in-stream applications from ACCs if the in-stream applications could be charged for the same amenities as are the subject of the ACC Bylaw by providing for their recovery in a CAC policy. (The argument in defence - being that the ACC grandparenting section does not expressly apply the in-stream grandparenting protection to CAC Policies - is obviously flawed, given that the *Local Government Act* does not authorize CAC policies at all.)

7. Substantive reasonableness

As has been noted, the question of substantive reasonableness would have arisen if the Court had held that CACs were within the jurisdiction of a municipality to adopt.

(a) Ladco

British Columbia Planning Law and Practice, supra, sets the stage for one aspect of this issue, in making the following comments about development cost charges, at 19.61:

> [19.6] …The legal nature of development cost charges has been considered in cases challenging their constitutionality. If they were taxes, they would be unconstitutional because they would be indirect taxes (tending to be paid by persons to whom the person who initially pays the tax passes it along), and such taxes are within the exclusive jurisdiction of the federal government. DCCs have been determined to be charges incidental to the operation of a regulatory scheme related to land development, and therefore within the legislative jurisdiction of the provinces.

The same would presumably be true of an amenity cost charge bylaw prepared in keeping with statutory authorization for such bylaws.

The problem for Langley's CAC Policy, as with other local government CAC Policies, is however a lack of legislative authority for such policies. Langley made an effort to defend its policy on the basis of the 'natural person' power, but, as noted earlier, and as found in the *Prairie Communities* case, natural persons do not have the power to set conditions on zoning or to impose charges.

The *Ladco* case cited earlier arose under Manitoba legislation that sufficed to provide authority for an impact fee bylaw, but without the specifics the *Local Government Act* establishes as regards both DCCs and ACCs.

The Court hearing the case concluded that the impact fee bylaw that the city had adopted in that case did not pass the substantive reasonableness test. The defects referenced included the following:

- the impact fee was *not* regulating development or growth, but rather were aimed at raising revenues to support the operations and infrastructure of the City as a whole, without any clear requirement that the monies be tied back to growth caused by the development from which the monies are collected. The capital projects used to calculate the cost of the growth included most of the capital projects undertaken by the City, including a new police headquarters when there was nothing to indicate that that cost was required by new development (paras 171-176);

- the criteria of that costs be properly estimated was not met, because the costs used were city wide rather that associated with the developments or the areas of the city subject to the charge (para 178),

- there was not a sufficient nexus between the costs of the regulatory regime and the revenues raised through the imposition of the fee. While there was an assessment of the overall cost of growth, the revenues derived from the fee were not directly connected to the costs generated by the developments from which the funds were drawn (para 183);

- because the monies were held in a general reserve fund that could be used for any purpose and not necessarily the costs related to growth generally or as a result of the specific developments subject to the fee, there was an insufficient relationship between the person being regulated and the regulation (para 188); and

- while there is a basis for saying that development or growth in a certain area of the city results in the requirement for additional infrastructure outside of that development, the benefit in this case was more indirect than direct (para 189).

Thus, even though there was authority for a regulatory charge, the Court concluded that the insufficient nexus between the fees and the expenses generated by growth meant that the result was an unlawful indirect tax, not a regulatory charge.

It has been suggested that a comprehensive set of statutory specifics equivalent to those in the DCC and ACC provisions of the *Local Government Act* may well be necessary in order for local governments to be able collect funds from development in a manner that avoids the risk of being held to be a constitutionally invalid indirect tax (see "Development Cost Charges in British Columbia: Lessons for the City of Winnipeg" (2021), University of Manitoba Abstract, Shogolev and D. Linton).

There are of course no statutory provisions whatever as regards CACs. There are on the other hand, detailed statutory provisions as regards ACCs.

(b) Lorval

Further to the direction at paragraphs 95 and 127 -128 of *Vavilov* that

> "the exercise of public power must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it"

various additional points were made in the *Lorval* proceeding as regards how Langley had handled its CAC Policy amendments. Merely by way of example:

- Langley did not provide Lorval with the calculations Langley staff had prepared in support of the rates set out in the CAC Policy, despite repeated requests for same. Indeed, there was no evidence that the calculations went to Council either; and

- after the proceeding was filed, Langley provided the Court with its staff's calculations for three CAC Policy amendments, following which Lorval noted that the CAC rates provided for

in the CAC Policy as it stood after the June 2024 amendment would, applying those rates and the baseline numbers from Langley's December 2022 calculations document, yield

- $150 million more than the total cost of the amenities for which funds were being raised, and
- $378 million more than what Langley's calculations said was the 'new development' share of the cost of those amenities (ie- after adjusting for the use of the new amenities by Langley's existing citizens).

D. <u>Closing comments</u>

1. Implications for local governments

Langley's appeal having been abandoned, the BC Supreme Court decision affirming that it was unlawful is clearly now the law of British Columbia, and local governments in British Columbia that carry on with their CAC Policies as if that was not the case do so at their own peril.

Based on the *Lorval d*ecision, and case law referenced herein as part of the Court proceeding, the raising of funds by way of CAC Policies is a risky proposition for local government. There is the risk of successful challenges based on:

- the absence of statutory authority, and
- alternatively, a failure of 'substantive reasonableness'.

Whatever the temptation may be from a political perspective to characterize a Court ruling regarding local government powers as unimportant in light of the fact that a CAC Policy:

- describes itself as 'voluntary', or
- is producing many millions of dollars in revenue,

neither of those considerations is responsive to the statute and case law and associated administrative implications reviewed in this paper.

As this paper has noted, strongly asserted 'voluntariness' arguments have failed in numerous cases over more than a century.

Further, the second of those assertions is commonly the result of identifiable factors that undermine the first assertion, to be reviewed by the Court in keeping with paragraph 137 of *Vavilov.* The concept of a policy that leads, on a voluntary basis (as compared to coercion though the manipulation of the processing of rezoning applications), to the 'fair sharing' of tens and hundreds of millions of dollars collectively among all of a substantial number of rezoning applications is inherently flawed, even leaving aside how that could be the case as regards 'voluntary contributions' calculated based on lift (and in

various cases 75% of lift) rather than the impact of the development that is the subject of the rezoning on the need for amenities.

For the reasons that have been set out in this paper, it is similarly risky for local governments to

- collect amenity charges during the grandparenting period for ACC Bylaws by way of an 'Interim CAC Policy' or otherwise; or

- revise or expand CAC policies to apply to subject matters not provided for by the *Local Government Act*, with or without an ACC Bylaw in place;

given the absence of statutory authority for CAC policies directed to those things, and the similar issues that would arise regarding the substantive reasonableness of those policies.

Over and above the risk that a Court might hold a CAC Policy to be unlawful, and the cost of defending the CAC Policy from such a challenge, is the risk that the local government in question will be ordered to repay funds collected.

The CACs Lorval faced in the Gloucester and Williams situations referred to had not been paid, and so the focus of the Lorval court challenge was the lawfulness of the CAC Policy in the first instance. While the *Lorval* decision did not, as a result, deal with the ability of an applicant to recover CACs obtained by way of an unlawful policy, there have been various cases that have resulted in repayment orders or unjust enrichment awards, including but by no means limited to

- *Oulton* (NSCA, 2002), as regards the new entrants' fee unlawfully charged to applicants for new quota allocations;

- ***Pacific National Investments Ltd. v. Victoria (City)*,** 2004 SCC 75 (PNI #2), as regards roads, parkland, walkways and a seawall that was held have unjustly enriched the municipality;

- ***Kingstreet Investments Ltd. v. New Brunswick (Finance)***, [2007] 1 S.C.R. 3, as regards constitutionally invalid taxes, and

- *Ladco* (MBQB, 2020)*,* as regards $30 to $32 million in growth impact fees plus accrued interest that the Court held to be a constitutionally invalid indirect tax and not a valid regulatory charge.

Any municipality that is considering adopting or continuing a CAC Policy would be well advised to obtain legal advice that

- addresses the foregoing risks in detail, and

- advises as to the cost versus benefit of doing so, relative to raising funds for amenities lawfully by way of an Amenity Cost Charge Bylaw established in compliance with the provisions of the *Local Government Act.*

2. Implications for applicants

While

- the *Lorval* decision includes propositions of law that extend beyond Langley's CAC Policy, and

- there are a significant number of cases that support the result in the *Lorval* case, as outlined above,

the Court in *Lorval* did not consider and was not asked to make a finding about any other local government's CAC Policy. Accordingly, an applicant who wishes to challenge any other local government's CAC Policy should have counsel review that local government's CAC Policy in the context of the law cited in this paper.

Generally speaking, a rezoning applicant would also be well advised to consider including in any legal proceeding taking issue with the lawfulness of a CAC Policy both

- the vires aspects noted at points 5(a) and 6 of Part C of this paper; and

- facts pertinent to the substantive reasonableness considerations of 'justification, transparency and intelligibility' noted at points 5(b) and 7 of this paper;

so that the Court can consider the CAC Policy through both lenses.

A rezoning applicant considering launching such a challenge should also take care to ensure that the advice it receives on such matters is from experienced counsel who

- has a solid grasp of all of the foregoing issues, and

- is in a position to ensure that the pertinent facts will be available to the court by way of admissible evidence that forms part of the record of the proceeding.

The fact that this paper notes the risk that municipalities face as regards repayment claims should also not be taken as advice to any party that it should launch a repayment claim. Any party considering making a claim for repayment should obtain first legal advice that includes not only the matters related to the particular municipal CAC Policy as set out above, but also a detailed consideration of

- the applicable limitation periods;

- the specifics of how the potential claimant came to make the payment it did;

- the potential application of the foregoing and other lines of authority related to repayment; and

- whatever other issues pertaining to their circumstances their legal advisor notes.

Hence while CAC Policies in British Columbia have by no means been limited to developers and big developments, but rather have commonly extended to small scale rezonings (including in various instances individual homeowners seeking to create a second lot), it would not be surprising if such

challenges would typically involve substantial corporate entities.

3. Implications for the rule of law and judicial review

While issues of repayment inevitably arise in connection with this topic, that is by no means the aspect of CACs of the greatest interest to the writer of this paper.

From a practical perspective:

- a significant consideration for local governments that choose to pursue CACs is the revenues they produce, and

- rezoning applicants pay them (where they do not defeat an application or project entirely) because the mandatory amenity payment regimes they face leave them with no practical alternative.

The transaction is not a two party transaction, however. There are external negative impacts as regards

- the affordability of housing, the availability of jobs and the viability of our economies, and the other practical and public policy matters reviewed above, and

- the rule of law.

The rule of law is a foundational legal and political principle to the effect that all individuals, institutions, and governments are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated. It ensures that no legal entity is above the law, and that society is protected from arbitrary abuses of power

In keeping with the rule of law, if there is some purpose regarding which local government believes that funding should be available from development beyond what the statute provides for, the path to securing such funding is

- for local governments to approach the Province to add a set of statutory provisions establishing a funding regime that sets out comprehensive parameters for same, and for the Province to take input from the citizens and the private sector as to the implications of what has been proposed, including for example as regards practical and public policy considerations in the nature of those set out in this paper; as compared to

- adopting arbitrarily drafted and applied policies, and securing funds ‘voluntarily’ through disguised charges achieved through references to ‘the public interest” and delays in regulatory processing.

The most important point from this writer’s perspective is for:

- the Province to draft the provisions of local government legislation in keeping with the legal, and practical and public policy considerations, noted herein;

- local governments to recognize, and act in keeping with, their obligation to operate in compliance with the statutory provisions under which they exist, notwithstanding the temptation to obtain additional revenues by acting outside of those provisions; and

- the Courts to continue the evolution of their approach to judicial review so that judicial review supports the rule of law and facilitates efforts by the Province and local governments to do the same.

4. Acknowledgements

The writer would be remiss not to commend the Province for undertaking the effort it undertook in its Housing Statutes to provide a mechanism for addressing amenity funding in a fashion that

- allows local governments to ensure that new development pays its legitimate share of the impact that such development has on the amenities actually required in a municipality,

- addresses the practical and public policy considerations discussed in this paper, and

- provides local governments with a path away from the increasingly aggressive policies related to CACs that have engaged the issues raised by all of the cases reviewed in this paper, and that inevitably led to the Court challenges in the *Gardner, Prairie Communities, Ladco* and *Lorval* cases.

The writer similarly commends the Lorval Group for taking the step that many other rezoning applicants chose not to take, so as to ensure that the legal issues surrounding CACs were advanced through the British Columbia Courts, and advanced on a record that spoke fully to both the vires and substantive reasonableness issues.

In each case, the Province and the Lorval Group have absorbed some significant criticism for proceeding as they have. In this writer's opinion at least, both have made significant positive contributions to addressing the negative practical and public policy impacts that this paper speaks to.

June 3, 2026

Kenward Development Law Corporation was lead counsel for the Lorval Group in the legal proceeding that is the subject of this paper. The writer of the paper (Peter Kenward of Kenward Development Law Corporation) is also past Chair of the Municipal Law Section of the Canadian Bar Association, both in British Columbia and nationally, was a member of the Board of Directors of the Urban Development Institute (Pacific Region) for 10 years, a former member of the Province's Development Process Advisory Committee and an advisor to the Province on various occasions as regards amendments to the *Local Government Act* and *Community Charter,* and on numerous occasions has lead or spoken at programs for such organizations as the Continuing Legal Education Society of BC, Local Government Management Association of BC, the Union of BC Municipalities, the Canadian Bar Association and the American Bar Association. The comments set out herein are those of the writer quite apart from the foregoing. This document is not intended as legal advice to any individual or organization regarding any specific circumstance, and must not be relied on as such.