OFF-SITE LEVIES:
A MUNICIPALITY'S MANUAL FOR CAPITAL COST RECOVERY DUE TO NEW DEVELOPMENT

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May 2019

RMA RURAL MUNICIPALITIES of ALBERTA

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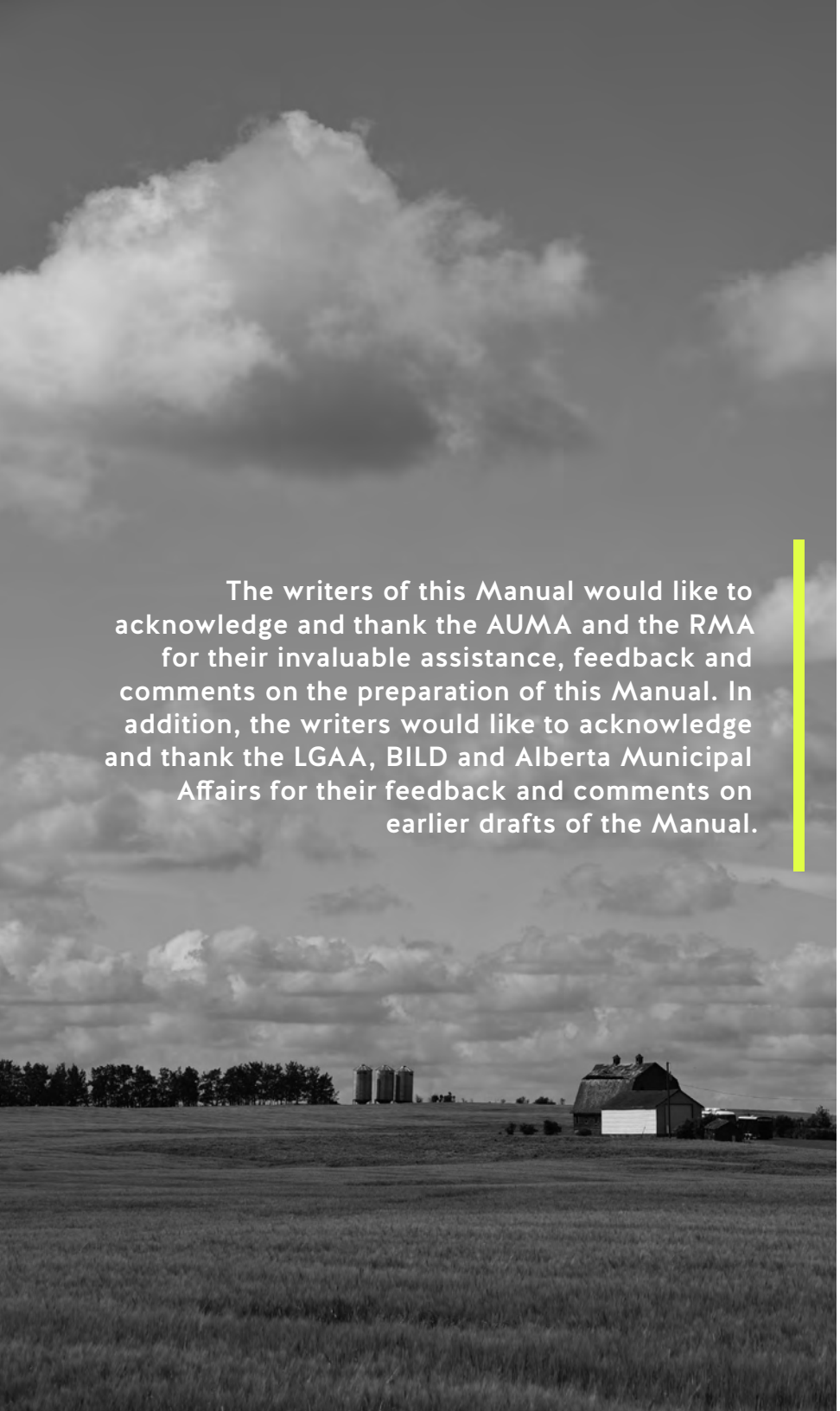
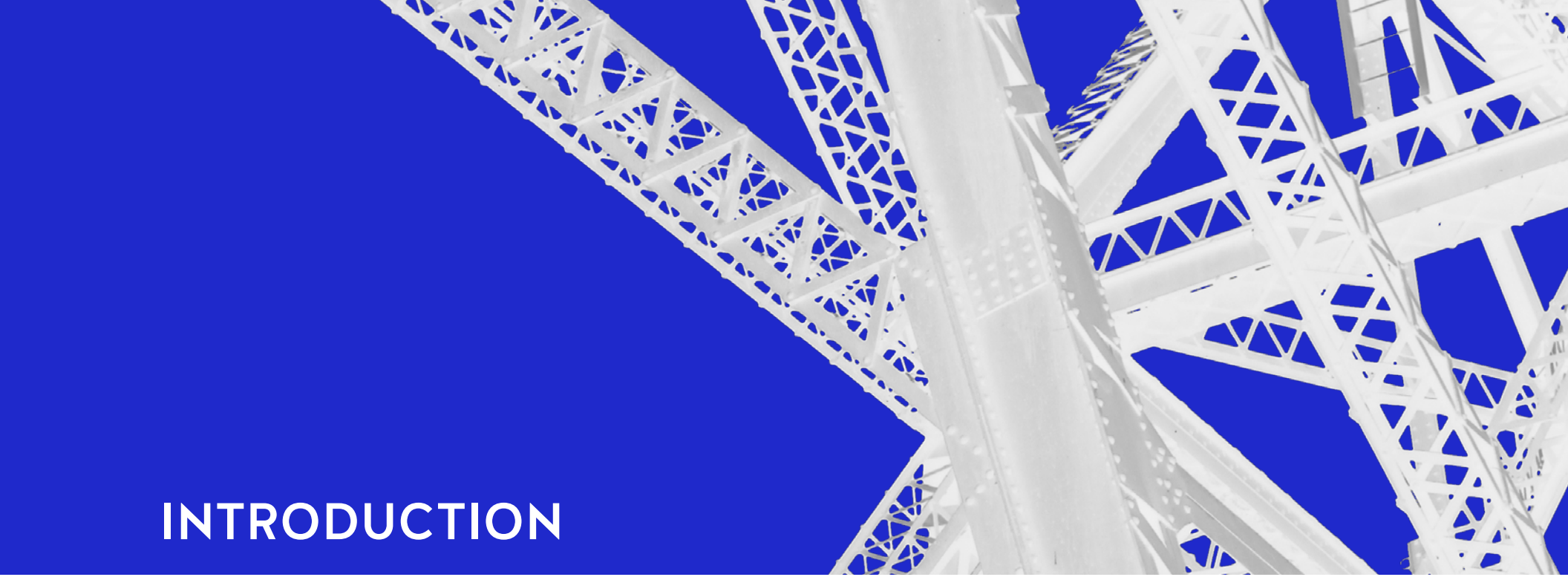


The writers of this Manual would like to acknowledge and thank the AUMA and the RMA for their invaluable assistance, feedback and comments on the preparation of this Manual. In addition, the writers would like to acknowledge and thank the LGAA, BILD and Alberta Municipal Affairs for their feedback and comments on earlier drafts of the Manual.



INTRODUCTION

What is an Off-Site Levy?

Most municipalities cannot afford to pay 100% of the costs of new municipal infrastructure. As such, they are concerned about funding the construction and installation of new and expanded municipal infrastructure associated with development. With Alberta's recent and ongoing population growth, the demand for new and expanded municipal infrastructure is a significant issue. Add to this an increasing demand on the general tax revenue of municipalities to deliver an ever-expanding variety of services, and it becomes even more important for municipalities to consider new ways to pay for infrastructure.

Municipalities wrestle with the question, "Who should pay for that new or expanded infrastructure?" The common position for many municipalities is that new development should "pay for itself".

The Municipal Government Act, RSA 2000, c M-26 (MGA), provides several tools that allow a municipality to implement a "user pay" approach to new infrastructure. One of these tools is the implementation of an Off-Site Levy (OSL) regime. An OSL regime allows a municipality to recover capital costs of certain types of municipal infrastructure based on the degree of benefit the development will receive from the infrastructure. Therefore, the imposition and collection of an OSL can be a valuable cost recovery tool for a municipality in constructing new or expanded infrastructure.

An OSL is a charge imposed by a municipality and collected from a developer as a condition of development or subdivision. OSL must be authorized by council through the adoption of a bylaw. If the developer fails to pay the OSL charge, then the developer is in breach of the condition of the development permit or the subdivision approval and enforcement action can be commenced to force the developer to comply with the condition. Funds collected through an OSL regime can provide a municipality with the necessary capital to undertake big ticket infrastructure projects. Although the process can vary, OSL-funded infrastructure is typically front-end funded by the municipality, with a proportion of costs then being recovered as development proceeds.

> *"Who should pay for that new or expanded infrastructure?"*

A Brief History of Off-Site Levies

When OSL first appeared in the MGA in 1973, they could only be collected for water supply, treatment and storage and sewage treatment and disposal facilities. Councils passed bylaws providing for the imposition of an OSL on undeveloped land that was to be developed for residential, commercial, industrial or other purposes. There were no rules or restrictions related to the determination of the levy amount other than the restriction in the MGA that an OSL could not exceed:

- $500 for each housing unit provided;
- $0.50 per square foot of gross floor area of each unit of housing or other building calculated based on external dimensions; or
- $2000 per acre on the gross acreage of lands being developed.
- If an OSL was not paid, it could be added to the tax roll of the property and collected in the same manner as taxes.
- Over the next twenty-five years the OSL system continued to evolve. In 1977, the power to adopt an OSL bylaw moved to the *Planning Act*. The limit on the size of the OSL was dropped, as was the ability to add the OSL to the tax roll of the property. Storm drainage facilities were recognized as a separate category of municipal infrastructure and wording was added to the legislation to make it clear that the capital cost of the facility could include land costs. In 1994, the power to adopt an OSL was put back in the MGA when the *Planning Act* was repealed. The OSL provisions can currently be found in sections 648 to 649 of the MGA.

In 2004, the Government of Alberta expanded the scope of municipal infrastructure that could be funded through an OSL regime to include "new or expanded roads required for or impacted by a subdivision or development". That same year, the Government of Alberta passed the *Principles and Criteria for Off-Site Levies Regulation*, Alta Reg. 48/2004.

In 2018, the Government of Alberta passed additional amendments to the OSL provisions. These included expanding the scope of OSL to include the capital costs of new or expanded community recreation facilities, new or expanded fire hall facilities, new or expanded police station facilities, and new or expanded libraries. The *Principles and Criteria Regulation* was also repealed and replaced with the *Off-Site Levies Regulation*, Alta Reg. 187/2017.

The authority to pass an OSL bylaw is set out in section 648 of the MGA. In addition to the provisions in the MGA, to pass an OSL bylaw, the municipality must also comply with the regulatory requirements. The first OSL regulation was the *Principles and Criteria for Off-Site Levies Regulation,* Alta Reg. 48/2004 (the *"Principles and Criteria Regulation"*). The *Principles and Criteria Regulation* introduced the requirement for consultation with the development community and the need for there to be a correlation between the levy and the impacts of new development. The method of calculating the levy had to be clear and the bylaw had to describe the infrastructure to be built with levy funds, describe the benefitting areas, estimate the costs of construction, and indicate how cost increases were to be addressed over time. All the calculations were to be supported by technical data and analysis. What was once a relatively simple cost recovery mechanism became much more complicated to adopt and administer. As a result of the *Principles and Criteria Regulation,* there were legal challenges to OSL regimes. Some of those legal challenges and the lessons learned from the court decision are discussed in the section of this Manual entitled "Court Considerations".

Since 2004, municipalities have advocated for the Government of Alberta to expand the types of municipal infrastructure that could be constructed using OSL. With the 2018 amendments to the MGA, OSL can now be imposed and collected to cover the capital costs of the following:

- new or expanded community recreation facilities;
- new or expanded fire hall facilities;
- new or expanded police station facilities; and
- new or expanded libraries.

In addition, the MGA expressly recognizes the ability of two or more municipalities to impose OSL on an intermunicipal basis and has expanded road infrastructure to include transportation infrastructure required to connect or to improve the connection of the municipal road network to provincial highways.

The *Principles and Criteria Regulation* has also been repealed and replaced by the *Off-Site Levies Regulation*, Alta Reg. 187/2017. New OSL bylaws or amendments to existing OSL bylaws will need to comply with the requirements of the *Off-Site Levies Regulation,* which expands consultation requirements and imposes new criteria for determining levy costs. New ways to appeal or challenge the imposition of OSL are also a part of the amendments to the MGA and the *Off-Site Levies Regul*ation. The new rules will be discussed in greater detail within this Manual.

City Charters and Off-Site Levies

The OSL provisions found in sections 648 to 649 of the MGA and the *Off-Site Levies Regulation* do not apply to the City of Edmonton and the City of Calgary. The City of Edmonton Charter and the City of Calgary Charter contain express provisions that replace the general requirements for OSL that are set out in the *MGA* and the *Off-Site Levy Regulation*. As such, this Manual does not address the requirements for OSL in Edmonton or Calgary, but rather is directed towards all other Alberta municipalities.

Distinction between Off-Site Levies and Other Charges, Contributions, and Levies under the MGA

The focus of this Manual is on OSL and not on other charges that a municipality may impose on a developer under other sections of the MGA. For example, some municipalities will use the phrase "off-site charge" for a development charge that is imposed on a developer for a piece of municipal infrastructure that is not within the limits of the developer's subdivision or "off of" the development site. These sorts of development charges are not to be confused with OSL. The rules for OSLs and development charges are not the same. The table below briefly explains the distinction between an OSL and a development charge.

	OFF-SITE LEVY	DEVELOPMENT CHARGE
AUTHORIZATION	Section 648	Section 650 – as a condition of a development permit provided it is authorized by the municipality's land use bylaw Section 655 – as a condition of a subdivision approval
REQUIRES BYLAW	Yes	No
TYPE OF INFRASTRUCTURE	Water, sanitary sewer, storm sewer, roads, community recreation facilities, police stations, fire halls, libraries.	Roads, pedestrian walkway systems, public utilities (e.g. water, sanitary sewer, drainage, electricity, natural gas), off-street parking, loading and unloading facilities.
CHARACTERIZATION OF MUNICIPAL INFRASTRUCTURE	Off-Site, typically required to service a large area of a municipality	More localized, required to service or access the immediate development or subdivision

In addition, development charges cannot be challenged through the courts in the same way as an OSL. A development charge is a simpler method that may be available to municipalities in some circumstances to achieve cost recovery for infrastructure costs. A development charge, however, is not a replacement for an OSL and not necessarily an alternative to avoid the more stringent requirements of an OSL bylaw. Although a development charge and an OSL may seem similar, it is important not to confuse the two methods that a municipality might use to recover costs of constructing municipal infrastructure.

A distinction should also be made between an OSL and a redevelopment levy. Although both are authorized under the MGA, a redevelopment levy requires a municipality to approve by bylaw an area redevelopment plan that identifies a redevelopment area and the redevelopment levy. A redevelopment levy may only be used to acquire land for a park or school buildings designated for the instruction or accommodation of students, or land for new or expanded recreation facilities (or both). A redevelopment levy may only be imposed and collected at the development permit stage and only in relation to the area of the municipality covered by the area redevelopment plan. Given this, a redevelopment levy is much more limited in scope and application than an OSL.

The Purpose of this Manual

This Manual is primarily a guide for municipalities, although developers and interested members of the public may find it useful in gaining a better understanding of OSL. Developing, implementing, reviewing and updating an OSL regime is not a simple process. It requires more than passing a bylaw to create the levy. This Manual will explore the numerous factors that should be considered by a municipality before implementing an OSL regime. The Manual will discuss how council can evaluate if an OSL regime makes sense for its municipality; what roles council, administration and industry play in establishing an OSL regime; and what might be the impact of an OSL regime on municipal finances and economic development. Finally, several case studies will be presented to further assist municipalities in understanding the new rules around OSL and how this tool for financing the construction of municipal infrastructure can be utilized.

This Manual is meant only as guide to assist municipalities in the development of an OSL regime and bylaw. This Manual is not meant to replace the need for municipalities to engage legal counsel for obtaining a legal review of their OSL bylaw to ensure that all statutory requirements are satisfied or to engage consultants in assisting with the development of a levy regime, rates and underlying engineering analysis that support an OSL.

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WHEN DO OFF-SITE LEVIES MAKE SENSE?

Off-Site Levies can be a great tool to recover the costs a municipality will incur for new or expanded municipal infrastructure or facilities. This is particularly true of larger infrastructure or facility projects that benefit a broad area. While OSL can certainly help address the costs of growth and increasing service demands, the decision to implement an OSL regime must be carefully considered by a municipality. For municipalities with limited resources or capacity, an OSL regime may be more of a problem than a benefit. Once a municipality "hops on board" an OSL train, it will likely be difficult if not impossible to stop the train.

Some of the questions a municipality should consider before implementing an OSL regime include:

- Is there pressure to build infrastructure or facilities that service more than one development area?
- Is there pressure to build "soft services"?
- Can an OSL be used to pay for that infrastructure or facility?
- Does the cost of the infrastructure or the facility justify the implementation and operation of an OSL regime?
- Is the benefitting area associated with an OSL large enough to justify the establishment of the levy?
- Will land development continue at a reasonable pace and will the levy amounts be collected within a reasonable period of time?
- Has the municipality collected any fee or charge that could be characterized as an OSL that might affect the municipality's ability to impose levies?
- Are there other cost-recovery tools available that might be more suitable?
- Will the implementation of an OSL regime help encourage development?
- Does the municipality have the financial capacity to build OSL-supported infrastructure or facilities?

In this section, we will discuss these issues in more detail and help your municipality determine if an OSL regime makes sense for you.

Initial Questions

A. IS THERE PRESSURE TO BUILD INFRASTRUCTURE OR FACILITIES THAT SERVICE MORE THAN ONE DEVELOPMENT AREA?

If a municipality has a need to build significant infrastructure like a water treatment plant, a water storage facility or sewage treatment plant, an OSL might be a good tool.

This type of large infrastructure is generally beyond the financial resources of a single developer and would be beneficial to more than just one development as well as potentially to existing developments and the municipality as a whole. As such, the development community is not likely to be required to undertake such a large project and will be looking for the assistance of the municipality to move forward with development. An OSL can spread the cost of these major pieces of infrastructure over a broad area, thereby reducing the impact on any individual developer and the municipality. Neither the MGA nor the Off-Site Levies Regulation specify a maximum geographical distance between the lands against which an OSL will be imposed and the location of infrastructure or facility that is to be constructed using OSL funds. For example, the main requirements for OSL for water, sanitary sewage and storm sewage is that the infrastructure be new or expanded and that it provide benefit to development area. If the municipality can establish these minimal requirements, then an OSL may be a viable option for the municipality to further explore.

B. IS THERE PRESSURE TO BUILD "SOFT SERVICES"?

Now that OSL can be used to fund "soft services" such as community recreation facilities, fire halls, police stations and libraries, a council may wish to establish an OSL that would apply across the municipality to fund the capital costs of such facilities. Where such facilities may have a regional benefit, an intermunicipal OSL may be an option to spread of the capital costs over a larger area.

Municipalities must be careful when implementing OSL for this type of infrastructure by ensuring that they comply with the requirements of section 6 of the Off-Site Levies Regulation. These requirements include the municipality having statutory plans and other documents that support the need and benefit of the facilities. It will not be sufficient to say, "A new library will be nice so let's start saving for one by imposing an OSL." If the municipality does not have the documentary support that establishes the need for the facility, creating and imposing an OSL would be unwise as doing so would not meet the requirements of the MGA and the Off-Site Levies Regulation.

C. CAN AN OSL BE USED TO PAY FOR THAT INFRASTRUCTURE OR FACILITY?

Section 648 of the MGA lists what categories of infrastructure can be funded with OSL. If the type of infrastructure that the municipality needs to build is not listed in section 648, then it is not possible to implement an OSL regime to fund that construction. If OSL are not an option, then the municipality can explore the use of other infrastructure cost recovery tools available under the MGA to fund construction.

The categories of infrastructure listed in section 648(2) include:

- new or expanded facilities for the storage, transmission, treatment or supplying of water;
- new or expanded facilities for the treatment, movement or disposal of sanitary sewage;
- new or expanded storm sewer drainage facilities;
- new or expanded roads required for or impacted by a subdivision or development;
- new or expanded transportation infrastructure required to connect, or to improve the connection of, municipal roads to provincial highways resulting from a subdivision or development; and
- lands required for or in connection with the above.
- The categories of facilities listed in section 648(2.1) include:
- new or expanded community recreation facilities;
- new or expanded fire hall facilities;
- new or expanded police station facilities;
- new or expanded libraries; and
- lands required for or in connection with the above.

Further, it should be noted that OSL can only be used for capital costs of new or expanded infrastructure and not for operational costs associated with such infrastructure.

D. DOES THE COST OF THE INFRASTRUCTURE OR THE FACILITIES JUSTIFY THE IMPLEMENTATION AND OPERATION OF AN OSL REGIME?

The establishment a defensible OSL regime requires supporting technical documentation and analysis, such as infrastructure master plans, engineering studies and OSL reports, including a cost benefit analysis. Undertaking these studies can be costly and time-consuming. Although the cost of the studies that provide the foundation for an OSL regime may ultimately be recoverable through the OSL, the municipality must be able fund the studies initially.

In addition to the costs of the up-front studies, the municipality must cover the costs of maintaining the OSL regime once it is in place. Maintenance of the

regime includes accounting for the funds that are collected and expended. Each category of OSL must be accounted for separately and any interest that accrues to the fund can only be used for that same purpose (section 648(5), MGA). Depending on the complexity of the municipality's OSL regime, the administrative costs and time associated with maintaining and administering the OSL regime may become a burden and cannot be offset against the OSL funds. These administrative costs are not directly linked to the capital costs associated with infrastructure or facilities, but rather are operational in nature.

A further cost of an OSL regime that must be covered by the municipality is the cost of updating the levy rates and preparing the required annual reports. Because construction costs will vary over time, it is important that the levy rates be kept current. If OSL rates are not updated and verified on a regular basis, there is a risk that the funds collected will be inadequate to cover the actual cost of construction.

If a municipality does not have the financial expertise to maintain the OSL regime or if it cannot afford to hire consultants to assist the administration with the operation of the OSL regime, the municipality would be wise to not implement an OSL regime.

E. IS THE BENEFITTING AREA ASSOCIATED WITH AN OSL LARGE ENOUGH TO JUSTIFY THE ESTABLISHMENT OF THE LEVY?

Municipalities should consider the size of the benefitting area, the number of potentially affected landowners/developers, and the cost of the OSL infrastructure or facilities. If the proposed OSL infrastructure or facilities would only benefit a small area of land and only be imposed upon one or a few developers, the development of an OSL regime might not be justifiable and another cost recovery tool, such as a local improvement or oversizing contribution, might more suitable for the municipality.

F. WILL LAND DEVELOPMENT CONTINUE AT A REASONABLE PACE AND WILL THE LEVY AMOUNTS BE COLLECTED WITHIN A REASONABLE PERIOD OF TIME?

A municipality can never be certain when it will be able to collect OSL. The imposition and collection of an OSL is dependent upon development and a projected growth horizon for the municipality. If development slows down, the rate at which an OSL will be collected will also slow. While ultimately the municipality should be able to collect the full cost of the OSL infrastructure or facility from developers over time, there is always a potential (and often the reality) that the infrastructure or facility will be needed before the full levy amount for that infrastructure or facility is collected. It is therefore important to consider whether OSL will be collected within a

"The imposition and collection of an OSL is dependent upon development and a projected growth horizon for the municipality."

reasonable time, given the expected time projection for construction. If a municipality implements an OSL regime, the municipality must understand that it may have to front-end infrastructure construction costs and carry these costs for several years. This will undoubtedly mean assuming debt with borrowings, which will impact the municipality's debt limit ratio and will likely limit the municipality's ability to undertake other projects. Potential trade-offs need to be considered. For example, the municipality may decide it can only afford to build one of a new fire hall and a new police facility. If that is the case, is it reasonable to have an OSL for both types of facilities? Given this, a municipality must identify its expected growth horizon and consider how that will impact the timing of potential collection of any OSL and the expected timing of construction for the OSL infrastructure or facility. This impact may influence whether an OSL is the right cost recovery tool for such infrastructure or facility and may even effect whether the municipality can afford the cost of servicing the new development.

G. AS THE MUNICIPALITY COLLECTED ANY FEE OR CHARGE THAT COULD BE CHARACTERIZED AS AN OSL THAT MIGHT AFFECT THE MUNICIPALITY'S ABILITY TO IMPOSE LEVIES?

In those instances where the municipality has previously imposed fees or other charges for one or more purposes included within section 648 of the MGA, the new subsections 648(7) and 648(8) will likely mean those fees or charges are deemed to "have been imposed pursuant to a bylaw under this section". This prior imposition of fees or charges does not eliminate the ability of the municipality to implement an OSL regime. However, the prior imposition of fees or charges must be considered in the development of the OSL regime as the municipality will not be able to collect OSL for the same category of infrastructure or facilities if fees or charges were previously collected for that type of infrastructure or facility from those lands. For example, some municipalities have collected community recreation contributions that have been used for the capital costs of building recreation facilities. It is possible that those community recreation contributions will be deemed to be an OSL pursuant to the MGA for community recreation facilities. The result of this is that a municipality may be unable to collect any further OSL from certain lands in the municipality for that same purpose, which will impact the amount that the municipality can collect through the OSL regime and might ultimately make such an OSL regime unfeasible.

H. ARE THERE OTHER COST-RECOVERY TOOLS AVAILABLE THAT MIGHT BE MORE SUITABLE?

If the focus for the municipality is on how to fund the types of facilities listed in section 648(2.1) of the MGA (community recreation facilities, fire halls, police facilities and libraries), an OSL regime is the only option for recovering capital construction costs from land developers at the time of issuance of a development permit or subdivision approval.

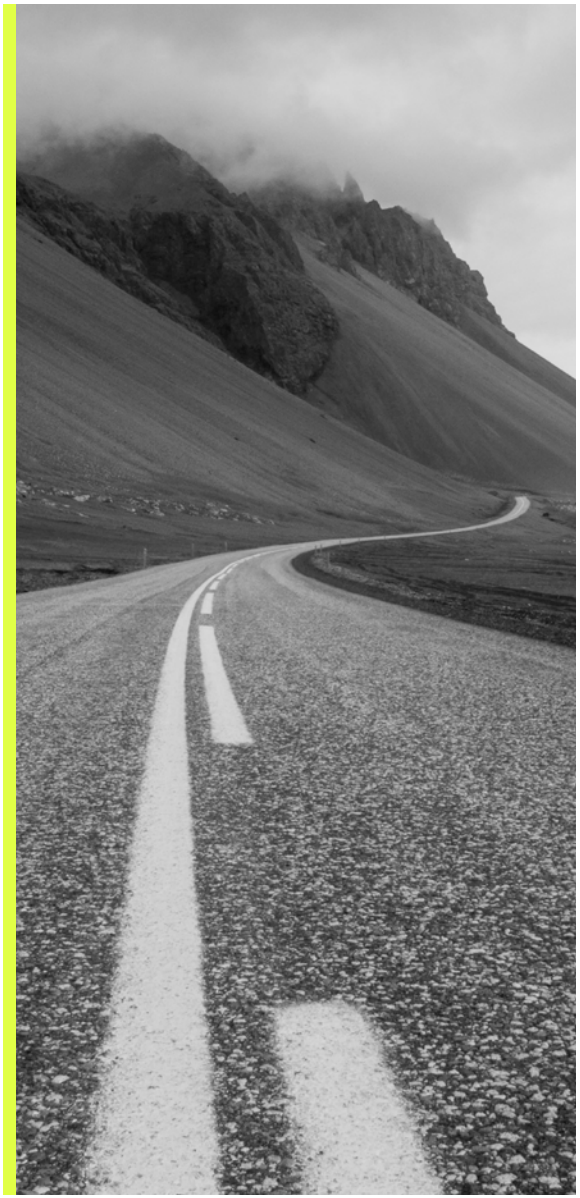
When the focus of the municipality is on the infrastructure listed in section 648(2) of the MGA (water, sanitary sewer, storm sewer, roads), the municipality may be able to utilize another cost recovery tool such as a local improvement tax pursuant to section 397 or cost contribution or cost sharing utilizing a development agreement pursuant to section 650 and/or section 655 of the MGA. The selection of a cost recovery tool should consider the type, size and timing of construction of the needed infrastructure, and the point in time when the infrastructure will be developed.

A local improvement tax can be used to recover costs of a project that the council considers to be of greater benefit to an area of the municipality rather than to the whole municipality. It can be used in an already-developed area or in a new development area. A bylaw is passed to recover the costs from the owners of the land that benefits from the local improvement project on a fixed repayment basis, giving property owners the ability to spread out the payment and still give the municipality an ability to recover the capital cost. A disadvantage of a local improvement tax is the fact that the owners of the benefitting land can petition against the local improvement and thereby eliminate this option for a municipality (section 396, MGA). Further, the municipality only has three years from the time it notifies the benefitting area of the pending construction of the project and the imposition of the local improvement tax to complete the project. Further, if a project has not been started or has been started but not completed, a local improvement tax can only be imposed for one year and cannot be imposed again until the project is completed. For these reasons and unlike an OSL, the local improvement tax cannot be utilized to collect money now for a project that will not be constructed for many years.

Municipalities can also utilize section 650 and/or section 655 of the MGA and require the developer of the land to pay for the costs of constructing the infrastructure. Under these sections, a developer can be required as a condition of issuance of a development permit or of subdivision approval to construct or pay for the construction of:

- roads required to give access to the development or subdivision;
- a pedestrian walkway system to serve the development or subdivision; and
- a public utility necessary to serve the development or subdivision.

A “public utility” is defined in section 616(v) of the MGA to include, among other things, water, sewage disposal, and drainage. This is the section of the MGA that municipalities rely upon when making a developer construct the services necessary for their proposed subdivision or development (which can include both new or upgraded infrastructure provided that it is necessary to access or service the proposed development). If the infrastructure to be funded through an OSL is subdivision- or development-specific, section 650 or section 655 may provide an alternative and possibly a better choice. Combining section 650 and/or section 655 with the authority given to a municipality under section 651 of the MGA, a municipality can require a developer to build or contribute to infrastructure with excess capacity or that is oversized. When other benefitting land is developed or subdivided, the subsequent developers can be required to pay a proportionate share of the costs incurred by the original developer for constructing the infrastructure that has excess capacity or that was oversized. For example, the infrastructure that needs to be constructed is a storm water management facility that will benefit more than one proposed development. The facility can be funded using an OSL or a developer can be required to build the storm water management facility. If a particular developer has the financial resources to build the storm water management facility, then relying on sections 655 and 651 of the MGA to require the developer build the facility may be a more appropriate choice than implementing an OSL regime. The reasons include that a development agreement under sections 655 and 651 of the MGA may be a simpler means of managing both construction and cost recovery, without having to undertake expensive studies and engineering analysis, complete time-consuming consultations, utilize the municipality’s precious debt limit ratio, or set aside resources for managing an OSL regime.



I. WILL THE IMPLEMENTATION OF AN OSL REGIME HELP ENCOURAGE DEVELOPMENT?

One benefit of an OSL regime that is often ignored is that its implementation can help level the playing field for land developers and therefore make development more feasible within a municipality. When there are significant and expensive pieces of infrastructure that need to be built before an area can be developed, smaller developers with limited financial resources may find it difficult, if not impossible, to proceed with a new development because they cannot afford to front-end or carry the financing costs of the required infrastructure or facility.

By assuming the responsibility for construction of the required infrastructure or facility through the implementation of an OSL regime, the municipality eliminates the financial impediment created by the costs of constructing the infrastructure or facility required to service a given development or subdivision. Regardless of size or financial capacity, all developers are treated in the same way under an OSL regime. Each developer is responsible for its proportionate, beneficial share of the infrastructure or facility cost and is not required to front-end or carry the full costs of expensive infrastructure or facilities with excess capacity or oversizing. This does not mean all developers will necessarily pay the same rate or amount for OSL, as levy rates may vary considerably across different basins within the municipality. Rather, it means that developers can move forward with development so long as the developer can pay the required OSL, which represents only their proportionate share based on their benefit of the OSL infrastructure or facility.

J. DOES THE MUNICIPALITY HAVE THE FINANCIAL CAPACITY TO BUILD OSL-SUPPORTED INFRASTRUCTURE OR FACILITIES?

In the “normal” course, most OSL infrastructure or facility is constructed by the municipality. When assessing whether to implement an OSL regime, the municipality should look at its capacity to assume debt and determine if it will have the financial capacity to construct the identified infrastructure or facility within the projected timelines. Municipalities should not assume that the OSL will be collected at a rate that will allow construction costs to be covered fully by the OSL. This will be particularly true for infrastructure that is required to serve an area of land that is unlikely to be fully developed for 15 to 20 years. For example, a fire hall may be needed sooner rather than later and there may not be enough in the OSL reserve for the fire hall to cover the construction costs. The same can be said for almost any of the infrastructure or facilities that can be paid for by an OSL.

Further, including infrastructure and facilities in an OSL regime may be viewed by the development industry to be a commitment from the municipality to build the infrastructure and facilities in a timely manner, as identified in the OSL documentation. If the municipality knows that it is unlikely to be able to build infrastructure or facilities in the timelines specified in the OSL documentation, the municipality may want to avoid the implementation of the OSL regime in the first place.

Additional Factors to Consider

Consideration of the previously-listed questions will help inform the municipality's decision about whether an OSL regime makes sense. In addition to those questions, there are other factors that a municipality may want to consider in evaluating whether to implement an OSL regime.

A. BROAD LOCAL DISCRETION

The implementation of an OSL regime leaves municipalities with the flexibility to make the regime fit local needs. The *Off-Site Levies Regulation* sets out the general principles for the calculation of levies but does not dictate to a municipality how to address specific factors or what model it must utilize. Additionally, a different methodology can be used for the different categories of infrastructure and facilities. In the end, "one size" does not necessarily fit all, and a municipality can use its discretion to establish an OSL regime that makes sense locally.

B. NO PETITION

Unlike a local improvement tax, an OSL is not subject to a landowner's right of petition. While this is an advantage for a municipality compared to using a local improvement tax, the implementation of an OSL bylaw does require consultation with stakeholders (which will include landowners, the development industry and any other person who may be affected by a levy). Consultation should occur when the OSL regime is first implemented, and whenever an OSL bylaw is amended (including adjustments to rates and to the underlying assumptions of the OSL model).

C. CONSISTENCY AND TRANSPARENCY

A well-conceived OSL bylaw eliminates piecemeal technical analysis and development agreement negotiations and provides a more consistent outcome with transparent charges. It can also support long-term municipal planning that is required and encouraged under the MGA. With the detailed and comprehensive technical reports that will be needed to support an OSL regime, the municipality will have a more complete understanding of what its infrastructure and facility needs are and when such infrastructure or facilities need to be constructed.

D. FLEXIBLE OVER TIME

An OSL bylaw allows a municipality to address infrastructure and facility requirements over a significant time period. The bylaw can require a developer to contribute to OSL infrastructure or facilities that benefits the development, whether the development precedes the construction of the OSL infrastructure or facilities, or the construction of the OSL infrastructure or facilities precedes the development. Further, the OSL regime should be developed with the ability for rates to be flexible over time so that the municipality is imposing and collecting the optimal amounts to cover projected and actual costs as well as financing costs, and in terms of OSL infrastructure or facility projects that may change due to servicing needs of the municipality and new development. Such an OSL regime can also assist a municipality with how it makes its capital budget decisions and support asset management.

Determining when OSL makes sense will depend on many factors that will differ among municipalities. Considering the questions and factors discussed above before implementing an OSL regime will help to ensure the OSL supports community development, rather than cause an administrative or financial burden to the municipality. Technical (such as engineering and accountant consultants) and legal advisors can help a municipality understand the full implications of its decision to move forward with and ensure that it is an approach that makes sense.

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LEGISLATION AND REGULATIONS

A municipality can impose an OSL as a condition of development or subdivision approval. An OSL must be authorized by bylaw. There are strict requirements in the MGA and in the Off-Site Levies Regulation that must be followed if the municipality is to have an enforceable OSL regime. This section will focus on sections 648 through 649 of the MGA and the Off-Site Levies Regulation. The text of the sections of the MGA and the Off-Site Levies Regulation at the time of publication of this Manual are reproduced in the attached Appendix.

Types of Infrastructure an Off-Site Levy Covers

An OSL can only be used for certain categories of infrastructure. Section 648(2) lists the categories of infrastructure and section 648(2.1) lists the categories of facilities for which an OSL can be imposed. An OSL cannot be used for any infrastructure or facility not included in the items listed in either section 648(2) or section 648(2.1).

The infrastructure listed in section 648(2) include:

- new or expanded facilities for the storage, transmission, treatment or supplying of water;
- new or expanded facilities for the treatment, movement or disposal of sanitary sewage;
- new or expanded storm sewer drainage facilities;
- new or expanded roads required for or impacted by a subdivision or development;
- new or expanded transportation infrastructure required to connect, or to improve the connection of, municipal roads to provincial highways resulting from a subdivision or development; and
- lands required for or in connection with the above.

The facilities listed in section 648(2.1) include:

- new or expanded community recreation facilities;
- new or expanded fire hall facilities;
- new or expanded police station facilities;
- new or expanded libraries; and
- lands required for or in connection with the above.

Prior to 2018, an OSL could only be imposed to pay for all or part of the capital cost of water, sanitary sewer, storm sewer and road infrastructure, along with land required for, or in connection with, such infrastructure (MGA, section 648(2)). OSL may now also be used to pay for all or part of the capital cost of new or expanded transportation infrastructure required to connect, or to improve the connection of municipal roads to provincial highways resulting from a subdivision or development (MGA, section 648(2)(c.2)). This Manual has dedicated a chapter specifically to this expanded transportation infrastructure category as there may be some debate as to what is included in “connection of municipal roads to provincial highways”.

Another significant 2018 addition to the OSL legislation is section 648(2.1) of the MGA, which allows for the use of OSL to pay for costs related to "facilities," or what are often referred to as "soft services." This section provides that OSL may be used to pay for all or part of the capital cost for any of the following purposes, including the cost of any related appurtenances and any land required for or in connection with the purpose community recreation facilities, fire halls, police stations and libraries.

The term "community recreation facilities" is defined in section 616(a.11) of the MGA as "indoor municipal facilities used primarily by members of the public to participate in recreational activities conducted at the facilities". This definition is critical because it establishes the boundaries of what types of recreation facilities can be constructed with OSL funds. OSL cannot be used to fund playground construction, outdoor arenas or playing fields. Those facilities must be funded using other mechanisms.

What is an Appurtenance?

Section 648(2.1) states that an OSL can be used to pay for all or part of the capital cost of the facility including the cost of any related appurtenances. Section 648(2) does not define "appurtenances." While "capital cost" would likely include the cost of the bricks and mortar of the community recreation facility, fire hall, police station or library, what would be an "appurtenance"?

The common *Oxford English Dictionary*, 6th ed, defines an appurtenance as "a minor property, right or privilege or incidental to a more important one; an appendage," and "a contributory adjunct, an accessory."[1] Similarly, the *Black's Law Dictionary*, 9th ed, defines it as "something that belongs or is attached to something else".[2] Case law has defined the term using phrases like "belong to", "annexed to" or "appended to". One old case, from 1903, went so far as to find that in the context of a mine, the use of the word appurtenance included the movable property used in working the mine.[3]

If an "appurtenance" is something belonging to or attached to something else, what would or could be an "appurtenance" to the community recreation facility?

For example, the surface of the indoor running track would likely an appurtenance, as well as the ice making machinery in an arena, which would likely be affixed to the building. Then there are the pieces of equipment that might be critical to the operation of the arena like the Zamboni. What is not clear is whether the cost of purchasing the first Zamboni might be considered a capital cost of an appurtenance. Or, in the context of the new fire hall, whether the fire engine would be an appurtenance and the cost of the fire trucks that will operate out of the new fire hall can be paid for with OSL funds. The answer to these questions may remain unknown until the courts have an opportunity to consider the breadth of what can be funded through an OSL under section 648(2.1). In light of this, should a municipality choose to develop an OSL for facilities, it is recommended that the municipality work closely in the development of the OSL bylaw with their legal counsel, and specialized consultants as necessary to assist in determining what capital costs should be included within the OSL regime.

[1] *The Oxford English Dictionary*, 6th ed, vol 1, *sub verbo* "appurtenance".
[2] *Black's Law Dictionary*, 9th ed, *sub verbo* "appurtenance".
[3] *Pelton v Black Hawk Mining Co*, 40 NSR 385; RSNS 1900, c 171 at para 9.

Intermunicipal Off-Site Levies

The 2018 legislative amendments also introduced the concept of an intermunicipal OSL. While there had been suggestions in the past that municipalities could work together to create levies that would function as an inter-municipal OSL, the new section 648.01 of the MGA expressly allows two or more municipalities to provide for an OSL to be imposed on an intermunicipal basis.

The municipalities must agree that a bylaw passed by one municipality has effect inside the boundaries of the other and both municipalities must pass a bylaw that approves that agreement.[4] The agreement that approves the cross-boundary application of a municipal bylaw could be part of an intermunicipal collaborative framework (ICF) or a stand-alone agreement. Whether stand-alone or part of the ICF, the agreement must be structured to attain one of the purposes identified in sections 648(2) or section 648(2.1). Section 648.01 does not expand the categories of infrastructure or facilities that can be funded through an OSL or require that both municipalities pass the same OSL bylaw. The *Off-Site Levy Regulation* does, however, provide that each participating municipality must use a consistent methodology to calculate the levy rates and identify the same:

- specific infrastructure, transportation and facilities;
- benefitting area across the municipal boundaries; and
- portion of benefit attributable to each participating municipality within that benefitting area.

In other words, there must be cooperation by each municipality involved with an intermunicipal OSL and consistency between each municipality's OSL regime and bylaw.

From a practical perspective, municipalities that consider an intermunicipal OSL may want to discuss this during strategizing and negotiating ICFs. Further, municipalities may wish to work together to develop substantially similar OSL bylaws to ensure consistency. Other questions to consider when developing an intermunicipal OSL include the following:

- What will consultation in developing the intermunicipal OSL look like? Who will coordinate and lead the development of the bylaw and consultation?
- Which municipality will control the timing of the construction of the infrastructure?
- Which municipality will manage the collection of the OSL? Or the OSL accounts?
- How will the municipalities address the situation of insufficient funds being collected to construct and install the OSL infrastructure or facility? Which municipality will finance the shortfall or how will the shortfall be allocated between the municipalities?
- What happens if development does not proceed as anticipated in one municipality, while it proceeds at full pace in the other? Will the project for which the OSL was collected proceed? If so, how will the financing and construction be coordinated?

> *"From a practical perspective, municipalities that consider an intermunicipal OSL may want to discuss this during strategizing and negotiating ICFs."*

[4] Section 12, MGA.

Limits on Collecting Off-Site Levies More Than Once

Previously, section 648(4) of the MGA provided that OSL could only be collected once from a property. For example, if a municipality collected an OSL for water services, the municipality could not later impose and collect an OSL for sanitary sewer services from the same land. Amendments to section 648(4) came into effect in 2015 that modified this restriction.

With the amendments, OSL can only be collected once for each of the purposes listed in section 648(2). Section 648(4) applies to the facilities or soft-services included in section 648(2.1) as well. This limit needs to be kept in mind because if a municipality collected contributions from developers for recreation facilities (whether such a contribution was voluntary or imposed), the municipality may be precluded from collecting an OSL for new or expanded community recreation facilities from those same lands. Even though the municipality may believe that OSL for community recreation facilities have not been previously collected, the contributions may be viewed by the courts as an OSL and thereby limit the municipality's ability to impose and collect an OSL for such infrastructure. Further, section 648(7) and section 648(8) of the MGA provide that if a development agreement entered into by a developer and a municipality included the payment of a fee or charge that could be for a purpose described in section 648(2)(c.1) expressly[5] or otherwise in sections 648(2) or (2.1)[6], that fee or charge is deemed to be a levy imposed by a bylaw passed under section 648.

Collectively, these sections of the MGA provide municipalities with the flexibility to impose and collect OSL in relation to a particular parcel of land at different times (i.e. at development or subdivision approval), provided that the municipality has not previously collected a levy for that type of infrastructure – whether that collection was a previous OSL or a deemed levy as determined by the courts.

Use of Off-Site Levy Funds

OSL funds, and interest on those funds, can only be used for the purpose for which the funds were collected.[7] Each type of OSL must be accounted for separately.[8] For example, sanitary sewer levies can only be used to build the sanitary sewer infrastructure that is identified in the OSL bylaw as the infrastructure that would be built from the levy funds. Sewer levy funds cannot be used to build new roads that were to be built using OSL funds.

OSL funds cannot be treated as one large indiscriminate pool of funds to be used to construct infrastructure that is part of the OSL process. Rather, where there used to be only four possible levy pools (water, sanitary sewer, storm sewer and roads), now there could be as many as nine separate levy pools for any given municipality.

If a review and amendment to an OSL regime results in specific pieces of infrastructure being removed from the list of infrastructure identified to be paid for by the OSL, a municipality may face requests from developers for refunds of a portion of the OSL that has been paid. However, if the same level of service that would have been provided under the original list of infrastructure is still provided under the revised list, the municipality may have grounds to deny such a demand for a refund. To avoid this sort of debate and challenge to the OSL bylaw, it is important that careful consideration be given to what infrastructure should be included in the list of levy-eligible infrastructure and whether any infrastructure projects may need to be removed over time. Any re-engineering of the manner of servicing, or even the outright repeal of an OSL bylaw, may have unintended consequences for an OSL regime.

[5] Section 648(7), MGA.
[6] Section 648(8), MGA.
[7] Section 648(5), MGA.
[8] Section 648(5)(a), MGA.

Regulatory Requirements

Successfully implementing an OSL regime requires an understanding of and compliance with the *Off-Site Levies Regulation,* Alta. Reg. 187/2017, as well as strong technical capacity to complete the supporting background studies, prepare detailed costs and levy rates, and define a benefitting area (the latter which will be discussed in more detail in the step by step section of this Manual). The *Off-Site Levies Regulation* replaces the former *Principles and Criteria for Off-Site Levies Regulation*. The *Off-Site Levies Regulation* is more comprehensive than its predecessor in establishing rules for the implementation and administration of OSL regimes. The *Off-Site Levies Regulation* applies to new OSL bylaws as well as applies to any amendments to an existing OSL bylaw passed prior to the *Off-Site Levies Regulation* coming into effect.

The *Off-Site Levies Regulation* can be divided into three components: consultation, reporting and transparency. The regulation also addresses the sale of facilities and the process for appeals to the Municipal Government Board. For more information regarding appeals of an OSL, see the section later in this Manual on "Legal Challenges to an Off-Site Levy Bylaw".

Consultation – Municipalities establishing an OSL must consult in good faith with stakeholders in accordance with section 8 of the *Off-Site Levies Regulation* (section 3(2)). A "stakeholder" is defined to be any person that will be required to pay the levy when the bylaw is passed, or any other person the municipality considers is affected (section 1(d), *Off-Site Levies Regulation*)). This includes developers, landowners, residents and lobbyists that have an interest in, or may be affected by, the proposed OSL.

Section 8 of the *Off-Site Levies Regulation* requires that:

- The municipality must consult in good faith with stakeholders prior to making a final determination on defining and addressing existing and future infrastructure and facility requirements (section 8(1)).
- The municipality must consult in good faith with stakeholders when determining the methodology on which to base the levy (section 8(2)).
- Prior to passing or amending a bylaw imposing a levy, the municipality must consult in good faith on the calculation of the levy with stakeholders in the benefitting area where the levy will apply (section 8(3)).
- During consultation under subsections (2), (3) and (4), the municipality must make available to stakeholders, on request, any assumptions, data or calculations used to determine the levy (section 8(4)).

It is important that municipalities comply with these new and expanded consultation requirements when they adopt new OSL bylaws or make amendments to existing bylaws. The requirement that consultation be conducted in "good faith" will require that municipalities give stakeholders a meaningful opportunity to provide input into the proposed levies.

What consultation will look like for a municipality may vary and will not necessarily be the same for all. A municipality should look to its public participation policy for direction or consult with legal advisors to determine what will be adequate. This could include providing draft reports to stakeholders for review and comment, holding a non-statutory public hearing, holding an open house, or simply meeting with affected stakeholders one on one.

Reporting – The *Off-Site Levies Regulation* also requires municipalities to engage in ongoing review and reporting on OSL. This includes the requirement to keep the information used to calculate an OSL current (section 5(3), *Off-Site Levies Regulation*).

The municipality must include, in the OSL bylaw, a requirement for a periodic review of the calculation of the levy (section 5(4), *Off-Site Levies Regulation).*

The *Off-Site Levies Regulation* also provides that:

- The municipality must report on the levy annually and include in the report the details on all levies received and utilized for each type of facility and infrastructure within each benefitting area (section 9(2)); and
- Such a report must be in writing and be publicly available in its entirety (section 9(3)).

In addition, there is a general requirement to provide full and open disclosure of all the levy costs and payments (section 9(1), *Off-Site Levies Regulation*).

A practical result of the above provisions is that municipalities with OSL regimes must:

- Update levy rates regularly (which as a best practice could be done on an annual basis);
- Report annually to both council and the public on what levies were collected and what levies were spent; and
- Review its OSL bylaws periodically (which as a best practice should be every three to five years).

Transparency – The *Off-Site Levies Regulation*, when compared to its predecessor, provides a more comprehensive listing of principles and criteria that must be considered by municipalities when establishing an OSL. These principles and criteria appear to, at least in part, be intended to encourage transparency in the establishment of OSL.

Examples of the increased transparency expectations include:

- in determining the basis on which the OSL is calculated, the municipality must at a minimum consider and include or reference the following in the bylaw imposing the levy:
  - a description of the specific infrastructure and facilities;
  - a description of each of the benefitting areas and how those areas were determined;
  - supporting technical data and analysis;
  - estimated costs and mechanisms to address variations in costs over time (section 5(1), *Off-Site Levies Regulation*).
- There must be a correlation between the levy and the benefits of new development (section 5(5)).
- In calculating an OSL imposed pursuant to section 648(2.1) of the MGA for facilities, the municipality must take into consideration supporting statutory plans, policies or agreements and any other relevant documents that identify:
  - the need for and anticipated benefits from the new facilities;
  - the anticipated growth horizon; and
  - the portion of the estimated cost of the facilities that is proposed to be paid by each of:
    - the municipality,
    - the revenue raised by the levy, and
    - other sources of revenue (section 6(1)).
  - In calculating an OSL imposed on an intermunicipal basis pursuant to section 648.01 of the MGA, each participating municipality must use a consistent methodology to calculate the levy and each bylaw imposing the levy must:
    - identify the same specific infrastructure and facilities,
    - identify the same benefitting area across each participating municipality for the specific infrastructure and facilities, and
    - identify the portion of benefit attributable to each participating municipality within that benefitting area (section 7(1)).

For further information on how to meet these requirements, refer to the Enactment section of the "Step by Step Process for Establishing Off-Site Levies" found later in this Manual.

Given the expansion of the *Off-Site Levies Regulation*, municipalities should undertake a review of their existing OSL bylaws and amend accordingly to ensure that their bylaw satisfies the requirements of the updated Regulation. This will need to happen, at minimum, upon any amendments to levy rates imposed by the bylaw. Importantly, OSL bylaws (and a municipality's related policies and practices) will need to be more detailed and more comprehensive than they were previously, and will need to incorporate detailed engineering analysis. Municipalities should consider obtaining a legal review of OSL bylaws and related land policies and practices to ensure that all statutory requirements are satisfied.

The rules around the creation and imposition of OSL are complex. Municipalities need to be careful to follow the rules because a failure to fully comply with the requirements of the Regulation could lead to an OSL bylaw being declared invalid.

"Municipalities must engage in public consultation prior to the sale of any such facilities..."

The Sale of Facilities Constructed with Off-Site Levies

The *Off-Site Levies Regulation* imposes rules regarding the sale of facilities constructed using OSL funds. The term "facilities" refers to the facilities described in section 648(2.1) of the MGA (i.e. the "soft services" — community recreation facilities, fire halls, police stations and libraries), the land necessary for these facilities and related appurtenances (section 1(a)).

Municipalities must engage in public consultation prior to the sale of any such facilities (section 15, *Off-Site Levies Regulation*) and the proceeds of the sale of such facilities must be used for the purpose for which the OSL was originally collected (section 16). This will likely mean that the sale proceeds of a fire hall could only be used for the construction of another fire hall, or of an ice arena could only be used for the construction of new ice arena or other type of community recreation facility.

Court Considerations

The Alberta courts have had a limited number of opportunities to consider the imposition of OSL and the validity of OSL bylaws. In part, this is because many municipalities do not impose OSL. But the limited court consideration of OSL is also a function of the fact that use of OSL has only become more widespread in the last 15 years. Before that time, municipalities used other methods to fund the construction of municipal infrastructure. While some of the decisions are fact-driven, the cases do establish some general principles that should be considered when implementing an OSL regime.

These decisions include Bighorn (Municipal District) No. 8 v. Alberta (Municipal Government Board), Urban Development Institute v. Leduc (City), Keyland Development Corp. v. Cochrane (Town), ARW Development Corp. v. Beaumont (Town), Prairie Communities Development Corp. v. Okotoks (Town), Kiewit Energy Corp v. Edmonton (Subdivision and Development Appeal Board), Rosenthal Communities Inc. v. Edmonton (Subdivision and Development Appeal Board) and Marrazzo v. Leduc County (Subdivision and Development Appeal Board). Each Court decision and its contribution to the OSL is discussed in more detail in Appendix C of this Manual.

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ROLES AND RESPONSIBILITIES IN ESTABLISHING AN OFF-SITE LEVY

"Effective, good faith consultation and involvement with stakeholders should result in a win-win scenario for the municipality and the community as a whole."

The establishment of an OSL regime is time-consuming and complex. The process includes several stages and requires the participation of a variety of participants, both internal and external to the municipality. The successful implementation of an OSL regime will depend on all the participants recognizing and respecting their roles in the process. This section identifies the responsibilities of the various participants in the establishment of an OSL regime.

Council

Section 201 of the MGA gives council the role of developing and evaluating the policies and programs of the municipality. In the context of OSL, council's involvement starts with the decision to explore whether to implement an OSL regime. Council will often make the initial policy decision to adopt an OSL regime and will direct administration to proceed with the necessary analysis and consultation to prepare an OSL bylaw for council's consideration.

Throughout the analysis and consultation process, council should be kept informed and updated. Council does not need to be directly involved in stakeholder consultation or technical research. Further, there is no requirement in the MGA or the *Off-Site Levies Regulation* for a public hearing to be held before the passage of an OSL bylaw (the MGA only requires that an OSL bylaw be advertised prior to second reading of the bylaw pursuant to section 606 of the MGA). Council may choose to hear from stakeholders through a non-statutory public hearing. However, the public hearing process in section 230 of the MGA does not apply so council can seek public input at any time prior to third reading of the OSL bylaw.

Once the analysis and consultation processes are complete, council's next significant involvement will be the consideration and passage of the OSL bylaw. During the consideration of the OSL bylaw, council may provide direction on matters such as what infrastructure should be included, how levy rates should be calculated or any of the other aspects of the OSL bylaw.

After an OSL bylaw is passed, council's role becomes more supervisory in that council will receive an annual report on how the OSL regime is functioning. The *Off-Site Levies Regulation* requires that an annual report be prepared (section 9(2), *Off-Site Levy Regulation*), although it does not expressly require that the report be submitted to council. As the operation of an OSL regime will impact a municipality's budget, it is both reasonable and prudent for the annual report to be submitted to council. Council consideration of the annual report will also help to satisfy the requirements of section 9(3) of the *Off-Site Levies Regulation* that the annual report be publicly available.

> *"Council does not need to be directly involved in stakeholder consultation or technical research."*

During the operation of the OSL regime, council may be called upon to make policy decisions related to issues such as the deferment or cancellation of some levies. Council can, however, opt to delegate such operational decisions to the chief administrative officer or other senior official. Similarly, in some municipalities, council will approve every servicing/development agreement regardless of whether the agreement includes the payment of OSL. In other municipalities, council may delegate the authority to deal with all types of servicing/development agreements to the chief administrative officer. Council will have less day-to-day involvement in the process of collecting OSL in such a municipality.

Council will also be required to consider amendments to the OSL bylaw if a periodic review of the bylaw points out the need to change the OSL regime and therefore requires bylaw amendments. Because the OSL regime is established through bylaw, the operation of the OSL regime can only be modified by amendments to the OSL bylaw, which only council has the authority to do. Any amendments to an existing OSL bylaw must conform with the requirements set out in the *Off-Site Levies Regulation*.

Stakeholders

Stakeholders can include landowners, land developers, the development industry in general, and members of the community. Specifically, the term "stakeholder" is defined by the *Off-Site Levies Regulation* as "any person that will be required to pay the levy when the bylaw is passed, or any other person that the municipality considers is affected." Stakeholders have an important role to play. The municipality is obligated to consult in good faith with stakeholders, and it is through this consultation process that stakeholders can have a direct impact on the development of the OSL regime.

Stakeholders should be encouraged to:

- review the assumptions, data and calculations the municipality is relying on to establish the OSL regime;
- participate in the consideration of defining the existing and future infrastructure and facility requirements of the municipality;
- participate in the determination of the methodology for calculating the OSL; and
- participate in the definition of benefitting areas.

A municipality must ensure that stakeholders have access to any assumptions, data or calculations that have been used by the municipality to determine the OSL (section 8(4), *Off-Site Levies Regulation*).

With active stakeholder participation, the municipality increases the likelihood that the OSL regime works for the developers and landowners in the municipality. Effective, good faith consultation and involvement with stakeholders should result in a win-win scenario for the municipality and the community as a whole.

Administration

Administration includes the chief administrative officer for the municipality, engineering and public works staff, development staff who process and approve subdivisions and development permits, and financial staff who will deal with the accounting of collected OSL.

Collectively, the administration will assist council with the background information and evaluations that council will need while considering the implementation of an OSL regime. This will require the administration to work with various consultants, such as engineers, planners, accountants and legal advisors, to ensure council has the information necessary to evaluate and establish an OSL regime.

The administration will also have an important role in working with stakeholders to ensure that stakeholders have the information they need to fully participate in the development of an OSL regime. The administration should act as a conduit for feedback from stakeholders to council. Council can be advised of issues and concerns that stakeholders have identified through the consultation process. As well, if the administration and stakeholders have been able to resolve those concerns, the resolution or proposed resolution can be communicated to council and incorporated in the development of the assumptions that will underlie the OSL regime when it is being implemented.

The administration will be instrumental in drafting the required OSL bylaw and making sure that it meets the requirements of the MGA and the *Off-Site Levies Regulation*. In preparing the OSL bylaw, the administration should work closely with any consultants that have been retained, such as engineers, accountants and legal counsel. An OSL bylaw should not be simply copied from a neighbouring municipality without a thorough review, consultation and discussion.

Once the OSL bylaw is passed, the financial staff must establish processes to effectively track payments and expenditures to ensure that each category of OSL is accounted for separately from other levies and revenues. Further, interest that accrues must be tracked and

credited for each of the separate OSL accounts. Depending upon how the benefitting areas are established by the OSL bylaw and further, depending upon the overlap of infrastructure across benefitting areas, there could be many OSL accounts that have to be tracked. OSL funds should not be deposited into the municipality's general revenue and merged with other municipal revenue.

Financial staff will also carefully manage the expenditure of the collected OSL to support council in ensuring that the collected OSL are only used for the purpose for which they were collected. For example, OSL collected for new or expanded water facilities cannot be used for new or expanded sanitary sewage facilities or other OSL infrastructure. Collected OSL cannot be shifted from one account/reserve to another, or even from one development basin to another. For example, if a water facility needs to be constructed and the balance of the water OSL funds is insufficient to pay for the construction of the water facility, a municipality cannot "borrow" OSL collected and held in the account for sanitary sewer infrastructure to help pay for the water facility. Another source of funding, such as a new borrowing for the sole purpose of funding the OSL water facility, must be found to cover the costs of constructing the water facility.

An important part of the tracking and management of the OSL is the preparation of the required annual report. The annual report must include "details of all levies received and utilized for each type of facility and infrastructure within each benefitting area" (section 9(2), *Off-Site Levies Regulation*).

Finally, the administration will be responsible for reviewing the performance of the OSL regime and recommending updates to the OSL model and rates. It is a best practice for municipalities to review and adjust OSL rates annually. A municipality must undertake a periodic review of the calculation of OSL as provided by the bylaw (section 5(4), *Off-Site Levies Regulation*). It is a best practice for municipalities to review the assumptions that underlie the OSL regime periodically as well. This allows for the assumptions to be updated to reflect changes in construction costs, financing etc., which would help ensure that the municipality is collecting sufficient levies to complete OSL infrastructure. Significant events, such as an annexation or passage of a new statutory plan, might trigger a need for a full review of the underlying assumptions, or the expansion of the OSL into a new area.

Consultants

Planners, professional engineers, accountants and legal advisors will all typically have a role to play the creation and implementation of an OSL regime. Firms that specialize in public consultation and stakeholder participation can also be helpful in explaining the process and underlying assumptions of the OSL to stakeholders. The role of the various consultants includes data gathering and report preparation. Reports will be required as part of the evaluation process and as part of the development process. Consultants will be able to help a municipality:

- define existing and future infrastructure and facility requirements, including the preparation of master servicing studies and plans;
- develop principles to establish and assess whether the extent to which infrastructure and facilities are required because of new development and the benefit that flows to the existing community from the new infrastructure or facility;
- define benefitting areas based on technical data;
- develop the methodology for calculating levy rates so that the methodology is clear and understandable; and
- develop a mechanism to address cost increases (e.g. inflation, interest, financing costs, etc.) over time.

Engineering and planning consultants may need to be involved from the outset as they will determine what infrastructure and facilities will be required, how much the infrastructure or facilities will cost and establish projected rates of growth that will be critical to evaluating the rate at which OSL can be expected to be collected.

Legal advisors should also be involved early in the process so that the underlying assumptions can be reviewed for compliance with the MGA, the *Off-Site Levies Regulation* and current case law. If legal advisors are not involved until late in the process (such as at the time of drafting the OSL bylaw), the process of establishing the OSL regime can be frustrated or delayed if the lawyer questions whether the proposed regime complies with the requirements of the MGA and the *Off-Site Levies Regulation*, and might not be defensible if the OSL bylaw is legally challenged.

Lastly, lawyers may be involved in any appeals or challenges related to the passage of the OSL bylaw or on the imposition of the OSL bylaw on a development permit or subdivision approval. This could include a challenge to the validity of the bylaw to the Court of Queen's Bench pursuant to section 536 of the *MGA*, an appeal of a bylaw for section 648(2.1) infrastructure to the MGB pursuant to section 648.1 of the MGA, or an appeal of a condition of a development permit or subdivision approval to the SDAB.

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STEP-BY-STEP PROCESS FOR ESTABLISHING OFF-SITE LEVIES

The process of establishing an OSL regime can be broken down into three phases:

A. Evaluation

B. Enactment

C. Operation

This section sets out a step-by-step checklist of the activities that will occur within each phase. The checklist also includes reference to the various issues that will need to be considered as the process moves along from one phase to another.

A. Evaluation

COUNCIL DECIDES TO EVALUATE WHETHER TO ESTABLISH (OR MODIFY) AN OSL REGIME.

Preparing and implementing an OSL regime is a complex and daunting task, involving the requirement for land use studies and growth projections, as well as master infrastructure studies and accounting analysis. The preparation of such studies and analysis may require the municipality to invest a great deal of time and expense. As such, council is faced with a difficult task of trying to achieve the appropriate balance for cost recovery and may or may not have the appetite to commit administration and resources to such an endeavour. Even the initial evaluation of whether to begin the process of developing an OSL regime is a complex process and requires consideration of numerous difficult and interrelated questions. For assistance on this evaluation, see the chapter in this Manual entitled "When Do Off-Site Levies Make Sense?".

IDENTIFY RESOURCES AND INFORMATION THAT THE MUNICIPALITY HAS AVAILABLE FOR THE INITIAL ANALYSIS.

An OSL regime requires support from various municipal departments. Early in the evaluation process, the municipality should determine what internal resources are available to undertake the initial analysis, including expertise of employees and departments, asset management systems and existing master utilities or capital studies.

MUNICIPALITY RETAINS CONSULTANTS TO ASSIST WITH EVALUATION OF IMPLEMENTING AN OSL REGIME.

At this time, the municipality may require the assistance of external consultants (i.e. planning, engineering, accounting and legal) to assist with the initial analysis and through the OSL process.

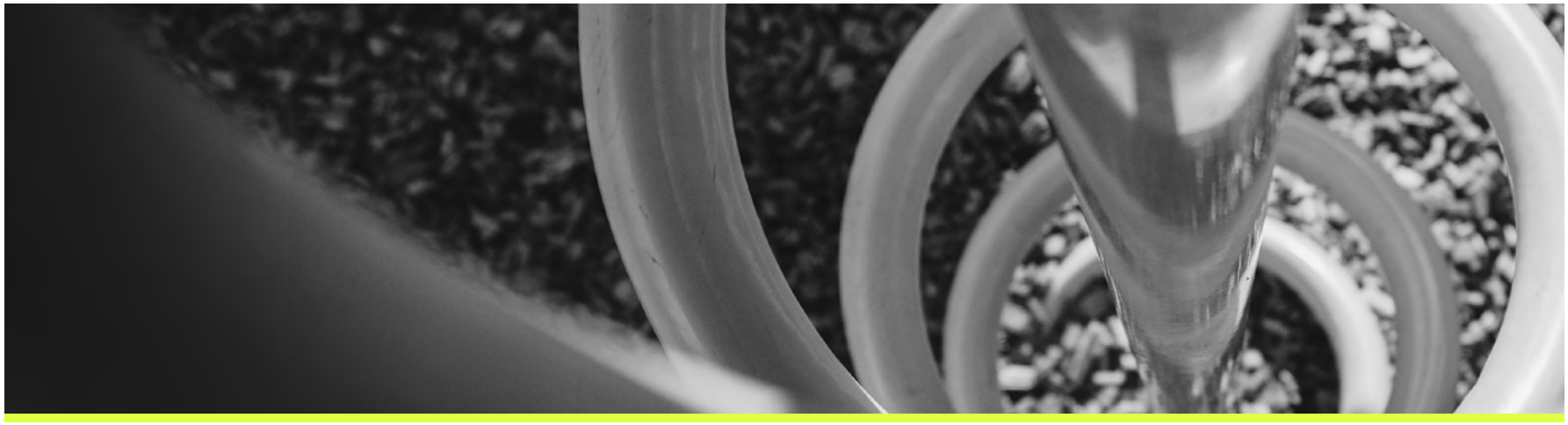
It is strongly recommended that a municipality consider obtaining legal advice early in the process and not avoid engaging its legal advisors (whether it is in-house or external) before the municipality proceeds too far on developing an OSL regime.

DETERMINE IF AN OSL MAKES SENSE FOR THE MUNICIPALITY.

As discussed in greater detail in the chapter of the Manual entitled "When do Off-Site Levies Make Sense?", questions like the following need to be answered when evaluating whether to implement an OSL regime:

A. Does the municipality have a need to build new infrastructure or expand existing infrastructure? Or new facilities or expand existing facilities?

The municipality will need to determine whether there is a need for new or expanded infrastructure, or in the case of "soft services," new or expanded facilities due to anticipated new development within the municipality.



B. Would the needed infrastructure or facilities be considered "recoverable" under the OSL provisions of the MGA?

A municipality may only impose an OSL to recover capital costs associated with the types of new or expanded infrastructure and facilities identified in sections 648(2) (water, sanitary sewer, storm sewer, connections to provincial highways, and roads) and 648(2.1) (community recreation facilities, fire halls, police station and libraries) of the MGA. Importantly, OSL cannot be used to recover maintenance or operation costs for such infrastructure and facilities; only the capital costs.

What constitutes "new" development has not yet been firmly decided by the Courts; however, it has been argued that infrastructure costs cannot be recovered unless the facility is constructed after the initial enactment of the OSL bylaw. This means that there could be a debate about whether a water treatment plant that is under construction at the time the OSL evaluation is completed can be considered recoverable infrastructure and facilities. Although it is clear law that a municipality may recover costs for expansion of previously existing infrastructure or facilities (in addition to new, stand-alone facilities), legal advice should be obtained as to the extent to which costs can be recovered for infrastructure or facilities constructed prior to the enactment of a bylaw (and not contemplated under a prior OSL regime).

It is important to remember that a municipality can choose to apply OSL to some or all of the infrastructure and facility types listed in section 648 of the MGA. However, there is a limit on the use of OSL from section 648(4) of the MGA; a municipality may collect OSL only once for each purpose for which OSL may be collected. This allows levies to be collected at different times for different types of infrastructure in the development process. This means that a municipality could pass a bylaw for an OSL for water infrastructure and collect that levy at the time of subdivision of a parcel of land and pass another OSL bylaw for road infrastructure at a later date and collect that levy at the time of a development permit being issued for the same parcel of land. However, this only applies to the types of infrastructure and facilities under section 648 and not to different projects within the same type of infrastructure or facilities. Consequently, if a municipality implements an OSL for water infrastructure, it is important that a municipality ensure that its engineering analysis of the water infrastructure needs and what is to be included in the OSL regime is as complete as possible and that it has not omitted any projects required as a result of new development or subdivision when developing its water OSL bylaw. Although new water infrastructure projects can be added to the OSL regime at a future date, the municipality will not be able to collect a water levy for this new project for any lands that have already paid a water OSL since OSL can only be collected once for each type of infrastructure.

C. Does the cost of the infrastructure justify the implementation and operation of an OSL regime?

An analysis of the municipality's capacity to implement and operate an OSL regime should be completed. Council must consider whether any additional operating costs for the municipality in tracking and accounting for OSL will be necessary. Whatever cannot be recovered through the OSL will have to be funded through general revenue or other funding sources.

D. Is there an expectation that land development will continue at a reasonable pace?

An OSL regime requires that the municipality make assumptions about growth. Those assumptions will be critical for determining when the new or expanded infrastructure will be required. If there is no expectation that development will occur at a significant pace, the need for new or expanded infrastructure may be too far into the future to make an OSL regime practical.

E. Has the municipality collected any fee or charge that could be characterized as an OSL?

A review of past practices will help inform decision-makers whether past actions in "collecting" money from developers will impact on the operation of an OSL regime.

F. Are there other cost recovery tools that would be more suitable?

Depending on the type of infrastructure required, it might be easier or better to use a local improvement tax or rely on sections 650 and section 655 of the MGA to require developers to contribute to infrastructure costs.

G. Would the implementation of an OSL regime help spur development?

If a required piece of infrastructure is too expensive for one developer to construct, the establishment of an OSL regime may help spur development. An OSL regime will typically mean that the municipality will front-end the construction costs of the necessary infrastructure, thereby creating a level playing field for developers of various sizes.

H. Does the municipality have the financial capacity to build OSL infrastructure or facilities?

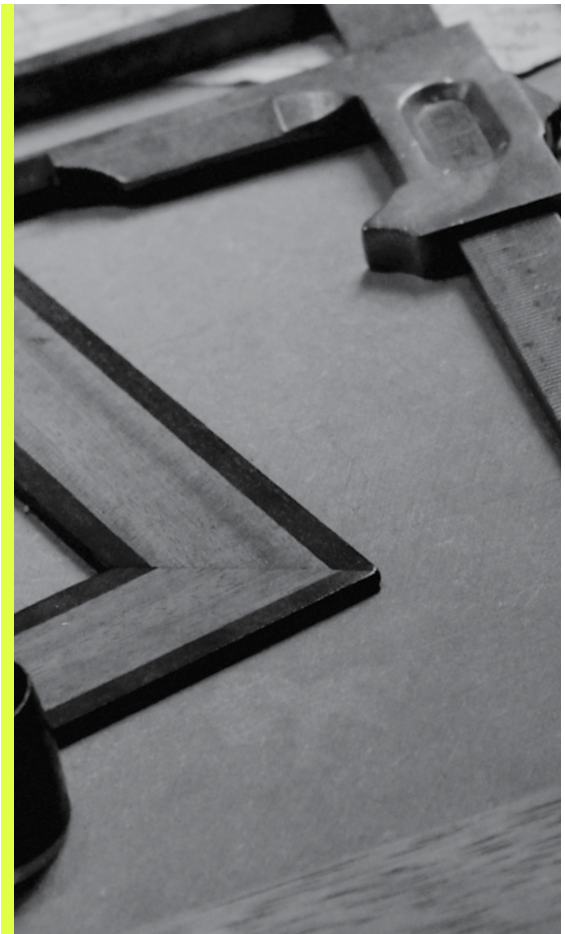
Municipalities often front-end the construction costs of OSL infrastructure or facilities, as opposed to collecting OSL first to create a reserve to finance an infrastructure or facility project. Does the municipality have room in its debt limit ratio capacity to assume new debt?

I. Presentation of reports and findings presented to council

Council gives direction to proceed with development of an OSL regime for one or more types of recoverable infrastructure.

MUNICIPALITY DETERMINES THE NATURE OF CONSULTATION WITH STAKEHOLDERS.

The *Off-Site Levies Regulation* requires the municipality to engage in good faith negotiations during various points of time in the OSL process. This includes prior to the municipality making a final determination on the requirements for existing and future infrastructure and facility needs, when determining the methodology on which to base the levy, and prior to passing or amending the OSL bylaw. Given this, consultation with affected stakeholders, who may include developers, builders, organizations representing developers and builders, and landowners, should be considered early on.



B. Enactment

RETAIN CONSULTANTS, INCLUDING LEGAL ADVISORS, TO ASSIST WITH THE DEVELOPMENT OF THE OSL REGIME.

Lawyers can assist with the review of assumptions that will be the foundation of the OSL regime and identify legal pitfalls in recovery assumptions. Engineers or accountants can be vital for compiling data and preparing reports to support levy calculations and rates.

INVOLVE STAKEHOLDERS IN THE DEVELOPMENT OF THE OSL REGIME.

The *Off-Site Levies Regulation* requires a municipality to consult in good faith with affected stakeholders prior to the municipality making a final determination on the requirements for existing and future infrastructure and facility needs, and when determining the methodology on which to base the levy. Depending on the nature of the affected stakeholders, the consultation process will vary from municipality to municipality. Consultation may include, but is not limited to, direct meetings with developers, builders, landowners and representative organization, open house meetings, non-statutory public hearings, and acceptance of written submissions.

DETERMINE THE PLANNING HORIZON.

The OSL regime must determine infrastructure costs for a planning horizon. The length of the planning horizon is a business decision for the municipality to make. However, it is not uncommon to see planning horizons vary from twenty to forty years. The municipality must then determine the anticipated rate of growth for the various types of development (residential, commercial, industrial, or otherwise) within the planning horizon that will impact infrastructure or facilities, as well as specific infrastructure and facility projects that will occur during the planning horizon. The planning horizon chosen may depend on the planning documents (i.e. Municipal Development Plan or infrastructure master studies) that the municipality already has in place.

The *Off-Site Levies Regulation* specifically requires the municipality to identify the anticipated planning horizon for the interconnected transportation infrastructure (section 5.1(1)) and for facilities that fall within section 648(2.1) of the MGA (section 6(1)).

ESTABLISH LIST OF INFRASTRUCTURE AND FACILITIES THAT WILL BE INCLUDED IN THE OSL REGIME WITHIN THE PLANNING HORIZON.

DETERMINE WHEN INFRASTRUCTURE OR FACILITIES WILL LIKELY BE NEEDED WITHIN THE PLANNING HORIZON.

DETERMINE ESTIMATED COSTS OF INFRASTRUCTURE OR FACILITIES.

It is important that the municipality have accurate cost estimates with respect to all infrastructure and facility projects that will be included in the OSL regime for the chosen planning horizon. Undoubtedly, there will be changes to specific projects over time; some infrastructure or facility projects that were originally anticipated may not be constructed; other infrastructure or facility projects may be added or modified. However, the municipality must develop as comprehensive a list of infrastructure and facility projects as possible and determine estimated costs as accurately as possible.

ASSESS THE RESIDUAL BENEFIT OF INFRASTRUCTURE OR FACILITIES TO EXISTING DEVELOPMENT.

To be eligible for OSL support, the recoverable infrastructure or facilities must be required by the municipality due to new development. Any infrastructure or facilities required for upgrading or retrofitting for existing development should not be included in the OSL regime. Likewise, costs of upgrading or retrofitting infrastructure or facilities for other purposes, such as due to regional demands, should not be included. This may require that construction costs for specific pieces of infrastructure be apportioned between what is to be paid by new development and collected through the OSL regime, and what is to be paid by the municipality because the need for the infrastructure is driven by existing development.

The Court of Appeal has not fully explained how municipalities should resolve the question of "residual benefit" for costs attributed to existing development. Municipalities need to ensure that their levy studies, rationale, apportionment, and calculations all factor and fairly address (and delineate) answers to the following questions:

A. Does the proposed infrastructure provide any benefit with respect to the longevity of existing infrastructure?

B. Does the new infrastructure or facility provide greater reliability of service for existing residents/development?

C. Does the new facility provide improved quality of service for existing residents/development or for future infill development that will not be subject to an OSL?

D. Does the new facility provide some other type of residual benefit to existing residents/development?

Addressing these questions should assist the municipality in determining if OSL infrastructure or facilities provide any residual benefit to existing development that is outside the benefitting area to be imposed the OSL, and such benefit should not be included in the amounts recoverable via the OSL calculations.

ESTABLISH THE BENEFITTING AREAS FOR EACH OF THE PIECES OF INFRASTRUCTURE/FACILITY.

Benefitting areas are often referred to as "basins." Identifying the benefitting areas may involve reviewing existing statutory plans, policies, agreements or other relevant documents or studies of the municipality. How simple or complex the OSL model is in terms of identifying these benefitting area or basins is up to the municipality.

A simple OSL regime may identify only one basin for all new development and subdivisions, without distinguishing the potential anticipated lands uses. This means that OSL for the whole municipality would be the same for any parcel of land.

A more complex OSL regime may divide the benefitting area into several basins and even sub-basins and may further classify these areas into the anticipated land uses (i.e. single or multifamily residential, commercial, industrial etc.).

No matter the number of basins or how benefitting areas are determined, the OSL regime will require analysis to support this determination. As an OSL model becomes more complex in terms of the number of basins and the division into sub-basins, more assumptions within the analysis will be necessary. For example, if the OSL will be different for each anticipated land use, the determination of the basins will require assumptions on the amount of each anticipated land use (i.e. how much of a basin will be developed as single family and multifamily residential, industrial and commercial development). Further supporting documentation will need to provide the necessary analysis to substantiate and support the OSL rates and its breakdown based on basins or anticipated use. That is, the supporting documentation should:

A. explain why certain basins will benefit from certain OSL infrastructure or facilities, while other basins do not; and

B. if costs vary according to anticipated land use (i.e. industrial, commercial, single family or multifamily residential), explain why one anticipated land use will benefit more from a certain OSL infrastructure or facility than another use.

Increased assumptions will add complexity to the analysis and leave open the possibility of the OSL rates not being apportioned equitably. If there are any changes to or errors in the assumptions, there is also the possibility of under-collecting the required amount of OSL to ensure capital cost recovery. The same concerns can also potentially result in over-collection by a municipality.

However, without such analysis, a municipality's OSL bylaw may not be in accordance with the MGA or with the requirements of the *Off-Site Levies Regulation*, and therefore may be susceptible to a challenge.

Care must be taken to establish basins that are rational; if the factors that differentiate basins result in a large number of basins, the assumptions used to establish the different basins may need to be revisited. A large number of basins can be an operational nightmare given that each category of infrastructure for each basin has to be accounted for separately. Funds cannot be co-mingled across basins. However, a municipality has flexibility in developing how its OSL regime is organized, including the number of basins or sub-basins to include.

DETERMINE IF THE OSL WILL BE CALCULATED ON NET OR GROSS DEVELOPABLE LANDS.

Consideration must be given to whether the OSL will be calculated and imposed on net or gross developable lands. "Net" calculations typically include land remaining after municipal reserve, arterial roads, environmental reserve lands or other types of lands (e.g. school reserve/sites, public utility lots etc.) are accounted for; "gross" calculations will typically include all developable lands, even that which may be set aside for other purposes such as roads and reserves. It is important that the use of net or gross lands is consistent between the OSL rates established in the bylaw and the supporting documents/studies that support the rates to ensure that the optimal amount of levies are collected based on the land included within benefitting areas.

> *"...a municipality has flexibility in developing how its OSL regime is organized, including the number of basins or sub-basins to include."*

ESTABLISH A METHOD FOR CALCULATING THE OSL.

The MGA and the *Off-Site Levies Regulation* require municipalities to develop a clear method of levy calculation (i.e. a clear cost apportionment analysis). A municipality's method of calculation must illustrate how the OSL is a fair conclusion from the underlying technical data and an equitable distribution of the estimated infrastructure costs. The courts have set a high standard as to what the OSL bylaw and its supporting documents should show in terms of the analysis of how the levy rates are determined.

Although there is flexibility in how a given municipality can calculate OSL rate (discussed in more detail below), a municipality's method of calculation will typically address issues such as:

A. whether some areas of the municipality have a greater future infrastructure or facility impact (and consulting costs) than others;

B. the relative benefit of the future infrastructure or facilities to different benefitting areas (including the benefit to existing development);

C. the expected timing for future development;

D. how costs for the future infrastructure or facility may vary with time; and

E. how that cost variance will be fairly distributed over time.

The municipality's assumptions in developing its method of levy calculation should be clearly stated in its OSL bylaw or the supporting reports that are referred to in the bylaw.

However, simply put, an OSL rate for each type of OSL infrastructure or facility is the equation of a numerator over a denominator. The numerator is the total value of the OSL infrastructure or facility projects to be completed under the OSL regime over the growth horizon which are beneficial to new development/subdivision. The denominator is typically the total area that the OSL infrastructure or facility projects benefit and in which costs are to be allocated. The simplified formula for an OSL is:

$$\frac{A}{B} = C$$

A= Total cost of Off-Site Levy infrastructure or facility projects

B = Total benefitting area

C = Off-Site Levy Rate

It should be noted that the above formula is simplified to provide a basic explanation of how an OSL rate is determined. In reality, the formula utilized to calculate the OSL rate will be much more complicated and be reflective of the assumptions and unique factors of the municipality's OSL model.

DETERMINE IF THE RATE WILL BE ASSESSED ON A PER AREA, PER LOT OR PER UNIT BASIS.

OSL can be imposed on a per area, per lot or per unit basis. However, an OSL bylaw should not impose levies for the same type of OSL infrastructure or facility differently in different parts of the municipality; that is, there must be consistency across the municipality for that type of infrastructure or facility (section 4(1)(c), *Off-Site Levies Regulation*). As an example, if the OSL for water infrastructure is on a per area basis, the levy must be on a per area basis across the whole municipality and the methodology of the levy rate cannot differ from one basin to another (a water levy in another area of the municipality cannot be on a per lot basis).

If a per area basis is used, the supporting documents should be reviewed to determine if rates are set on the net or gross calculation of the total area.

If a per lot/unit basis is used, the supporting documents should be reviewed to ensure that there are logical assumptions related to how the rates are set (e.g. estimates for the number of lots or units per hectare or per multifamily site, etc. and the related proportionate benefit).

Assumptions as to the rate of collection of the OSL may need to be reconsidered if the decision is made to collect OSL on a per lot or unit basis. An area (such as per acreage or per hectare) or lot basis of collection can easily occur at subdivision whereas collection of OSL on a per unit basis may be delayed until development permits are issued and the number of units is determinative.

CONSIDER WHETHER THERE ARE UNIQUE CIRCUMSTANCES WITHIN THE MUNICIPALITY THAT MIGHT IMPACT ON THE OPERATION OF THE OSL REGIME.

There is no one correct model or approach to OSL. Neither the MGA nor the *Off-Site Levies Regulation* prescribe a particular model, provided that there is a correlation between the levy and degree of benefit to new development. OSL are not a "one size fits all" form of cost recovery. The OSL should reflect the unique or special circumstances of the municipality. This could mean considering the input that geographical features (such as a river intersecting a municipality) or likewise, a regional servicing or regional roads may have on determining the benefit of OSL infrastructure. This may also mean having multiple basins with differing rates, considering the different impact/benefit of the type of development (i.e. residential, commercial, industrial etc.) with differing rates for each type, and addressing regional impacts on infrastructure services and needs.

> *"Current market conditions demonstrate that inflationary factors can have a major impact on cost recovery calculations."*

DECIDE HOW THE OSL REGIME WILL ADDRESS INFLATION.

Current market conditions demonstrate that inflationary factors can have a major impact on cost recovery calculations. For example, if there is net inflation of 15% per annum (increase in construction costs less investment revenue), the cost of what was initially a two-million-dollar project could, in three years, increase to over three million dollars (note that this is based on a simplistic calculation of inflation).

The OSL calculation may include "estimated costs and mechanisms to address cost increases over time" (section 5(1)(d), *Off-Site Levies Regulation*). As such, consideration of when the construction of the OSL infrastructure or facility will be undertaken, whether the municipality will have enough reserve or require borrowing to undertake the project, and what the inflationary costs may be should be considered and worked into any OSL model.

On the issue of inflation, a number of tools can be utilized to lessen the impact:

A. **Adjustments –** the bylaw can contemplate adjustments for the year of estimate versus the year of collection;

B. **Limiting deferred payments –** if deferrals are allowed, escalation clauses can require that when the deferred payment is made the levy rate in effect at the time of payment applies;

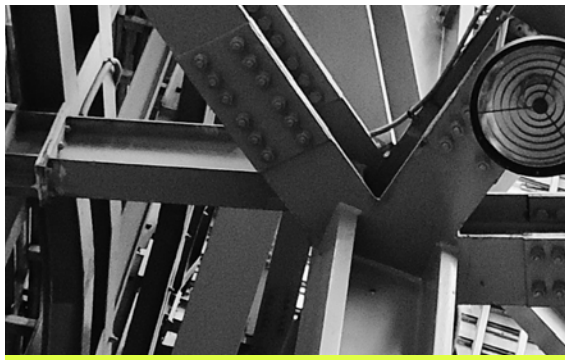
C. **Recalculation –** estimated costs can be recalculated annually; and

D. **Staging –** construction can be staged continuously throughout the planning horizon.

DECIDE WHEN OSL WILL BE COLLECTED – SUBDIVISION OR DEVELOPMENT.

Section 648 states that an OSL may be imposed and paid in respect of land that is to be developed or subdivided. This means that the OSL bylaw may authorize the development authority to impose an OSL as a condition of a development permit, or the subdivision authority to impose an OSL as a condition of a subdivision approval. Further, sections 650 and 655 of the MGA permit a municipality to use a development agreement to facilitate the payment of the OSL. If a decision is made to delay collection of all OSL until a development permit is issued, the OSL model needs to be adjusted to reflect the fact that the collection of the OSL will delayed. Imposing OSL at the time of issuance of a development permit also puts the obligation to pay the OSL on the builder or homeowner and not the developer of the subdivision. Further, if collection is deferred to the development stage in the case of a larger subdivision, there may be increased administrative costs.

OSL may only be triggered as a condition of subdivision approval or the issuance of development permits, and the municipality's OSL bylaw should provide for when levies can be imposed. OSL cannot be imposed at the time of issuance of building permits, the issuance of occupancy permits or actual occupancy or at the time of redistricting.



DETERMINE IF THERE WILL NEED TO BE AN ALLOWANCE IN THE OSL MODEL FOR FRONT-ENDING AND LEVY CREDITS.

Who will be undertaking construction of OSL infrastructure is another consideration when developing an OSL regime. Typically, a municipality will construct the OSL project, to be paid through OSL reserves or financed initially through a borrowing bylaw. However, if a municipality wishes to require a developer, rather than the municipality, to construct some of the infrastructure or facilities contemplated under the OSL bylaw, a "levy credit" may need to be contemplated. This is a situation where the project cost exceeds the developer's OSL contribution; this is often referred to as the developer "front-end financing" the OSL infrastructure or facility project. While it may be possible for the municipality to structure repayment when levy payments are received from other subsequent developers, the details of such levy credits or reimbursements should be carefully drafted in policy or development agreements. Further, such arrangements may be considered borrowing and may impact the municipality's debt limit ratio. As such, specific consideration of this impact will likely be required before a municipality incorporates the possibility of any front-ending by a developer and any associated levy credits scenario into its OSL regime. Even if the likelihood of a developer front-ending is remote, this issue needs to be considered when the OSL regime is developed as an after-the-fact incorporation of front ending and levy credits may impact the reliability of the assumptions that are the foundation of the OSL regime.

DECIDE IF THE OSL REGIME WILL ALLOW PAYMENT OF OSL TO BE DEFERRED.

Section 648(4.1) of the MGA allows OSL to be collected by installments or otherwise over time. This raises the question of whether developers may defer (delay) the payment of OSL that would be otherwise due and payable. Deferring payment of the OSL from execution of the development agreement to endorsement of the subdivision approval may be beneficial to a developer to help better manage cash flow and financing, with minimal risk to the municipality. However, deferral beyond endorsement of subdivision approval or issuance of a development permit requires greater consideration.

Delaying payment of OSL until the developer has had the opportunity to recover some of the costs of the construction (i.e. lot sales) can be quite beneficial to the developer, its financing and cash flow. However, several questions arise if the municipality decides to allow payment of OSL to be deferred:

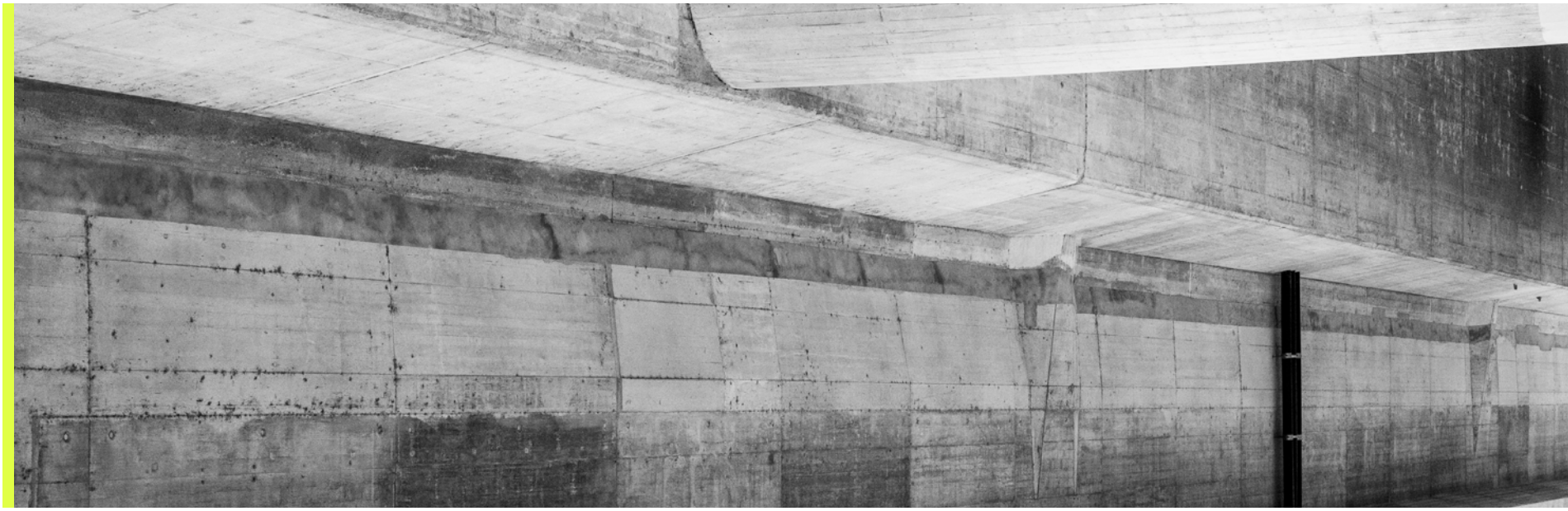
A. Will the availability of a deferral be a matter of predetermined policy, a decision for the administration, or a decision for council?

B. How will deferral impact the OSL model and its financing? Deferring collection of the OSL means that the assumptions regarding the rate of payment of the OSL may need to be reconsidered as the flow of money into the OSL regime will be delayed.

C. What rate will be used in calculating the OSL when it is actually paid? This could be either the rate at the time the deferral occurs or the rate at the time the payment is made.

D. What about interest that would have accrued to the OSL fund if the payment of the OSL had not been deferred? Does the developer have to pay an amount in addition to the OSL to "cover" the lost interest?

E. A very important question any time a deferral is granted is how will the payment be secured? The prudent municipality requires the developer to post security to guarantee that the OSL will be paid. Without security, the OSL regime is at risk. The municipality needs to keep in mind that there are no special collection mechanisms for OSL. If the municipality does not require security and the developer is bankrupt or otherwise unable to pay the OSL at the time the OSL are payable, the OSL pool will suffer a short-fall. It should also be noted that an OSL is not a tax and there are no special cost recovery mechanisms under the MGA for unpaid levies. Principles of fairness would make it inappropriate to make other developers pay for the shortfall. The municipality may have to make up the shortfall or otherwise the levy pool continues to operate with a permanent deficit.



CONSIDER FUNDING SOURCES.

Given that a municipality must consider what the potential benefit to existing development will be of any given infrastructure type, consideration should be made early on to how OSL infrastructure or facilities will be funded. If a municipality anticipates utilizing grants to fund a portion of an off-site levy project, this should be contemplated and incorporated into the OSL calculation. If the municipality will need to undertake any borrowings to pay for OSL infrastructure or facility, the costs of the borrowing (i.e. interest) can be considered and incorporated into the OSL calculations.

Additionally, the *Off-Site Levies Regulation* requires that for a levy being collected for the purposes of section 648(2)(c.2) infrastructure or section 648(2.1) facilities that the municipality must identify what portion of the estimated costs of the proposed facility will be paid by:

A. the municipality;

B. the revenue raised by the levy; and

C. other sources of revenue (e.g. grants, donations, etc.)

(section 6(1)(c), *Off-Site Levies Regulation*).

REVIEW OUTSTANDING DEVELOPMENT AGREEMENTS, OTHER FORMS OF AGREEMENTS AND PREVIOUS PRACTICES.

Previous or ongoing development agreements or other form of contribution agreements can impact an OSL regime. As such, before finalizing any OSL bylaw, it is important to determine if any such agreements will impact what the municipality can recover through its OSL model (including situations where previous OSL may be considered to have already been collected). The operation of subsections 648(7) and 648(8) of the MGA may deem previously paid fees or charges to be OSL. If such fees and charges have been paid, the municipality will be unable to recover again for that category of infrastructure or facility from those parcels of land (section 648(4), MGA). For more information see the section entitled "Limits on Collecting Off-Site Levies More than Once" in the Legislation and Regulations chapter of this Manual.

DRAFT THE OSL BYLAW.

The OSL bylaw itself can be fairly basic as there is no prescribed form required; however, the *Off-Site Levies Regulation* does provide that certain principles and criteria must be followed in determining the methodology behind the calculation of the levy rates (section 4, *Off-Site Levies Regulation*) and that certain information must be included in or referenced in the OSL bylaw (section 5, *Off-Site Levies Regulation*). This includes:

A. a description of the specific infrastructure, facilities and transportation infrastructure that is to be funded by the levy;

B. a description of each of the benefitting areas and how those areas have been determined;

C. supporting studies, technical data and analysis; and

D. the estimated costs of the infrastructure and facilities, and any mechanisms to address variation in costs over time.

In addition, section 5(4) of the *Off-Site Levies Regulation* requires the bylaw to include a requirement for a periodic review of the calculation of the levy (discussed further above), and section 7(1) imposes certain requirements in respect of the content of bylaws imposing intermunicipal OSL.

It is important that there be consistency throughout the bylaw as well as consistency with the supporting documents that establish the OSL rates. If legal advisors have not been part of the implementation process from the outset, retaining a lawyer to draft or review the OSL bylaw is important. Any legal concerns can be identified and resolved before the OSL bylaw is tabled for stakeholder consultation or brought before council for approval, thereby reducing the risks of potential legal challenges.

CONSULT WITH STAKEHOLDERS.

Sections 3(2) and 8 of the *Off-Site Levies Regulation* require municipalities that are establishing OSL to consult in good faith with stakeholders. The following specific requirements must be complied with:

A. the municipality must consult in good faith with stakeholders prior to making a final determination on defining and addressing existing and future infrastructure and facility requirements (section 8(1), *Off-Site Levies Regulation*).

B. the municipality must consult in good faith with stakeholders when determining the methodology on which to base the levy (section 8(2), *Off-Site Levies Regulation*).

C. prior to passing or amending a bylaw imposing a levy, the municipality must consult in good faith on the calculation of the levy with stakeholders in the benefitting area where the levy will apply (section 8(3), *Off-Site Levies Regulation*).

D. during consultation under subsections 8 (2), (3) and (4), the municipality must make available to stakeholders on request any assumptions, data or calculations used to determine the levy (section 8(4), *Off-Site Levies Regulation*).

When the consultation with stakeholders occurs is up to the municipality, provided that the consultations occur prior to passage of the OSL bylaw. Involving stakeholders early in the process, when underlying assumptions are being established, may result in stakeholders having a better understanding and acceptance of the OSL regime that is being proposed.

Waiting until the OSL regime is drafted creates a "straw-dog" for the stakeholders to question and challenge. The downside of waiting to involve stakeholders in the process is that it may be expensive to rework the OSL model if changes become necessary after such consultation.

What consultation will look like will be different for each municipality and will depend on the nature of stakeholders in a given municipality. Consultation may include, but is not limited to, meeting one on one with developers, potential developers and affected landowners; providing draft reports to stakeholders for review and comment; workshops or open house meetings; or a non-statutory public hearing.

AMEND/FINALIZE DRAFT OSL BYLAW TAKING INTO ACCOUNT RESULTS OF CONSULTATION.

ADVERTISE THE DRAFT OSL BYLAW.

Section 648(6) of the MGA requires that an OSL bylaw be advertised in accordance with section 606 of the MGA. Section 606 of the MGA requires that advertising occur prior to second reading of the bylaw that is the subject of the advertisement. If the municipality has passed an advertising bylaw in accordance with section 606.1 of the MGA, the draft OSL can be advertised in accordance with that bylaw (section 606(2)(c), MGA). If there is no advertising bylaw, the OSL bylaw must be advertised by publication of a notice appearing once a week for two consecutive weeks in at least one newspaper or other publication circulating in the area (section 606(2)(a), MGA). Another option would be to mail or deliver a copy of the bylaw to every residence in the area.

COUNCIL CONSIDERS AND PASSES THE OSL BYLAW.

C. Operation

OFF-SITE LEVY POLICIES.

Policies should be developed to define any operational rules regarding the application of the OSL. Policies can be of assistance to the municipality's development authority, subdivision authority and the administration in determining when a levy should be imposed, be deferred, or where and how front-end servicing will occur. Policies also define the operating rules for stakeholders.

If a municipality develops OSL policies, section 638.2 of the MGA requires that all policies related to Part 17 on Planning must be listed and posted on the municipality's website. There must also be a summary of the policy and a description as to how the policies relate to each other, and to statutory plans and bylaws.

If a policy that should be listed is not set out in the list as required by section 638.2, and is not published in the manner required, a development authority, subdivision authority, SDAB, MGB or court shall not have regard to that policy. Not only will the creation of the list be important for municipalities, it will be equally as important that the municipality keeps the list of policies and publication of polices current.

AMEND DEVELOPMENT AGREEMENT.

The adoption of an OSL bylaw may require that the municipality amend its standard development agreement to include provisions that address the new OSL regime. Legal advisors can assist in this regard.

ESTABLISH PROPER ACCOUNTING PROCEDURES.

Procedures should be in place to effectively track payments and expenditures and to provide annual reporting and proper management/expenditures of the collected OSL. For example, section 648(5) of the MGA requires that OSL collected are (a) accounted for separately from other levies collected, and (b) used for the specific purpose for which the levy is collected or for the land required for or in connection with that purpose. This means that separate accounts should be maintained for each infrastructure or facility type that an OSL is collected for and if the OSL model provides for a further division, for example by basins, the accounting must also reflect this division. The accounting must include what is collected, what interest may be earned or incurred, and how each account is utilized for each type of OSL infrastructure or facility.

ANNUAL REPORTING.

Municipalities must report on the OSL annually and include details of all levies received and utilized for each type of facility and infrastructure within each benefitting area (section 9(2), *Off-Site Levies Regulation*). This report must be in writing and publicly available in its entirety (section 9(3), *Off-Site Levies Regulation*).

It is important for municipalities to have appropriate accounting procedures in place to ensure that it is possible to fully comply with the reporting requirement. If OSL reporting occurs concurrently with the municipality's annual budgeting process, then OSL expenditures and the identification of alternative funding sources for projects to be undertaken can be part of the budget process.

RE-EVALUATE PROJECTS AND ESTIMATED COSTS PERIODICALLY.

The underlying assumptions of any OSL bylaw should be reviewed periodically and adjusted as new information becomes available. This will ensure that the municipality's OSL costs are up to date and the municipality is collecting the optimal amount through OSL to recover the capital costs of the OSL infrastructure or facility. Further, the *Off-Site Levies Regulation* specifically requires the OSL bylaw include a requirement for periodic review of the calculation of the levy (section 5(4), *Off-Site Levies Regulation*). It is a best practice for any municipality to undertake this exercise on an annual basis (ideally concurrently with its budgeting process) to reconcile costs and collected levies, and to re-evaluate the whole OSL regime periodically, such as every three to five years or as necessary. This will help to account for the occurrence of a significant event (for example, an annexation or passage of a new statutory plan), or a change to the basic assumptions behind the OSL (for example, change to pace or scale of development). Such a review should include underlying assumptions such as the planning horizon, assumed rates of development and recovery, and projected needs for infrastructure construction. Proper and timely OSL reviews can help eliminate any risk of under-collection or over-collection of levies over time.

Conclusion

This section has outlined a step-by-step process to assist your municipality in establishing an OSL regime and passing the respective OSL bylaw. This checklist is meant only as a guideline and may need to be modified to address the circumstances of your municipality. What is clear from the checklist is that the process of establishing an OSL regime and passing the OSL bylaw is not a simple exercise, and there are many nuances and factors that must be fully considered to ensure optimal cost recovery and compliance with the requirements of the updated legislation.

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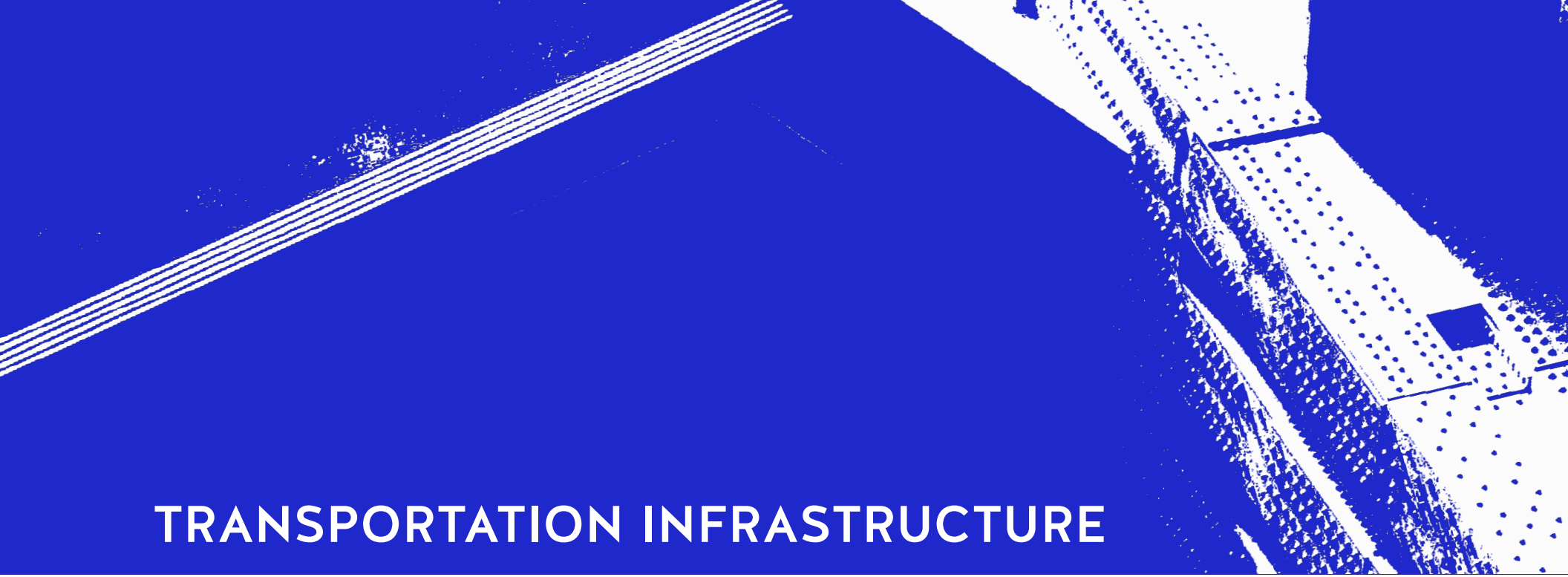

TRANSPORTATION INFRASTRUCTURE

"Apportionment had to be reasonable and the methodology applied to determine the apportionment had to be consistent across the municipality."

Municipalities were first able to use the OSL to fund transportation infrastructure as of 2004. At that point the municipality was only allowed to impose the OSL for "new or expanded roads required for or impacted by a subdivision or development" (section 648(2)(c.1), MGA). The addition of roads to an OSL regime posed some challenges as municipalities worked to ensure that the roads funded by the OSL met the standard of section 648 of the MGA. Unlike the situation with water or sewer lines (where the requirement for or impact of a subdivision or development can be easily established by showing that a development connects to the pipes), establishing the requirement for roads led to the establishment of benefitting areas that were defined by arterial or commuter roads.

Prior to roads being incorporated in an OSL regime, the first developer into an area might have been required to build the first two lanes of an arterial standard road with limited opportunities to recover the costs incurred in the initial construction. As a result of the 2004 amendments to the OSL provisions, a developer opening a new area for development was no longer required to fully fund the arterial road connection. However, internal or collector roads continued to be funded and constructed directly by developers, typically through a section 650(1) or section 655(1)(b) development agreement.

As the MGA allowed municipalities to include "expanded" roadways within an OSL regime, it became important to municipalities to consider what factors contributed to the need for roadway "expansion" or upgrades. Certainly, new development would contribute to the need for roadway improvements. However, other factors such as existing bottlenecks, increased through traffic or infill development could also contribute to the need for roadway upgrades. Traffic impact assessments became an important tool in assessing the need for the roadway improvement and in the apportioning of the roadway improvement costs between new developments and the municipality. Apportionment had to be reasonable and the methodology applied to determine the apportionment had to be consistent across the municipality. As with other types of infrastructure, the municipality could not arbitrarily impose the entire cost of expanded roadway infrastructure on the development community without having a rationale for doing so.

Expansion of Transportation Infrastructure under an Off-Site Levy Bylaw

The 2018 MGA amendments clarify that municipalities can pass an OSL bylaw to cover "new or expanded transportation infrastructure required to connect, or to improve the connection of, municipal roads to provincial highways resulting from a subdivision or development" (Section 648(2)(c.2), MGA). An OSL established under section 648(2)(c.2) of the MGA is in addition to any OSL for roads under section 648(2)(c.1), "new or expanded roads required for or impacted by a subdivision or development". The requirements in the Off-Site Levy Regulation for establishing an OSL under section 648(2)(c.2), discussed below, do not apply to the creation of an OSL for roads under section 648(2)(c.1). The process of establishing an OSL for roads under section 648(2)(c.1) has not changed. There is no requirement for the municipality to involve the Government of Alberta in making this determination nor is there any new requirement for establishing the rationale for an OSL for arterial roads. Further, a municipality does not require any provincial approval of standards for roads to be constructed using OSL funds collected pursuant to section 648(2)(c.1). For roads that are clearly within the municipality, the municipality need only work with local stakeholders to create an OSL for such roads.

Utilizing the new section 648(2)(c.2) brings its own challenges. For example, there will likely be debate over the interpretation of what constitutes "transportation infrastructure" or "municipal roads", what is a connection to a provincial highway or where is the boundary between the end of a municipal road and the beginning of a provincial highway. As well, it is unclear whether a municipality may include the costs of installing traffic lights to create a signalized intersection connecting a municipal street with a provincial highway that crosses through the municipality as part of the municipal transportation OSL. What about the cost of an on-ramp and an overpass? The more broadly that terms such as "transportation infrastructure" and "municipal roads" are interpreted, the more that municipalities could include in the OSL bylaw and the higher the OSL could be. Given that section 648(2)(c.2) has recently come into effect, it will likely be some time before the scope of the section will be considered by the courts and therefore these questions will remain unanswered in the short-term. However, given the expense of overpasses and major intersection upgrades, it would not be surprising if the development industry challenges municipal bylaws that attempt to impose a share of the costs of an overpass on new development.

"There is no requirement for the municipality to involve the Government of Alberta in making this determination nor is there any new requirement for establishing the rationale for an OSL for arterial roads."

Reviewing the definitions in the MGA related to roads and highways may provide some assistance in determining the scope to which section 648(2)(c.2) may apply in an OSL regime. The term "highway" is defined in Part 17 of the MGA as "a provincial highway under the Highways Development and Protection Act" (section 616(h), MGA). The Highways Development and Protection Act, SA 2004, c H-8.5, includes the following definition in section 1: "(l) 'highway', 'road' or 'street', except in section 38.1, means land that is authorized by a highway authority to be used or surveyed for use as a public highway, road or street, and includes a bridge forming part of a public highway, road or street and any structure incidental to the public highway, road or street;" The term "highway authority" is also defined in section 1(m) of the Highways Development and Protection Act:

(m) "highway authority" means

- **(i)** the Minister, in respect of highways subject to the Minister's direction, control and management,
- **(ii)** an urban municipality, in respect of highways subject to its direction, control and management, or
- **(iii)** a rural municipality, in respect of highways subject to its direction, control and management;

Within Part 17 of the MGA, "road" is defined in section 616(aa) as "a road as defined in section 1(1), but does not include highway as defined in this Part". The definition of "road" in section 1(1)(z) of the MGA is quite broad:

(z) "road" means land

- **(i)** as a road on a plan of survey that has been filed or registered in a land titles office, or
- **(ii)** used as a public road, and includes a bridge forming part of a public road and any structure incidental to a public road;

As the potential exists for a piece of physical roadway to be included in the definition of both a highway and a road, clear delineation of what can be included within a municipal OSL bylaw may, in some instances, require court determination.

One may also look to the definition of the term "provincial highway" in the *Highways Development and Protection Act* to resolve what is and is not a piece of new or expanded transportation infrastructure connecting municipal roads to provincial highways. The *Highways Development Protection Act* defines provincial highways as follows:

(s) "provincial highway" means

- **(i)** a highway or proposed highway designated as a provincial highway under this Act, and
- **(ii)** a highway that has been designated as a primary highway under a former Act if the designation is subsisting on the coming into force of this Act;

Whether a court will look to these definitions to resolve any debates about what roads might be included in a "provincial highway" is uncertain. What is certain is that given the ambiguity around the meaning of section 648(2)(c.2) and until the courts have had an opportunity to consider the meaning and limitations of section 648(2)(c.2), municipalities will need to carefully consider what can reasonably constitute a municipal road. Is a municipal road anything that is not a provincial highway as that term is defined in the *Highways Development and Protection Act*? Or will the determination be made based on whether a piece of traffic infrastructure is to be within a road right-of-way controlled by the province or a road right-of-way controlled by the municipality? The definitions from existing legislation should nevertheless be considered as a starting point for a municipality that wishes to establish an OSL regime that includes such infrastructure and may be a primer for any discussions and consultations with the Minister responsible for the *Highways Development and Protection Act* in accordance with the requirements of the *Off-Site Levies Regulation*.

Criteria for Establishing an Off-Site Levy under Section 648(2)(c.2)

In establishing an OSL pursuant to section 648(2)(c.2), the municipality has specific requirements under the *Off Site Levies Regulation*. In particular, section 5.1(1) the *Off-Site Levies Regulation* sets out a list of factors the municipality must consider in calculating an OSL under the new section 648(2)(c.2). These includes supporting traffic impact assessments, statutory plans, policies and agreements that identify:

- **A.** the need for and benefits from the new transportation infrastructure,
- **B.** the anticipated growth horizon, and
- **C.** the portion of the estimated costs of the transportation infrastructure that is not covered by the Crown that is proposed to be paid by the
  - **(i)** the municipality,
  - **(ii)** the revenue from the levy, and
  - **(iii)** other sources of revenue

(section 5.1(1), *Off-Site Levies Regulation*).

While it would be expected that the municipality would look at similar documentation when establishing OSL for other infrastructure due to other provisions of the *Off-Site Levy Regulation*, the municipality should be prepared to explain or show how these factors were considered. This should be addressed in the reports used to establish the OSL bylaw. In section 5.1(3) of the *Off-Site Levy Regulation*, the municipality, in consultation with the Minister responsible for the *Highways Development and Protection Act*, is required to determine the benefitting area and to "base the benefitting area on a reasonable geographic area for the use of the transportation infrastructure." In section 5.1(4), the discretion of the municipality in determining the OSL rate is limited in that it requires the levy to apply proportionally to the determined benefitting area. What the *Off-Site Levy Regulation* does not specify is what the criteria is for establishing that proportionality. Is the proportionality to be established by area or perhaps by anticipated traffic generation based on the traffic impact assessments? Whatever basis the municipality might adopt, it would again be prudent to fully discuss these factors in a report that Council considers when establishing the OSL. Specific mention of these factors in the supporting reports will make it easier to defend an OSL pursuant to section 648(2)(c.2) if the OSL bylaw is ever challenged on the basis that the municipality has failed to comply with the requirements of *the Off-Site Levy Regulation*.

Perhaps the biggest challenge with establishing an OSL under section 648(2)(c.2) will come with the involvement of the Province. While a municipality must consult with stakeholders when establishing an OSL for other infrastructure or facility types, a municipality does not have any obligation to consult the Province nor does the municipality have to reach any agreements with the Province with respect to what infrastructure should or could be included within the OSL regime. That is not the case with transportation infrastructure under section 648(2)(c.2). The Province will be a fundamental part of the process for this category of OSL, which will undoubtedly change the dynamic of the consultation and potential negotiation process between the municipality and other stakeholders. The extent and the impact of the involvement and role of the Province in the establishment of an OSL under section 648(2)(c.2) is unknown. However, what is clear is that the municipality will have the new challenge of juggling the expectations of industry and stakeholders with the expectation of and directions from the Province.

Lastly, it should be noted that a municipality's OSL cannot have the effect of committing the Government of Alberta to contribute to transportation infrastructure. Section 3(5) of the *Off-Site Levies Regulation* specifically states "Notwithstanding anything to the contrary in this Regulation, the levy is of no effect to the extent it directs the Government of Alberta to expend funds, to commit to funding transportation infrastructure or arrangements to undertake actions or to adopt particular policies or programs." Given this, a municipality should clearly address any proportionate benefit attributed to the Province in its OSL regime, and there should be no expectation to have the Province contribute to transportation infrastructure attributed to an OSL model

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IMPACT OF OFF-SITE LEVIES ON THE DEVELOPMENT INDUSTRY

Prior to passing and implementing an OSL bylaw, a municipality must consult in good faith with stakeholders. These stakeholders will include the local development community, including individual developers, landowners who may develop their land or sell their land to developers, and organizations that represent the development and builder community, such as BILD. A municipality will find through its consultations and discussions with such parties, that an OSL may have both positive and negative impacts on the development industry.

There can be a positive impact on the development industry through the OSL processes as the municipality must consult with developers; this will give the development industry an opportunity to help shape the rules for land development. An active development organization such as BILD can be an important resource in reaching developers and landowners. Such an organization can also assist the municipality in assessing and understanding how the implementation of an OSL regime will impact the development industry and affect the rate of development. The same can be said for engaged individual developers and landowners who may take a more involved role and greater interest in the consultation process – which may often start as a desire to protect their self-interest, and may turn into an expression of a greater community interest.

The consultation process should allow the development industry the opportunity to provide input into the determination of what the infrastructure needs of the municipality are as well as how they can best be funded. There are numerous ways that the development industry can influence the process of establishing an OSL regime including acting as a check and balance for assumptions about the rate of projected growth and in reviewing the reasonability of the projections of what infrastructure will be needed when and the projected costs of such infrastructure. The more involved the industry stakeholders become in the process of developing the OSL regime, the more likely it will be that the industry will understand and accept the OSL regime once the OSL bylaw is passed. Addressing questions and resolving concerns about the OSL regime before the OSL bylaw is passed is less time-consuming and less expensive than responding to legal challenges after the OSL bylaw is passed.

An OSL bylaw may also have negative impacts on the development industry. The most obvious negative impact is that an OSL will increase the cost of new development. Developers pass on the cost of an OSL to the purchasers of the lots and consequently the imposition of the OSL contributes to increased housing costs (particularly of new, greenfield development, as well as potentially increasing housing costs on the resale market). Developers and home purchasers will undoubtedly see this as a disadvantage. However, there is a correlated benefit of having a well-established and clear OSL

regime. Once the OSL bylaw is in place, the development industry has certainty in terms of costs they will face when developing and will have a better understanding when various pieces of infrastructure are projected to be constructed. This will be to the benefit of the development industry and ultimately, to the purchasers who will benefit from such OSL infrastructure and facilities. Knowing when infrastructure is likely to be constructed can also assist with long-range planning for developers and help identify where their next development opportunity in a given municipality may be located.

As has been previously stated, the implementation of an OSL regime provides a source of funding for the municipality to pay for required municipal infrastructure. Having an additional source of funding may make it easier for a municipality to invest in municipal infrastructure projects that are directed towards municipal growth. Such investments in new infrastructure can help encourage development by increasing the amount of developable land that will receive municipal services. A new fire hall, for example, will open new areas for development, assuming that the location of the new fire hall will mean that a broader area can be reached within an acceptable response time. Or an expansion to a water reservoir may create significantly more capacity for a municipality's water system to support growth and perhaps encourage the development industry to provide much needed residential or industrial development within a municipality.

If a municipality can proceed with infrastructure construction because an OSL will fund such construction, this will mean that no specific developer will have to bear the full burden of the cost of constructing that much needed infrastructure to support development. This can be a significant benefit for the development industry if the cost of necessary infrastructure exceeds the financial capabilities of the developers (particularly, smaller developers with more limited resources) operating within the municipality. Because the municipality is assuming the responsibility for constructing more expensive pieces of infrastructure, the playing field of developers is leveled. For example, smaller developers who could not afford to build a water distribution main on their own do not have to wait for a "big developer" to build the water distribution main. The result of an OSL bylaw may be that the cost of constructing infrastructure does not act as a barrier to development by small developers or landowners. In circumstances where the municipality has collected an OSL and created a reserve, and a developer, rather than the municipality, builds a piece of infrastructure that is to be constructed using the OSL, the costs that the developer incurs in undertaking the construction may be partially or fully covered by already-collected OSL, thereby reducing the financial impact on the developer.

The impact of the OSL bylaw may depend on the number of active developers and other stakeholders in a community, as well as on the OSL rate that the municipality establishes. Although on its face, an OSL may be viewed as having a negative impact on development, there may be just as likely a positive impact on the development industry and growth in a municipality because the OSL enables the municipality to build infrastructure required for development. It will be through the upfront engagement and good faith consultation with the development industry that a municipality can explore what those impacts may be and to work towards an OSL regime that creates a win-win for both the municipality and its development community.

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OFF-SITE LEVIES AND MUNICIPAL FINANCES

> *Off-Site Levies can be a valuable tool for a municipality to recover some of the capital costs of municipal infrastructure.*

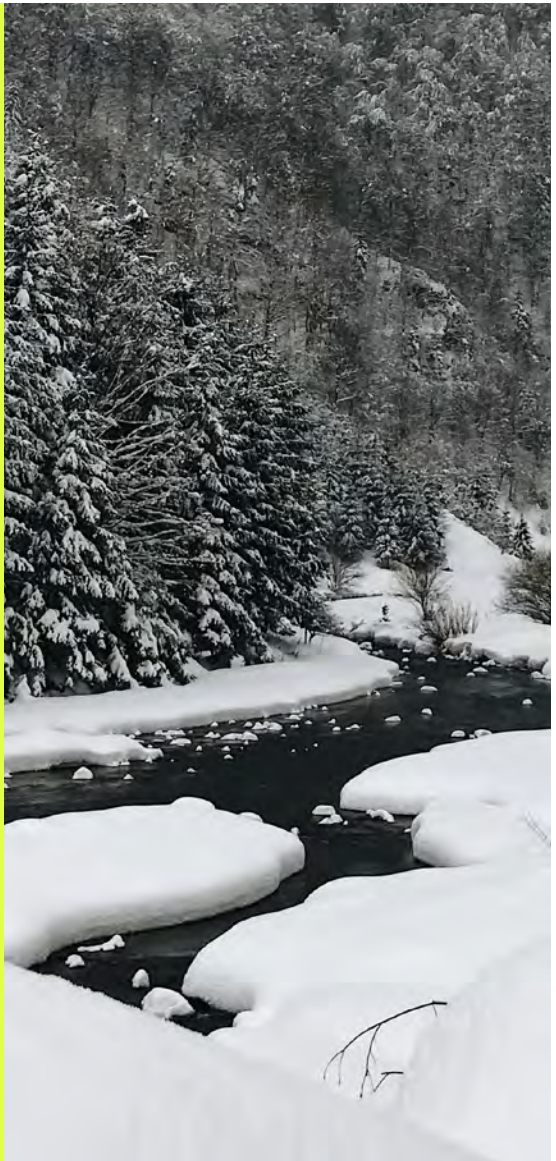
Off-Site Levies can be a valuable tool for a municipality to recover some of the capital costs of municipal infrastructure. In some cases, OSL might be the only means for a municipality to fund and construct necessary infrastructure and facilities required for new development; and without an OSL regime, new subdivisions and developments might not be serviced and overall development may stagnate. As has been previously discussed, an OSL cannot be used for all types of municipal infrastructure. Section 648 of the MGA sets out what specific categories of municipal infrastructure and facilities can be funded using OSL. Only the infrastructure and facility types listed in section 648 can be the subject of an OSL.

Use of Off-Site Levy Funds

The legislative restrictions on the use of OSL funds can have a significant impact on municipal finance. A municipality must segregate OSL funds it collects into separate pools or accounts. Each category of an OSL must be accounted for separately from other levies (section 648(5)(a), MGA), interest that accrues on one pool of OSL funds must be credited to that pool only (section 648(5), MGA), and OSL funds can only be used for the specific purposes for which the OSL was collected (section 648(5)(b), MGA). This means, for example, that OSL funds for new or expanded roads cannot be co-mingled with the OSL funds collected for storm sewer drainage facilities so that the combined fund can be directed towards paying the costs of constructing a storm water infrastructure project.

While it is clear from the legislation that OSL collected for one type of infrastructure can only be used for the same type of infrastructure, the Courts have not had the opportunity to interpret the phrase "specific purpose described ... for which it is collected ..." which appears in section 648(5)(b). Giving the phrase a broad and purposive interpretation, it could be argued that the section allows OSL collected for "roads" to be used for any of the roadway projects that were identified in the OSL bylaw as being a road project for which the roadway OSL was imposed. Put another way, if the OSL bylaw identified five roadway projects for which an OSL would be collected, then the OSL funds collected for roads could be used for any of the identified roadway projects (however, if there are different development areas with different levy rates and different OSL infrastructure projects identified for each development area, then a municipality will be limited to only using OSL funds within that development area). An alternative interpretation of this phrase in section 648(5)(b) would be that the OSL funds collected for the five roadway projects would have to be treated as five separate pools and the funds that could only be used for a particular project would be the proportion of the road OSL fund collected for that particular project. Such a narrow interpretation of the phrase would place a very heavy burden on municipalities to track the collection and use of OSL funds. Further, as it has been previously discussed, it would be very unlikely that a municipality will collect all the OSL to cover the construction costs for any given infrastructure project prior to the need to construct that OSL infrastructure. If all of the OSL funds collected for roads can be used to pay for any roadway project that has been identified in the OSL bylaw, the municipality will be able to draw on the entirety of the OSL collected for roads to pay for an identified roadway project. What the correct interpretation of section 485(5)(b) may be is dependent on the nature of the OSL regime, including the nature of the regime's basins or sub basins and the OSL infrastructures identified for each basin/sub basin.

It is also important for a municipality to be cognizant of the legislative restrictions on the use of OSL funds to ensure the municipality complies with the MGA. Significant sums of money sitting in reserve accounts may be seen as an attractive alternative to debt financing. OSL, however, cannot be used to avoid municipal borrowing. For example, if the municipality has collected a total of five million dollars in OSL, being the sum of the road, sewer and water levies that have been collected, and the municipality is going to construct a water facility structure that costs three million dollars, the municipality can only use that portion of the collected OSL funds that were collected as a water OSL to fund the project. It follows then, that if only one million dollars was collected as water OSL, then the municipality has to find alternative sources for the remaining two million dollars to construct the water facility. The municipality cannot "borrow" the additional two million dollars from the OSL fund that were collected for the other types of OSL infrastructure.

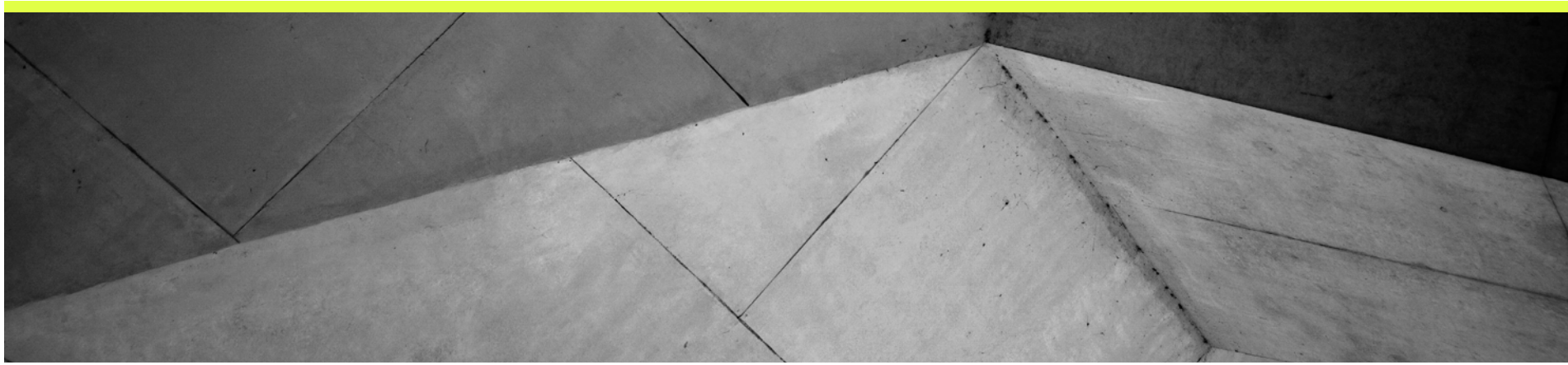


Uncertain Rate of Collection

With any OSL regime, a municipality has no certainty as to the timing of the imposition and collection of the OSL. As previously discussed, an OSL can only be collected at the time that land is subdivided or developed. If the rate of land development is slow, then the rate of collecting the OSL and thereby creating an OSL fund reserve will be similarly slow. An uncertain rate of collection means that projections as to how much money will be collected through the OSL process could turn out to be unreliable. This in turn could create challenges for a municipality when constructing an OSL infrastructure project. For example, the OSL regime may project that 50% of the cost of infrastructure would be collected by the time the infrastructure is to be constructed by the municipality. However, if only 30% of the costs of the infrastructure is collected by the time the infrastructure is to be constructed, then the municipality will have to make up the shortfall between the OSL amount collected and the amount that was projected to be collected through the OSL regime. This means that the municipality will have to find alternate sources of funding (such as general revenues, a borrowing, grants, etc.) for the project to proceed.

Uncertainty Created by Inflation

The calculation of an OSL rate is dependent upon numerous assumptions made during the development of the OSL regime and bylaw. For example, there will be assumptions about the rate of land development, what infrastructure will be needed at what point in time, the cost to construct the infrastructure at the point in time when construction occurs and how the rate of inflation will impact construction costs. If any of those assumptions are not accurate, then the rate at which the OSL are imposed and collected may not be high enough to fully recover the proportion of the costs expected to be collected through the OSL bylaw. For this reason, it is important for a municipality to review its OSL rate on an annual basis. However, even with annual reviews and adjustments of the OSL rate, there is still a risk that a spike in construction costs at the time of construction might result in a shortfall. In such a situation, an insufficient amount may have been collected from the first developers who paid the OSL. Regardless of a perceived "under-collection," a municipality cannot require developers who have already paid the OSL to pay an additional amount. Nor can the municipality impose and collect such a shortfall from the rest of benefitting developers. The municipality must be prepared to cover the full costs of the construction of the infrastructure regardless of the amount of the OSL it has collected.



Use of Grant Funds

Over the course of the operation of an OSL regime, the municipality will need to decide whether grant funds will be utilized for OSL infrastructure.

Grants that are specifically identified for the OSL infrastructure will need to be directed towards that purpose and accounted for within the OSL model. The question that needs to be determined is whether the grant will be applied to cover the municipality's share of the construction costs or will the grant be applied to the overall cost of the infrastructure so that both the OSL rate for all stakeholders within the benefitting area and the municipality's share is reduced. For example, assume that the OSL bylaw includes, as part of the road OSL, the construction of a new bridge. The cost of constructing the bridge is $20 million. The OSL regime provides that 50% of the costs of the bridge should be paid for by new development through the levies and 50% should be paid for by the municipality at-large in recognition of the benefit to existing development. The municipality receives a grant of $10 million specifically directed to the bridge project. Should the $10 million be considered as part of the municipality's share? Or, should the $10 million be applied to reduce the total construction costs of the project, in which case the bridge becomes a $10 million project that is cost shared 50% by new development through levies and 50% by the municipality – thereby each contributes five million dollars to the project. In the first alternative, the municipality would have contributed its 50% by application of the grant. In the second alternative, the municipality would still have to contribute five million dollars to the bridge project. From a fair and equitable application, a specific grant for an OSL project should be applied to reduce the overall construction costs and not only to the benefit of the municipality. This is a simplistic example of the impact that a grant can have on an OSL regime. In reality, this can be much more complicated where there may be contributions or grants from the provincial and/or federal governments towards the infrastructure or facility.

The implication of non-project specific grants must also be considered in the context of OSL infrastructure, as it is not clear whether a municipality should direct a non-project specific grant towards OSL projects or direct them towards other municipal projects that cannot be funded using the OSL. A municipality can adopt a policy regarding the application of grant funding or can make decisions on a case-by-case, year-by-year basis. A policy would create certainty for the industry and the municipality in the operation of the OSL regime. If grants are applied to OSL projects, then the OSL rates will vary over time and developers who are the first to pay the OSL may feel that developers who come later, and get the benefit of the grant, are not paying their fair share. Unfortunately, given the uncertainty of federal and provincial grant funding, a municipality cannot safely make assumptions about the amount of grant dollars that may be available any given year to be used for OSL infrastructure. Assuming grants are used to help finance OSL infrastructure, it would be risky to include in the calculations of the OSL rate an assumption about the availability of grant dollars.

Carrying Costs

There can also be a significant risk in carrying or financing costs associated with an OSL. An OSL regime requires the municipality to make several assumptions relating to cost estimates and the rate of development. These assumptions may involve whether it is necessary for a municipality to borrow funds to complete OSL infrastructure projects and the estimated amount paid towards financing those costs (i.e. interest payments) until the OSL are paid to pay back the borrowing. If the municipality's assumptions in this regard prove incorrect and costs – including carrying costs – greatly exceed OSL contributions, the financial impact on the municipality may be significant. While revision to the OSL rates can ensure that changes in costs are accounted for under future collections, past collections of the OSL cannot be revisited. Further, there could also be a corresponding impact on the municipality's borrowing capacity. In contrast, if the municipality can require a developer to undertake infrastructure projects at an oversized capacity to benefit both it and adjacent future developments as opposed to an OSL, it is the developer that assumes the financial risk and the carrying costs and not the municipality.

Municipal Debt Limit

It is typical that the construction of OSL infrastructure is undertaken by the municipality. Even if a considerable amount has been collected in OSL, the municipality may still need to fund the municipal share of the costs of the OSL infrastructure. In the bridge example set out above, the municipality's share was 50% of the total construction costs, based on the benefit apportioned to existing development. The municipality would therefore have to fund 50% of the bridge construction and finance any portion of the construction costs of the other 50% share that has not yet been collected through an OSL. To do this, the municipality might have to borrow money. Timing for the construction of the bridge might therefore depend on how close the municipality is to its debt limit ratio and its ability to take on such a borrowing. If the municipality lacks sufficient debt capacity to borrow the required funds, construction of the bridge may be delayed until it has capacity to borrow or has collected sufficient OSL.

Given this, municipalities should be cautious about having too many OSL projects within their OSL regime. Municipalities may also have to decide whether to proceed with an OSL infrastructure project over other municipal capital project. This may be particularly true if many of the OSL infrastructure projects are projected to be needed within the same time period based on the OSL regime or with other municipal capital replacement. The municipality may simply not have the financial strength to afford all the projects at the same time. Assumptions as to timing of construction within the OSL regime should take into account the fiscal reality of the municipality and the municipality's ability to finance and contribute its share of the costs.

Front-Ending Developers

Determining who will undertake construction of OSL infrastructure is another consideration to developing an OSL regime. Typically, a municipality will construct OSL projects, to be paid through OSL reserves or a borrowing bylaw. However, if a municipality wishes to require a developer to construct some of the infrastructure contemplated under the OSL bylaw, a "levy credit" may need to be contemplated.

This is a situation where the project cost exceeds the developer's OSL contribution; this is often referred to as the developer front-end financing the OSL infrastructure project. While it may be possible for the municipality to structure repayment when levy payments are received from other developers, the details of such levy credits or reimbursements should be carefully drafted in a policy or development agreement. Further, such arrangements may be considered a borrowing by the municipality and may impact one's debt limit ratio. That is, the developer is paying for certain OSL infrastructure that would otherwise be funded by the municipality, with an expectation to be reimbursed or credited for any amounts beyond its OSL contribution. If there is an expectation that such amounts will also have interest charges accrued and recoverable, there is an even greater likelihood that such a front-ending situation will be viewed as a borrowing of a municipality.

Operational Costs

OSL can only be used to pay for capital costs associated with the construction of the infrastructure. Consequently, the municipality must fund the operating costs of the new infrastructure or facility from other sources. Given this, before creating an OSL, the municipality should consider whether it has the financial capacity to cover the operating costs of such any OSL infrastructure or facility. If the municipality cannot or likely will not be able to pay to operate the infrastructure or facility, there is little value to be gained in creating an OSL to fund construction of such infrastructure or facility. In the example of the community recreation facility, the development community and residents will be expecting a facility to be built and be opened for public use. Those expectations will be unsatisfied if the municipality cannot afford all aspects of the facility.

> *"...before creating an OSL, the municipality should consider whether it has the financial capacity to cover the operating costs of such any OSL infrastructure or facility."*

Financial Plans and Budgets

The 2017 amendments to the MGA impose an obligation on municipalities to have operating plans and capital plans. The plans need to be in place for the 2020 financial year (section 4, *Municipal Corporate Planning Regulation,* Alta Reg 192/2017). Municipalities with OSL regimes must incorporate the assumptions about the implementation of the OSL regime into the capital plans that are developed. It would be imprudent for the OSL regime to predict that a piece of infrastructure will be needed in 2021 but fail to identify that infrastructure project in the capital plan for that year. Similarly, municipalities who adopt an OSL regime must make appropriate changes to existing operating and capital plans so that the OSL regime and the statutory required plans are consistent. The same can be said of the municipality's annual budget. If the OSL infrastructure is to be built in a given year, such an expenditure should be identified in the municipality's annual capital budget so that the municipality has granted the proper authority for making that expenditure from the OSL fund.

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LEGAL CHALLENGES TO AN OFF-SITE LEVY BYLAW

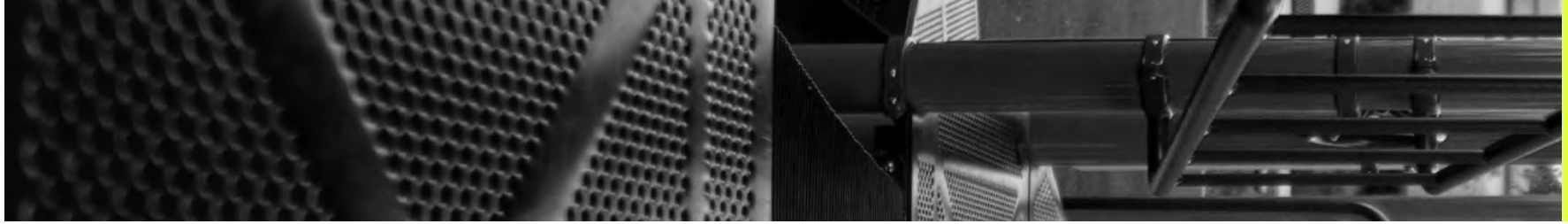
There are several ways in which an OSL bylaw can be challenged, which are dependent on the type of OSL bylaw as well as the nature of the challenge itself.

Challenge to the Alberta Court of Queen's Bench

An OSL bylaw can be challenged in the same manner as any other bylaw. A challenge to a bylaw can be sought before the Alberta Court of Queen's Bench pursuant to section 536 of the MGA.

Such a challenge can seek the opinion on the Court of Queen's Bench on whether the bylaw is a valid exercise of municipal jurisdiction. Section 536 of the MGA provides that a person may apply to the Court of Queen's Bench for a declaration that a bylaw is invalid, or an order requiring a council to amend or repeal a bylaw as a result of a vote by the electors on the amendment or repeal. In fact, some of the cases discussed in the Court Consideration appendix of this Manual were brought to the Courts relying on this provision.[9] These types of court challenges have questioned whether specific infrastructure is within the scope of section 648 and whether the municipality complied with other requirements of the legislation and the former *Principles and Criteria for Off-Site Levies Regulation*.

[9] See *Urban Development Institute v. Leduc (City)*; *Keyland Development Corp. v Cochrane (Town); Prairie Communities Development Corp. v. Okotoks (Town).*



Challenges at the Subdivision and Development Appeal Board at the Time of Imposition

Municipalities collect OSL through the imposition of conditions on development permits or conditions on subdivision approvals. Unless a development permit has been issued or a subdivision approved, a municipality cannot require landowners to pay OSL. Decisions about development permits can be appealed to the Subdivision and Development Appeal Board (SDAB). Decisions approving subdivisions can also be appealed to the SDAB or in some limited cases to the Municipal Government Board (MGB).

Developers can appeal a decision to the SDAB and argue that the condition requiring the payment of the OSL be struck from the conditions of approval on the basis that the municipality has no jurisdiction to impose the obligation to pay the OSL[10] or perhaps that the development authority or subdivision authority miscalculated the amount of the OSL. This type of challenge can be made whether the OSL relates to the infrastructure types mentioned in section 648(2) or the facility types mentioned in section 648(2.1).

Appeal to the Municipal Government Board for Section 648(2.1) Facilities Only

Section 648.1 of the MGA gives parties that would be obliged to pay an OSL for the facilities listed in section 648(2.1) (community recreation facilities, fire halls, police stations and libraries) the right to appeal provisions of the OSL bylaw imposing a levy for such facilities to the MGB. Note that OSL bylaws for the types of infrastructure listed in section 648(2) of the MGA (water, sanitary sewer, storm sewer and roads) cannot be appealed to the MGB.

The OSL bylaw for the facilities listed in section 648(2.1) may be appealed to the MGB on any of the following grounds:

- That the purpose for which the OSL is imposed is unlikely to benefit future occupants of the land who may be subject to the levy to the extent required by the regulations;
- That the principles and criteria referred to in the regulations that must be applied when passing the OSL bylaw have not been complied with;
- That the benefitting area was not determined in accordance with the relevant regulations;
- That the OSL or any portion of it is not for the payment of capital costs of the purposes set out in section 648(2.1);
- That the calculation of the OSL is inconsistent with the relevant regulations or is incorrect; or
- That an OSL for the same purpose has already been collected and imposed with respect to the proposed development or subdivision.

The MGB has the power to dismiss an appeal under section 648.1 in whole or in part or to declare the OSL bylaw (or portion thereof) invalid and require that the bylaw be repassed or amended (section 648.1(2), MGA). The *Off-Site Levies Regulation* contains further rules regarding appeals to the MGB (see sections 10-14).

Even if a "soft service" OSL bylaw has been challenged to the MGB, a municipality may continue to collect the OSL imposed by that bylaw (section 14(1), *Off-Site Levies Regulation*). However, during the appeal period, or pending the determination of the appeal, any levy received by the municipality must be held in a separate account for each type of facility and the municipality must not use the funds until the appeal has been determined (sections 14(2) and (3), *Off-Site Levies Regulation*). Presumably, if the MGB upholds the appeal and sides with the developer, the municipality would be obliged to repay the levies collected under the challenged bylaw.

[10] See *Kiewit Energy Corp v Edmonton (Subdivision and Development Appeal Board).*

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CASE STUDY #1: INTERMUNICIPAL OFF-SITE LEVY

The Town of Waterville and Dry County are neighbours. Waterville would like to source potable water from the Regional Water Commission. To do so, Waterville will need to construct a water transmission main from the City of Plenty to Waterville and construct a water reservoir within Waterville. The water transmission line will cross through Dry County. The Director of the Water Utility in Waterville reaches out to their counterpart in Dry County to see if Dry County would like to access the water transmission line. The Director of Public Works for Dry County indicates that they would be interested in drawing water from the water transmission line if the line is constructed. The CAOs of Waterville and Dry County agree to retain an engineer to design the water transmission line and to provide a model for sharing the costs of the construction of the water transmission line. Waterville and Dry County are contemplating OSL to cover the construction costs of the water transmission line.

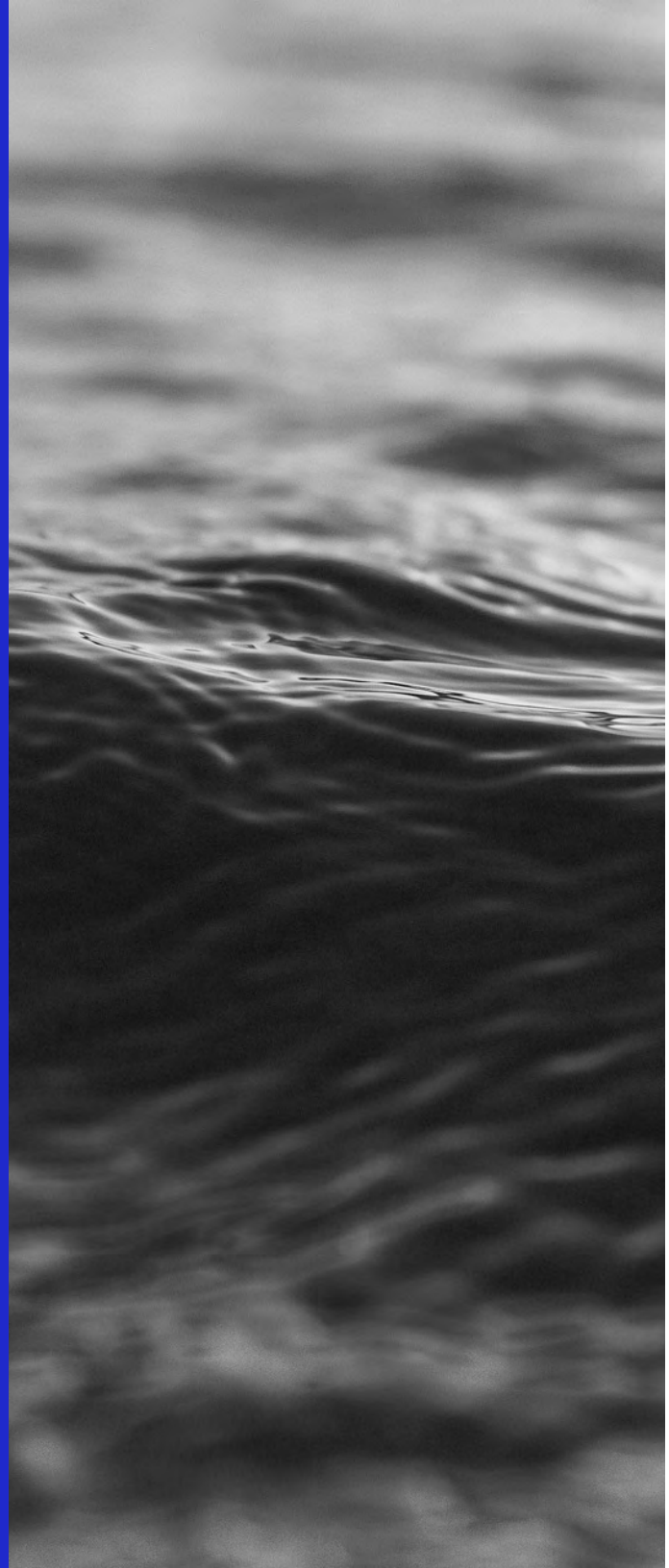
Is this a feasible option?

Section 648.01 of the MGA specifically allows two or more municipalities to create an OSL to be imposed on an intermunicipal basis. Waterville and Dry County agree to pursue the imposition of an intermunicipal OSL to cover the costs of the water transmission line. An intermunicipal OSL would require the same type of technical support, analysis and justification as would an OSL being developed to operate in only one municipality.

For the municipalities to establish an intermunicipal OSL, they will need to:

A. **Enter into an agreement that addresses cost-sharing between the two municipalities (section 648.01(2), MGA) –** This can be a stand-alone agreement or be incorporated as part of the intermunicipal collaboration framework (ICF) between Waterville and Dry County. Practically, a stand-alone agreement on the cost sharing arrangement that is referenced in, but not made part of the ICF, may be more appropriate to allow adjustments to the terms of the cost sharing arrangement independently without triggering an amendment to the ICF. The costs would be shared based on the benefit flowing to each municipality from the construction of the water transmission line. For example, if Waterville requires a three-inch line to meet its needs but a three-and-a-half inch line is necessary if the water transmission line is also going to be used to supply Dry County, Dry County should be responsible for payment of the incremental costs of constructing the larger line and a share of the engineering costs.[11]

[11] This is a very simplistic case study. The cost sharing agreement between the municipalities can be as complex or as simple as deemed necessary by the respective municipalities. The MGA does not set out a formula for the cost sharing.



B. Retain consultants to identify the benefitting areas in each municipality and the proportion of the construction costs that each benefitting area will bear – The methodology used by the municipalities in calculating the levy must be consistent for both municipalities (section 7(1), *Off-Site Levies Regulation*). This means that the OSL in both municipalities must be based on the same supporting information and on the same basin (for example, one basin model or per acre basin).

C. Consult with stakeholders in each municipality – Municipalities adopting an intermunicipal OSL have the same consultation requirements as a single municipality establishing an OSL. Such consultation can be undertaken jointly or separately, although there may be benefits to aligning consultation across both municipalities to allow for consistent engagement opportunities. The fact that the OSL will be collected across two or more municipalities does not change any other of the obligations set out in *Off-Site Levies Regulation* such as the consultation or reporting requirements for the implementation and operation of an OSL regime.

D. Draft the OSL Bylaw – There are two ways that the OSL bylaw can be implemented. The first would be to have Waterville and Dry County each pass an identical OSL bylaw, which must identify the same infrastructure, the same benefitting areas and identify the portion of benefit attributable to each participating municipality within that benefitting area. The second would be to have Waterville pass the OSL bylaw and the councils of both Waterville and Dry County pass a bylaw that approves an agreement between Waterville and Dry County allowing the OSL bylaw passed by Waterville to apply within a defined area of Dry County (section 12(a), MGA). The advantage of the first alternative would be that each municipality would be responsible for imposing and collecting its "share" of the OSL. With the second alternative, Dry County would impose a condition on development permits and subdivisions that the applicant pay the OSL to Waterville. Which alternative is chosen may be influenced by the obligations of the cost sharing agreement or ICF.

E. Pass the OSL Bylaw – Each council will need to pass the respective OSL bylaw (either their own or a bylaw approving the agreement that one municipality's OSL bylaw shall apply within the other municipality's boundaries).

F. Implement and operate the OSL regime in accordance with the principles and assumptions agreed to by the municipalities – Any changes to the OSL regime that would require that the OSL bylaw be amended would have to be implemented in the same way that the original OSL bylaw was passed and made operational in both municipalities. Waterville and Dry County will also have to decide between themselves how the OSL will be imposed and administered, including who will be collecting and holding the OSL funds and who will be responsible for undertaking construction of the OSL infrastructure.

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CASE STUDY #2: FUNDING / INDUSTRY LIMITATIONS

Riverside is a growing community that is bisected by Rambling River. Residential land within the municipal boundaries south of Rambling River is almost fully developed. Landowners, within the boundaries of Riverside, lying north of Rambling River are anxious to develop their land. The recently prepared Riverside Transportation Master Plan has identified that the one bridge that exists to cross the Rambling River has reached its traffic capacity. The Transportation Master Plan concluded that a second river crossing is required before additional development is approved on the north side of Rambling River. The opinion of the traffic engineers is that without a second river crossing there is a substantial risk of traffic grid lock. The estimated cost of a new four lane bridge (two lanes northbound and two lanes southbound along with a shared use pedestrian/bike pathway) is $75 million. The landowners on the north side of Rambling River are all relatively small developers who have made it clear to Riverside Council that individually and collectively they do not have the financial resources to build the bridge. Riverside Council is concerned that if something is not done to assist with the construction of the bridge, land development within Riverside will grind to a halt and a neighbouring municipality will reap the benefit of residential growth.

What can Riverside Council do?

The dilemma faced by Riverside Council is perhaps more extreme than the dilemmas faced by other councils. Increasingly, many municipalities are met with the challenge to help fund needed infrastructure because of the limited resources of small developers. There are few developers who can afford to front end the costs of a $75 million project in order to bring a relatively small number of lots to the marketplace. Even communities with developers that have more financial strength may face circumstances where new development simply cannot afford to pay for necessary large infrastructure projects.

The establishment of an OSL for the needed infrastructure may be an option to help eliminate the bottleneck. Further, developers who benefit from the infrastructure can be made to pay for the benefit that is attributable to their land only, as opposed to be burdened with the entire financial costs of such a significant project. However, such an option will also require the municipality to fund the needed infrastructure without exceeding its debt limit ratio.

In the case of Riverside, Council decides to consider the establishment of an OSL to cover the costs of constructing the needed bridge. An OSL is an option for Riverside as an OSL can be used for the construction of new roads. A road under the MGA “includes a bridge forming part of a public road” (section 1(z), MGA). The challenge for Riverside will be justifying any assumption that forms part of the OSL regime regarding the extent to which the bridge benefits the existing community, and being able to finance such a large project and to provide the proportionate share of the bridge costs to the existing community. It is clear from case law that the full costs of a bridge cannot be attributed to the development on only

one side of the river (see *Keyland Developments Corp. v Cochrane (Town)*). The OSL must at a minimum include or reference a description of each of the benefitting areas and how those areas were determined, along with the supporting studies, technical data and analysis.

Riverside must have a justifiable and reasonable method for establishing the split between the benefit to the existing community and any new development. One option is to attribute the costs of the bridge across the entire municipality. That would leave the municipality responsible for the proportionate share of the costs of the bridge for the existing developed area of the municipality. This may not be reasonable if the geography of the municipality suggests that one part of the municipality is more likely to use the new bridge and another part is more likely to continue to use the old bridge (perhaps traffic patterns can also be split on an east/west basis with the east being the side of the new bridge and the west being the side of the old bridge).

By Riverside assuming responsibility for funding and constructing the new bridge, the municipality can eliminate the bottleneck on development and make it possible for even the smaller developers to proceed to develop their land without having to deal with the burden of the cost of the bridge. Without municipal intervention, the rate of development would have slowed and perhaps stopped altogether. The OSL allows Riverside to place only the proportionate share of the burden for the new bridge on the undeveloped lands, which may help encourage its development after the bridge is constructed. While section 655 of the MGA would allow Riverside to simply require a developer seeking to subdivide land on the north side of Rambling River to fully finance and build the bridge, it is unlikely that any developer would be able to proceed with such construction given such a heavy financial burden. Even if Riverside committed, as part of its agreement with the constructing developer to have other developers contribute proportionally to the costs of the bridge as other development occurs (relying on section 651 of the MGA), such an approach would still leave the developer who builds the bridge having to bear both the initial contribution and the ongoing carrying costs. Given that full development of the north side of the municipality might take many years, the developer could be waiting a long time for recovery of the excess costs that the developer has incurred and continues to finance.

OSL can be useful in stimulating development, particularly if there are expensive pieces of infrastructure that are needed before development can occur. OSL, although complex to establish and administer, can make sharing the burden of the costs of this type of infrastructure a reality.

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CASE STUDY #3: CHALLENGES TO AND APPEALS OF AN OFF-SITE LEVY

The Municipality of Albertaville has been working on implementing an OSL to help fund the construction of an expansion to its community recreation facility. The current community recreation facility, known as the Plex, contains one hockey/skating arena, four sheets of curling ice, change rooms and a restaurant/lounge space. The proposal is to add an additional hockey/skating arena, a field house, a running track, and a swimming pool. The OSL Bylaw is given third reading, signed and passed on September 10, 2018.

On September 13, 2018, the Subdivision Authority for Albertaville approves a subdivision of land and imposes, as a condition of that subdivision, that the applicant, ABC Development, enter into a development agreement with Albertaville to construct municipal infrastructure required to service the proposed subdivision and to pay the OSL for the Plex expansion. The principal of ABC Development strongly objects to having to pay the OSL.

How can ABC Development challenge or appeal the OSL Bylaw?

ABC Development has a number of options to challenge the imposition of the OSL. In an effort to cover all the bases, ABC Development:

A. BRINGS AN APPLICATION FOR JUDICIAL REVIEW OF THE OSL BYLAW TO THE COURT OF QUEEN'S BENCH;
B. FILES AN APPEAL OF THE SUBDIVISION APPROVAL TO THE SDAB; AND
C. FILES AN APPEAL OF THE OSL BYLAW TO THE MGB.

Note that the MGA does not restrict the number of appeal avenues that ABC Development can pursue. Albertaville can thus find itself dealing with three separate appeals in three distinct venues.

A. Application for Judicial Review

Any bylaw passed by a municipality can be the subject of an application for review. An application challenging a bylaw can be filed pursuant to section 536 of the MGA with the Court of Queen's Bench of Alberta. In most cases, the Application for Judicial Review must be filed within six months of the passage of the bylaw.[12] To date, the challenges to OSL bylaws that have been considered by the courts have usually been brought by way of an Application for Judicial Review.

In this case study, ABC Development will need to set out in the documents that commence the application the reasons why they believe the Council of Albertaville erred in exercising its jurisdiction to pass the OSL bylaw. Such reasons may could include that:

- the municipality failed to comply with the requirements of section 648(6) of the MGA that requires the proposed bylaw be advertised in accordance with section 606 of the MGA;
- the municipality failed to undertake consultation with stakeholders as required by section 8 of the *Off-Site Levies Regulation*;
- the municipality failed to comply with the requirements of section 6 of the *Off-Site Levies Regulation* by failing to consider relevant statutory plans, policies or agreements; and
- the municipality failed to comply with the requirement of section 4 of the *Off-Site Levies Regulation* in that the methodology for calculation of the levy is not clear or reasonable.

Applications for judicial review require the municipality to file a Record with the Court. The Record is a copy of all documentation reviewed by council when council considered the bylaw being challenged. The Record would include all meeting minutes, the portion of any meeting agenda dealing with the bylaw and any reports referenced in the agenda report in support of the bylaw and its underlying assumptions. It should be noted that the filing of an Application for Judicial Review challenges the validity of the bylaw but does not suspend the operation of the bylaw. This means that throughout the time leading up to the court hearing, the municipality can continue to impose a condition requiring developers to pay the OSL as a condition of subdivision approvals or as a condition of development permit approvals.

An application for judicial review can take six to twelve months or longer to be heard by the Court of Queen's Bench. Typically, the only entities involved would be the applicant and the municipality. It is possible for other parties to apply to the Court to intervene in the appeal. Intervenors are parties who believe they can bring an important perspective to the Court that will assist the Court in making its decision. It is up to the Court to decide if someone will be granted intervenor status.

A judicial review application will be made before one Justice of the Court. The case is presented to the Court by way of written and verbal argument. Witnesses are not called to testify, although affidavits from individuals that were part of the bylaw process could be filed with the Court in advance. For example, the municipality might have the individual who arranged for the bylaw to be advertised swear an affidavit to be put in as evidence before the Court to refute the allegation that the bylaw was not properly advertised. After hearing the arguments of the applicant (i.e. ABC Development), the municipality (Albertaville) and any intervenors, the Justice will decide if the OSL bylaw is valid. There is no time limit on how long the Justice can take in making their decision on the validity of the bylaw. If the Justice decides that the bylaw is not valid, the Justice will identify what errors the municipality may have made and the decision will "quash" the bylaw.

If ABC Development is successful with its Application for Judicial Review, Albertaville can re-draft the OSL bylaw, correcting the deficiencies identified by the Court. If the bylaw is quashed, any decisions or conditions relying on the bylaw, including the condition that ABC Development pay the OSL, become invalid. The validity of the condition was dependent upon the validity of the bylaw. If Albertaville has collected any payments of the OSL from other developers, it will be obligated to repay the amounts paid under the invalid bylaw.

[12] If the application for judicial review alleges the municipality had no jurisdiction to pass the bylaw, there is likely no time limit on commencing an Application for Judicial Review. For example, if the municipality passed a bylaw purporting to impose an OSL to pay for a new municipal office that bylaw could likely be challenged at any time because the argument would be that Section 648 of the MGA does not give the municipality jurisdiction to impose an OSL for that purpose.

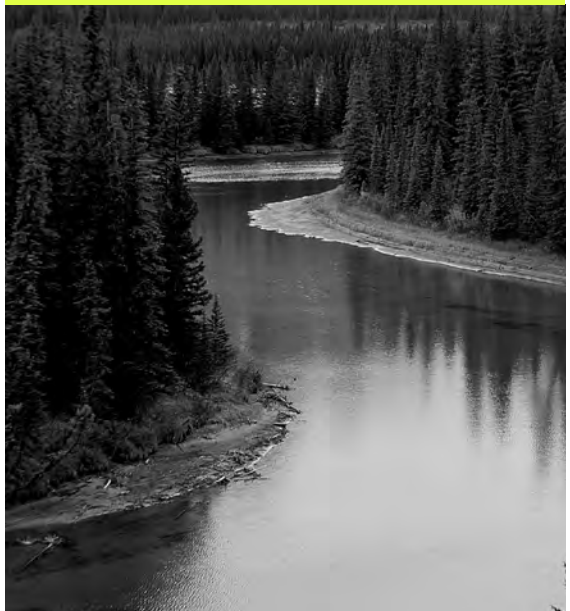
B. Appeal to the Subdivision and Development Appeal Board

ABC Development may file an appeal to object to the imposition of the condition requiring the payment of the OSL. Any applicant for subdivision or development can appeal the imposition of a condition, including a condition requiring that the applicant pay an OSL. This type of an appeal is made to the SDAB and may only be filed within 14 days after receipt of the written decision of the Subdivision Authority (section 678(2), MGA) in the case of a subdivision approval, or within 21 days after the decision by the Development Authority on the development permit is given to the applicant to appeal (section 686(1), MGA) in the case of the issuance of a development permit. The SDAB will review the subdivision or development permit decision and can make or substitute its own decision for the decision of the Subdivision Authority or the Development Authority.

The SDAB must commence its hearing on the appeal within 30 days after receipt of the notice of appeal filed by ABC Development. The SDAB can agree with ABC Development that the condition should not be imposed and delete the condition from the subdivision approval (or the development permit if that be the case). What the SDAB cannot do is determine whether the OSL bylaw is valid. The SDAB must treat the OSL bylaw as valid. In the ABC Development situation, the questions before the SDAB to decide are therefore limited to:

- Whether the land that is the subject of the subdivision was ever required to pay a charge or fee that could be deemed to be the same as an OSL for community recreation facilities; and
- Whether the amount of the OSL to be paid by ABC Development was calculated correctly in accordance with the OSL bylaw.

The Court of Appeal decision in *Kiewit Energy Canada Corp v. Edmonton (Subdivision and Development Appeal Board)* made it clear that the SDAB can review charges that were previously paid by the landowner to the municipality to determine if those charges were OSL. The new section 648(8) of the MGA means any charges the municipality may have imposed for recreation facilities can be "deemed" to be charges imposed pursuant to section 648 and be deemed to be validly imposed and collected levies. Section 648(8) of the MGA was not in place when *Kiewit* was decided so in that instance the Court of Appeal held the SDAB had erred in not concluding the charge previously paid in *Kiewit* was an OSL. With section 648(8), the SDAB would only need to find that Albertaville had previously collected a fee or charge that was for the same purpose as the community recreation facility OSL. In the event that the SDAB finds that such a fee or charge was imposed, the SDAB would be bound to delete the condition imposing the requirement to pay the OSL because a municipality can only collect an OSL once for each of the authorized purposes for a given a parcel of land.



Section 648(8) applies to all infrastructure and facility types described in section 648(2) and section 648(2.1) of the MGA, and is not limited to previous charges for community recreation facilities.

Assuming that the OSL bylaw is clear, it should be a simple matter for the SDAB to determine if the amount of the OSL being imposed was correctly calculated.

If the SDAB determines that the condition imposing the requirement to pay the OSL should be deleted from the subdivision approval, then ABC Development can proceed with its subdivision without being obligated to pay the OSL. The same logic would apply in the case of an appeal of a condition of a development permit. The ability of Albertaville to impose an obligation to pay the OSL on any other benefitting lands identified under the OSL bylaw is not impacted by the SDAB decision.

In light of a decision by the SDAB to delete the condition to pay the OSL, it would be prudent for Albertaville to re-evaluate the impact any previously collected fees or charges might have on the underlying assumptions of its OSL regime.

If there is an Application for Judicial Review at the same time as an appeal to the SDAB, it would not be unusual for either ABC Development or Albertaville to ask the SDAB to adjourn its proceedings until after the judicial review has been concluded. Assuming such a request is made, the SDAB would convene its hearing and deal with the request for the adjournment and thereby satisfy the statutory requirement that the hearing on an appeal be commenced within 30 days. If the Court concludes the OSL bylaw is invalid, then ABC Development would likely abandon its appeal to the SDAB.

C. Appeal to the Municipal Government Board

Section 648.1 of the MGA creates the opportunity for an appeal of an OSL bylaw to the MGB. Only an OSL bylaw for the facilities listed under section 648(2.1) of the MGA (community recreation facilities, fire hall facilities, police station facilities and libraries) can be appealed to the MGB.

Section 648.1(1) of the MGA sets out the following as the grounds for an appeal to the MGB:

(i) that the purpose for which the off-site levy is to be imposed is unlikely to benefit future occupants of the land who may be subject to the off-site levy to the extent required by the regulations;

(ii) that the principles and criteria referred to in regulations made under section 694(4)(b) that must be applied by a municipality when passing the off-site levy bylaw have not been complied with;

(iii) that the determination of the benefitting area was not determined in accordance with regulations made under section 694(4)(c);

(iv) that the off-site levy or any portion of it is not for the payment of the capital costs of the purposes set out in section 648(2.1);

(v) that the calculation of the off-site levy is inconsistent with regulations made under section 694(4) or is incorrect;

(vi) that an off-site levy for the same purpose has already been imposed and collected with respect to the proposed development or subdivision.

Section 10 of the *Off-Site Levies Regulation* provides that "any person who is directly affected by a bylaw imposing a levy for the purpose referred to in section 648(2.1) of the *Municipal Government Act* may submit a notice of appeal to the Municipal Government Board." How broadly "person directly affected" will be defined is unknown at this time. In this case, there would be little doubt that ABC Development would be a person directly affected because their application for subdivision has been approved subject to a condition requiring them to pay an OSL for community recreation facilities.[13]

> *"The Court tends to be reluctant to interfere with the legislative power granted to a municipal council. In giving the MGB the ability to direct a municipal council, the MGA allows the MGB to involve itself in the political process."*

Whether another developer, who might have to pay the OSL for the community recreation facility but against whom the condition has not yet been imposed, is directly affected by an OSL and has standing to appeal will have to be determined by the MGB when/if the circumstance arises.

The time within which an appeal can be filed with the MGB is very short. According to section 11 of the *Off-Site Levies Regulation,* an appeal must be submitted to the MGB "within 30 days of the day on which the bylaw imposing the levy was passed." Section 12 of the *Off-Site Levies Regulation* sets out what must be included in the notice of appeal. The notice of appeal must, among other things,

- explain how the appellant is directly affected by the bylaw (section 12(1)(b), *Off-Site Levies Regulation*);
- set out the ground on which the appeal is made; and
- contain a description of the relief requested.

In terms of other procedures to be followed, as this is a new category of appeal, the procedure that will be followed by the MGB will likely be similar to the procedure used by the MGB with respect to subdivision appeals that are within the jurisdiction of the MGB. In that regard, the MGB's website refers readers to the MGB Residual Procedure Rules (For Matters Under Subsections 488(1)(D, E, E.1, G, H, AND K)) for OSL appeals under section 648(2.1), suggesting that it is these Residual Rules that will apply.[14]

What remedies could ABC Development request? Based on section 648.1(2) of the MGA, ABC Development can request that the OSL bylaw or a portion of the bylaw be declared invalid. The MGB can, in declaring the bylaw invalid "provide that the bylaw may be repassed or amended in a manner determined by the Board" (section 648.1(2)(b), MGA). This elevates the MGB to the same position as the Court of Queen's Bench with respect to the question on whether an OSL bylaw is invalid. Typically, if the Court of Queen's Bench quashes a bylaw, it does not direct how the municipality must amend the bylaw. The Court tends to be reluctant to interfere with the legislative power granted to a municipal council. In giving the MGB the ability to direct a municipal

[13] The person directly affected could in some circumstances be an applicant for a development permit when a condition imposing an obligation to pay an OSL has been made part of the development permit. In that limited context, the MGB would deal with the appeal even though the MGB does not have jurisdiction to otherwise hear appeals of a development approval.

[14] See http://www.municipalaffairs.alberta.ca/off-site-levy which refers to the MGB Residual Procedure Rules.

council, the MGA allows the MGB to involve itself in the political process. The type or extent of directions that the MGB may give municipalities will be of great interest to follow.

Another interesting complication to the challenge of an OSL bylaw is how the MGB appeal and the Application for Judicial Review will work together. It would be nonsensical if both appeals proceeded at the same time with the potential that the Court could uphold the OSL bylaw and the MGB conclude that the same OSL bylaw is invalid. Were that to happen, the municipality would be in the untenable position of not knowing which decision takes priority over the other. Even if the appeal to the MGB and the Application for Judicial Review proceed sequentially, the municipality may still have to defend its bylaw before both the MGB and the Court. The developer that is unsuccessful with its first appeal/application, whether that first appeal/application is to the MGB or the Court, could proceed with an appeal/application to the second body (MGB or Court). Effectively this gives those challenging an OSL bylaw for section 648(2.1) facilities two opportunities to challenge the OSL bylaw. Given the short time-frame within which an appeal to the MGB can be made, the risk of conflicting Court and MGB decisions is limited to the period immediately following the passage of the OSL bylaw. If a section 648(2.1) OSL bylaw is not appealed to the MGB within 30 days of its passage, a municipality will not have to worry about conflicting MGB and Court decisions.

Finally, it should be noted that the MGB can award costs against one of the parties, which would also be the case with the Application for Judicial Review. The SDAB, however, cannot award costs. Further, the MGB can revisit its decision. The SDAB, however, cannot revisit its decision and a Court would be unlikely to revisit its decisions. All three decisions, from the Court, SDAB and MGB, can in turn be appealed to the Court of Appeal. Appeals from the SDAB and the MGB to the Court of Appeal would be limited to questions of law or jurisdiction in accordance with section 688 of the *MGA*. An appeal of a decision on an Application for Judicial Review would need to be brought in accordance with the applicable Rules of Court.

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APPENDIX A:
EXCERPT OF RELEVANT PROVISIONS OF THE MUNICIPAL GOVERNMENT ACT

RSA 2000, CHAPTER M-26

Application to the Court of Queen's Bench

536(1) A person may apply to the Court of Queen's Bench for

(a) a declaration that a bylaw or resolution is invalid, or

(b) an order requiring a council to amend or repeal a bylaw as a result of a vote by the electors on the amendment or repeal.

(2) A judge may require an applicant to provide security for costs in an amount and manner established by the judge.

Requirements for advertising

606(1) The requirements of this section apply when this or another enactment requires a bylaw, resolution, meeting, public hearing or something else to be advertised by a municipality, unless this or another enactment specifies otherwise.

(2) Notice of the bylaw, resolution, meeting, public hearing or other thing must be

(a) published at least once a week for 2 consecutive weeks in at least one newspaper or other publication circulating in the area to which the proposed bylaw, resolution or other thing relates, or in which the meeting or hearing is to be held,

(b) mailed or delivered to every residence in the area to which the proposed bylaw, resolution or other thing relates, or in which the meeting or hearing is to be held, or

(c) given by a method provided for in a bylaw under section 606.1.

(3) A notice of a proposed bylaw must be advertised under subsection (2) before second reading.

(4) A notice of a proposed resolution must be advertised under subsection (2) before it is voted on by council.

(5) A notice of a meeting, public hearing or other thing must be advertised under subsection (2) at least 5 days before the meeting, public hearing or thing occurs.

(6) A notice must contain

(a) a statement of the general purpose of the proposed bylaw, resolution, meeting, public hearing or other thing,

(b) the address where a copy of the proposed bylaw, resolution or other thing, and any document relating to it or to the meeting or public hearing may be inspected,

(c) in the case of a bylaw or resolution, an outline of the procedure to be followed by anyone wishing to file a petition in respect of it, and

(d) in the case of a meeting or public hearing, the date, time and place where it will be held.

(7) A certificate of a designated officer certifying that something has been advertised in accordance with this section is proof, in the absence of evidence to the contrary, of the matters set out in the certificate.

(8) The certificate is admissible in evidence without proof of the appointment or signature of the person who signed the certificate.

Advertisement bylaw

606.1(1) A council may by bylaw provide for one or more methods, which may include electronic means, for advertising proposed bylaws, resolutions, meetings, public hearings and other things referred to in section 606.

(2) Before making a bylaw under subsection (1), council must be satisfied that the method the bylaw would provide for is likely to bring proposed bylaws, resolutions, meetings, public hearings and other things advertised by that method to the attention of substantially all residents in the area to which the bylaw, resolution or other thing relates or in which the meeting or hearing is to be held.

(3) Council must conduct a public hearing before making a bylaw under subsection (1).

(4) A notice of a bylaw proposed to be made under subsection (1) must be advertised in a manner described in section 606(2)(a) or (b) or by a method provided for in a bylaw made under this section.

(5) A notice of a bylaw proposed to be made under subsection (1) must contain

(a) a statement of the general purpose of the proposed bylaw,

(b) the address or website where a copy of the proposed bylaw may be examined, and

(c) an outline of the procedure to be followed by anyone wishing to file a petition in respect of the proposed bylaw.

(6) A bylaw passed under this section must be made available for public inspection.

Definitions

616 In this Part,

...

(a.11) "community recreation facilities" means indoor municipal facilities used primarily by members of the public to participate in recreational activities conducted at the facilities;

...

(h) "highway" means a provincial highway under the Highways Development and Protection Act;

...

(aa) "road" means road as defined in section 1(1), but does not include highway as defined in this Part;

Listing and publishing of policies

638.2(1) Every municipality must compile and keep updated a list of any policies that may be considered in making decisions under this Part

(a) that have been approved by council by resolution or bylaw, or

(b) that have been made by a body or person to whom powers, duties or functions are delegated under section 203 or 209,

and that do not form part of a bylaw made under this Part.

(2) The municipality must publish the following on the municipality's website:

(a) the list of the policies referred to in subsection (1);

(b) the policies described in subsection (1);

(c) a summary of the policies described in subsection (1) and of how they relate to each other and how they relate to any statutory plans and bylaws passed in accordance with this Part;

(d) any documents incorporated by reference in any bylaws passed in accordance with this Part.

(3) A development authority, subdivision authority, subdivision and development appeal board, the Municipal Government Board or a court shall not have regard to any policy approved by a council or by a person or body referred to in subsection (1)(b) unless the policy is set out in the list prepared and maintained under subsection (1) and published in accordance with subsection (2).

(4) This section applies on and after January 1, 2019.

Off-site levy

648(1) For the purposes referred to in subsections (2) and (2.1), a council may by bylaw

(a) provide for the imposition and payment of a levy, to be known as an "off-site levy", in respect of land that is to be developed or subdivided, and

(b) authorize an agreement to be entered into in respect of the payment of the levy.

(1.1) A bylaw may not impose an off-site levy on land owned by a school board that is to be developed for a school building project within the meaning of the School Act.

(2) An off-site levy may be used only to pay for all or part of the capital cost of any or all of the following:

(a) new or expanded facilities for the storage, transmission, treatment or supplying of water;

(b) new or expanded facilities for the treatment, movement or disposal of sanitary sewage;

(c) new or expanded storm sewer drainage facilities;

(c.1) new or expanded roads required for or impacted by a subdivision or development;

(c.2) subject to the regulations, new or expanded transportation infrastructure required to connect, or to improve the connection of, municipal roads to provincial highways resulting from a subdivision or development;

(d) land required for or in connection with any facilities described in clauses (a) to (c.2).

(2.1) In addition to the capital cost of facilities described in subsection (2), an off-site levy may be used to pay for all or part of the capital cost for any of the following purposes, including the cost of any related appurtenances and any land required for or in connection with the purpose:

(a) new or expanded community recreation facilities;

(b) new or expanded fire hall facilities;

(c) new or expanded police station facilities;

(d) new or expanded libraries.

(2.2) Subject to an appeal under section 648.1, an off-site levy may be imposed and collected for a purpose referred to in subsection (2.1) only if no off-site levy has been previously imposed under subsection (1) for the same purpose with respect to the land on which the off-site levy is being imposed.

(3) On September 1, 1995 an off-site levy under the former Act continues as an off-site levy under this Part.

(4) An off-site levy imposed under this section or the former Act may be collected once for each purpose described in subsection (2) or (2.1), in respect of land that is the subject of a development or subdivision, if

(a) the purpose of the off-site levy is authorized in the bylaw referred to in subsection (1), and

(b) the collection of the off-site levy for the purpose authorized in the bylaw is specified in the agreement referred to in subsection (1).

(4.1) Nothing in subsection (4) prohibits the collection of an off-site levy by instalments or otherwise over time.

(5) An off-site levy collected under this section, and any interest earned from the investment of the levy,

(a) must be accounted for separately from other levies collected under this section, and

(b) must be used only for the specific purpose described in subsection (2)(a) to (c.2) or (2.1)(a) to (d) for which it is collected or for the land required for or in connection with that purpose.

(6) A bylaw under subsection (1) must be advertised in accordance with section 606 unless

(a) the bylaw is passed before January 1, 2004, or

(b) the bylaw is passed on or after January 1, 2004 but at least one reading was given to the proposed bylaw before that date.

(7) Where after March 1, 1978 and before January 1, 2004 a fee or other charge was imposed on a developer by a municipality pursuant to a development agreement entered into by the developer and the municipality for the purpose described in subsection (2)(c.1), that fee or charge is deemed

(a) to have been imposed pursuant to a bylaw under this section, and

(b) to have been validly imposed and collected

effective from the date the fee or charge was imposed.

(8) If, before the coming into force of this subsection, a fee or other charge was imposed on a developer by a municipality pursuant to a development agreement entered into by the developer and the municipality for one or more purposes described in subsection (2) or (2.1), that fee or charge is deemed

(a) to have been imposed pursuant to a bylaw under this section, and

(b) to have been validly imposed and collected effective from the date the fee or charge was imposed.

(9) If, before the coming into force of this subsection, a bylaw was made that purported to impose a fee or other charge on a developer for a purpose described in subsection (2) or (2.1),

(a) that bylaw is deemed to have been valid and enforceable to the extent that it imposed a fee or charge for a purpose described in subsection (2) or (2.1) before the coming into force of this subsection, and

(b) any fee or charge imposed pursuant to the bylaw before the coming into force of this subsection is deemed to have been validly imposed and collected effective from the date the fee or charge was imposed.

Intermunicipal off-site levy

648.01(1) For the purpose of section 648(1) and subject to the requirements of section 12, 2 or more municipalities may provide for an off-site levy to be imposed on an intermunicipal basis.

(2) Where 2 or more municipalities provide for an off-site levy to be imposed on an intermunicipal basis, the municipalities shall enter into such agreements as are necessary to attain the purposes described in section 648(2) or (2.1) that are to be funded by an off-site levy under section 648(1), by a framework made under Part 17.2 or by any other agreement.

(3) For greater clarity, where 2 or more municipalities provide for an off-site levy to be imposed on an intermunicipal basis under subsection (1) for the purposes described in section 648(2.1), the benefitting area determined in accordance with the regulations may comprise any combination of land in the participating municipalities.

(4) If a bylaw providing for an off-site levy to be imposed on an intermunicipal basis is appealed under section 648.1, the corresponding bylaws of the other participating municipalities are deemed to also be appealed.

Appeal of off-site levy

648.1(1) Any person may, subject to and in accordance with the regulations, appeal any of the provisions of an off-site levy bylaw relating to an off-site levy for a purpose referred to in section 648(2.1) to the Municipal Government Board on any of the following grounds:

(a) that the purpose for which the off-site levy is to be imposed is unlikely to benefit future occupants of the land who may be subject to the off-site levy to the extent required by the regulations;

(b) that the principles and criteria referred to in regulations made under section 694(4)(b) that must be applied by a municipality when passing the off-site levy bylaw have not been complied with;

(c) that the determination of the benefitting area was not determined in accordance with regulations made under section 694(4)(c);

(d) that the off-site levy or any portion of it is not for the payment of the capital costs of the purposes set out in section 648(2.1);

(e) that the calculation of the off-site levy is inconsistent with regulations made under section 694(4) or is incorrect;

(f) that an off-site levy for the same purpose has already been imposed and collected with respect to the proposed development or subdivision.

(2) After hearing the appeal, the Municipal Government Board may

(a) dismiss the appeal in whole or in part, or

(b) declare the off-site levy bylaw or a portion of the bylaw to be invalid and provide that the bylaw may be repassed or amended in a manner determined by the Board.

(3) Where an off-site levy bylaw amends the amount of an off-site levy referred to in subsection (1), an appeal under this section may only be brought with respect to that amendment.

Levy bylaws

649 A bylaw that authorizes a redevelopment levy or an off-site levy must set out the purpose of each levy and indicate how the amount of the levy was determined.

Condition of issuing development permit

650(1) A council may in a land use bylaw require that, as a condition of a development permit's being issued, the applicant enter into an agreement with the municipality to do any or all of the following:

(a) to construct or pay for the construction of a road required to give access to the development;

(b) to construct or pay for the construction of

(i) a pedestrian walkway system to serve the development, or

(ii) pedestrian walkways to connect the pedestrian walkway system serving the development with a pedestrian walkway system that serves or is proposed to serve an adjacent development,

or both;

(c) to install or pay for the installation of a public utility described in section 616(v)(i) to (ix) that is necessary to serve the development, whether or not the public utility is, or will be, located on the land that is the subject of the development;

(d) to construct or pay for the construction of

(i) offstreet or other parking facilities, and

(ii) loading and unloading facilities;

(e) to pay an off-site levy or redevelopment levy imposed by bylaw;

(f) to give security to ensure that the terms of the agreement under this section are carried out.

(2) A municipality may register a caveat under the *Land Titles Act* in respect of an agreement under this section against the certificate of title for the land that is the subject of the development.

(3) If a municipality registers a caveat under subsection (2), the municipality must discharge the caveat when the agreement has been complied with.

(4) Where, prior to the coming into force of this subsection, an agreement referred to in subsection (1) required the applicant to install a public utility or pay an amount for a public utility referred to in subsection (1)(c), that requirement is deemed to have been validly imposed, whether or not the public utility was located on the land that was the subject of the development.

Agreements re oversize improvements

651(1) An agreement referred to in section 648, 650 or 655 may require the applicant for a development permit or subdivision approval

(a) to pay for all or a portion of the cost of an improvement constructed or paid for in whole or in part by a municipality at any time prior to the date of approval of the development permit or subdivision approval application, or

(b) to construct or pay for all or a portion of an improvement with an excess capacity.

(2) An agreement referred to in subsection (1)(b) or (3) that obliges an applicant for a development permit or subdivision approval to construct or pay for an improvement with an excess capacity may also provide for the reimbursement of the cost incurred or payment made in respect of the excess capacity together with interest calculated at the rate fixed pursuant to subsection (4) on the amount of the cost until the land that benefits from the excess capacity is developed or subdivided.

(3) If a municipality has at any time, either before or after this section comes into force, or before or after section 77.1 of the Planning Act was deemed to come into force, entered into an agreement providing for reimbursement of payments made or costs incurred in respect of the excess capacity of an improvement by an applicant for a development permit or subdivision approval, the municipality must, when other land that benefits from the improvement is developed or subdivided, enter into an agreement with the applicant for a development permit or subdivision approval for the other land, and that agreement may require the applicant to pay an amount in respect of the improvement, as determined by the municipality, which may be in excess of the cost of the improvement required for the proposed development or subdivision.

(4) An agreement made in accordance with subsection (1)(a) or (3) may require that, in addition to paying for all or part of the cost of an improvement, an applicant for a development permit or subdivision approval must pay reasonable interest on the cost in an amount to be fixed by the municipality.

(5) In this section,

(a) "excess capacity" means any capacity in excess of that required for a proposed development or subdivision;

(b) "improvement" means

(i) a facility or land referred to in section 648(2), or

(ii) a road, pedestrian walkway, utility or facility referred to in section 650(1) or 655(1)(b),

(c) whether or not located on the land to be developed or subdivided and whether or not constructed at the time of development or subdivision approval.

Conditions of subdivision approval

655(1) A subdivision authority may impose the following conditions or any other conditions permitted to be imposed by the subdivision and development regulations on a subdivision approval issued by it:

(a) any conditions to ensure that this Part and the statutory plans and land use bylaws and the regulations under this Part, and any applicable ALSA regional plan, affecting the land proposed to be subdivided are complied with;

(b) a condition that the applicant enter into an agreement with the municipality to do any or all of the following:

(i) to construct or pay for the construction of a road required to give access to the subdivision;

(ii) to construct or pay for the construction of

(A) a pedestrian walkway system to serve the subdivision, or

(B) pedestrian walkways to connect the pedestrian walkway system serving the subdivision with a pedestrian walkway system that serves or is proposed to serve an adjacent subdivision,

or both;

(iii) to install or pay for the installation of a public utility described in section 616(v)(i) to (ix) that is necessary to serve the subdivision, whether or not the public utility is, or will be, located on the land that is the subject of the subdivision approval;

(iv) to construct or pay for the construction of.

(A) offstreet or other parking facilities, and

(B) loading and unloading facilities;

(v) to pay an off-site levy or redevelopment levy imposed by bylaw;

(vi) to give security to ensure that the terms of the agreement under this section are carried out.

(2) A municipality may register a caveat under the Land Titles Act in respect of an agreement under subsection (1)(b) against the certificate of title for the parcel of land that is the subject of the subdivision.

(3) If a municipality registers a caveat under subsection (2), the municipality must discharge the caveat when the agreement has been complied with.

(4) Where a condition on a subdivision approval has, prior to the coming into force of this subsection, required the applicant to install a public utility or pay an amount for a public utility referred to in subsection (1)(b)(iii), that condition is deemed to have been validly imposed, whether or not the public utility was located on the land that was the subject of the subdivision approval.

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APPENDIX B:
OFF-SITE LEVIES REGULATION

ALBERTA REGULATION 187/2017

Definitions

1 In this Regulation,

(a) "facilities" includes the facility, the associated infrastructure, the land necessary for the facility and related appurtenances referred to in section 648(2.1) of the Act;

(b) "infrastructure" means the infrastructure, facilities and land required for the purposes referred to in section 648(2)(a) to (c.1) of the Act;

(c) "levy" means an off-site levy referred to in section 648(1) of the Act;

(d) "stakeholder" means any person that will be required to pay the levy when the bylaw is passed, or any other person the municipality considers is affected;

(e) "transportation infrastructure" means the infrastructure and land referred to in section 648(2)(c.2) required to connect or improve the connection of a municipal road to a provincial highway.

Application generally

2 A municipality, in establishing a levy

(a) for the purposes of section 648(2)(a) to (c.1) of the Act and any land required for or in connection with these purposes, must apply the principles and criteria specified in sections 3, 4 and 5,

(a.1) for the purposes of section 648(2)(c.2) of the Act and any land required for or in connection with these purposes, must apply the principles and criteria specified in sections 3, 3.1, 4, 5 and 5.1,

(b) for the purposes of section 648(2.1) of the Act, must apply the principles and criteria specified in sections 3, 4, 5 and 6, and

(c) for the purposes of section 648.01 of the Act, must apply the principles and criteria specified in sections 3, 4, 5 and 7.

General principles

3(1) Subject to section 3.1, the municipality is responsible for addressing and defining existing and future infrastructure, transportation infrastructure and facility requirements.

(2) The municipality must consult in good faith with stakeholders in accordance with section 8.

(3) All beneficiaries of development are to be given the opportunity to participate in the cost of providing and installing infrastructure, transportation infrastructure and facilities in the municipality on an equitable basis related to the degree of benefit.

(4) Where necessary and practicable, the municipality is to coordinate infrastructure, transportation infrastructure and facilities provisions with neighbouring municipalities.

(5) Notwithstanding anything to the contrary in this Regulation, the levy is of no effect to the extent it directs the Government of Alberta to expend funds, to commit to funding transportation infrastructure or arrangements to undertake particular actions or to adopt particular policies or programs.

(6) A municipality cannot compel an applicant for a development permit or subdivision approval to fund the cost of the construction of infrastructure, transportation infrastructure or facilities to be funded by a levy beyond the applicant's proportional benefit.

(7) A municipality and an applicant for a development permit or subdivision approval may enter into an agreement whereby the applicant agrees to fund the entire cost of the construction of infrastructure, transportation infrastructure or facilities to be funded by a levy, subject to terms and conditions agreed to by both parties.

(8) An agreement made under subsection (7) may include provisions for the reimbursement of the cost incurred or payment made in excess of the applicant's proportional benefit of the infrastructure, transportation infrastructure or facilities together with interest calculated at a rate fixed by the municipality for the amount of the cost of the infrastructure,

transportation infrastructure or facilities until all land in the benefitting area for the specific infrastructure, transportation infrastructure or facilities is developed or subdivided.

Transportation infrastructure – general principles

3.1(1) The municipality, in consultation with the Minister responsible for the Highways Development and Protection Act, is responsible for defining the need, standards, location and staging for new or expanded transportation infrastructure.

(2) All transportation infrastructure constructed must adhere to the standards, best practices and guidelines acceptable to the Minister responsible for the Highways Development and Protection Act and are subject to that Minister's approval.

LEVY BYLAWS

Principles and criteria for determining methodology

4(1) A municipality has the flexibility to determine the methodology on which to base the calculation of the levy, provided that such methodology

(a) takes into account criteria such as area, density or intensity of use,

(b) recognizes variation among infrastructure, facility and transportation infrastructure types,

(c) is consistent across the municipality for that type of infrastructure, facility or transportation infrastructure, and

(d) is clear and reasonable.

(2) Notwithstanding subsection (1)(c), the methodology used in determining the calculation of a levy may be different for each specific type of infrastructure, transportation infrastructure or facility.

Principles and criteria for determining levy costs

5(1) In determining the basis on which the levy is calculated, the municipality must at a minimum consider and include or reference the following in the bylaw imposing the levy:

(a) a description of the specific infrastructure, facilities and transportation infrastructure;

(b) a description of each of the benefitting areas and how those areas were determined;

(c) supporting studies, technical data and analysis;

(d) estimated costs and mechanisms to address variations in cost over time.

(2) The municipality may establish the levy in a manner that involves or recognizes the unique or special circumstances of the municipality.

(3) The information used to calculate the levy must be kept current.

(4) -The municipality must include a requirement for a periodic review of the calculation of the levy in the bylaw imposing the levy.

(5) There must be a correlation between the levy and the benefits to new development.

Additional principles and criteria to apply to transportation infrastructure

5.1(1) In calculating a levy imposed pursuant to section 648(2)(c.2) of the Act, the municipality must take into consideration the following:

(a) supporting traffic impact assessments or other applicable technical studies;

(b) statutory plans;

(c) policies;

(d) agreements that identify

(e) the need for and benefits from the new transportation infrastructure,

(i) the anticipated growth horizon, and

(ii) the portion of the estimated costs of the transportation infrastructure that is not covered by the Crown that is proposed to be paid by

(A) the municipality,

(B) the revenue raised by the levy, and

(C) other sources of revenue;

(f) any other relevant documents.

(2) In addition to the principles and criteria set out in sections 3, 3.1, 4 and 5, the additional criteria set out in subsections (1), (3) and (4) apply when determining a levy for transportation infrastructure.

(3) Once the need for transportation infrastructure has been identified by a municipality in consultation with the Minister responsible for the Highways Development and Protection Act, the municipality

(a) must determine the benefitting area, and

(b) must base the benefitting area on a reasonable geographic area for the use of the transportation infrastructure.

(4) A levy under this section must apply proportionally to a benefitting area determined under subsection (3).

Additional principles and criteria to apply to s648(2.1) facilities

6(1) In calculating a levy imposed pursuant to section 648(2.1) of the Act, the municipality must take into consideration supporting statutory plans, policies or agreements and any other relevant documents that identify

(a) the need for and anticipated benefits from the new facilities,

(b) the anticipated growth horizon, and

(c) the portion of the estimated cost of the facilities that is proposed to be paid by each of

(i) the municipality,

(ii) the revenue raised by the levy, and

(iii) other sources of revenue.

(2) In addition to the criteria set out in subsection (1), the principles and criteria set out in sections 3, 4 and 5 apply when determining a levy for the facilities referred to in section 648(2.1) of the Act.

(3) The municipality has the discretion to establish service levels and minimum building and base standards for the proposed facilities.

Additional principles and criteria to apply to s648.01 intermunicipal off-site levies

7(1) In calculating a levy imposed on an intermunicipal basis pursuant to section 648.01 of the Act, each participating municipality must use a consistent methodology to calculate the levy and each bylaw imposing the levy must

(a) identify the same specific infrastructure, transportation infrastructure and facilities,

(b) identify the same benefitting area across participating municipalities for the specific infrastructure, transportation infrastructure and facilities, and

(c) identify the portion of benefit attributable to each participating municipality within that benefitting area.

(2) In addition to the criteria set out in subsection (1), the principles and criteria set out in sections 3, 4 and 5 apply when determining an intermunicipal levy referred to in section 648.01 of the Act.

(2.1) In addition to the criteria set out in subsection (1), the principles and criteria set out in sections 3.1 and 5.1 apply when determining an intermunicipal levy for transportation infrastructure referred to in section 648(2)(c.2) of the Act.

(3) In addition to the criteria set out in subsection (1), when determining an intermunicipal levy referred to in section 648.01 of the Act for facilities referred to in section 648(2.1) of the Act, the principles and criteria set out in section 6 apply.

Consultation

8(1) The municipality must consult in good faith with stakeholders prior to making a final determination on defining and addressing existing and future infrastructure, transportation infrastructure and facility requirements.

(2) The municipality must consult in good faith with stakeholders when determining the methodology on which to base the levy.

(3) Prior to passing or amending a bylaw imposing a levy, the municipality must consult in good faith on the calculation of the levy with stakeholders in the benefitting area where the levy will apply.

(4) During consultation under subsections (1), (2) and (3), the municipality must make available to stakeholders on request any assumptions, data or calculations used to determine the levy.

Annual report

9(1) The municipality must provide full and open disclosure of all the levy costs and payments.

(2) The municipality must report on the levy annually and include in the report the details of all levies received and utilized for each type of facility and infrastructure within each benefitting area.

(3) Any report referred to in subsection (2) must be in writing and be publicly available in its entirety.

LEVY BYLAW APPEALS

Who may appeal

10 Pursuant to section 648.1 of the Act, any person who is directly affected by a bylaw imposing a levy for a purpose referred to in section 648(2.1) of the Act may submit a notice of appeal to the Municipal Government Board.

Appeal period

11 An appeal must be submitted to the Municipal Government Board within 30 days of the day on which the bylaw imposing the levy was passed.

Form of appeal

12(1) A notice of appeal under section 10 must

(a) identify the municipality or municipalities that passed the bylaw that is objected to,

(b) identify how the appellant is directly affected by the bylaw that is objected to,

(c) set out the grounds on which the appeal is made,

(d) contain a description of the relief requested by the appellant,

(e) where the appellant is an individual, be signed by the appellant or the appellant's lawyer,

(f) where the appellant is a corporation, be signed by an authorized director or officer of the corporation or by the corporation's lawyer, and

(g) contain an address for service for the appellant.

(2) If a notice of appeal does not comply with subsection (1), the Municipal Government Board must reject it and dismiss the appeal.

Consolidation of appeals

13 Where there are 2 or more appeals commenced in accordance with section 10, the Municipal Government Board may

(a) consolidate the appeals,

(b) hear the appeals at the same time,

(c) hear the appeals consecutively, or

(d) stay the determination of the appeals until the determination of any other appeal.

No stay of levy

14(1) The municipality may continue to impose and collect a levy even if the bylaw imposing the levy is subject to an appeal under section 10.

(2) During the appeal period or pending the determination of an appeal of the bylaw imposing the levy by the Municipal Government Board, any levy received under that bylaw by the municipality must be held in a separate account for each type of facility.

(3) The municipality must not use levy funds received while the bylaw imposing the levy is subject to an appeal under section 10 until the appeal has been determined by the Municipal Government Board.

SALE OF FACILITIES

Consultation on proposed sale

15 The municipality must engage in public consultation prior to the sale of any facilities constructed using levy funds.

Proceeds of sale

16 The proceeds of the sale of a facility constructed using levy funds must be used for the purpose for which the levy was originally collected.

Repeal

17 The Principles and Criteria for Offsite Levies Regulation (AR 48/2004) is repealed.

Coming into force

18 This Regulation comes into force on the coming into force of sections 104, 105 and 131(b) of the Modernized Municipal Government Act and section 1(60)(a) of An Act to Strengthen Municipal Government.

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APPENDIX C:
COURT CONSIDERATION OF OFF-SITE LEVY BYLAWS AND ISSUES

A. Bighorn (Municipal District) No. 8 v. Alberta (Municipal Government Board)

1999 Alberta Court of Appeal

The Subdivision Authority for the Municipal District of Bighorn approved a subdivision to create 10 lots. It was determined that the road that provided access to the lots was not in a condition to service the lands and needed to be upgraded. Council had passed a resolution that would require each new lot to pay a contribution of $4,670 plus GST towards the upgrades. Condition 9 of the subdivision approval imposed the obligation to pay for the construction of the road upgrade on the developer. The developer appealed to the MGB. The MGB upheld the appeal and struck Condition 9. The MGB concluded that the levy could only be imposed as an OSL and that a bylaw was required. As there was no bylaw authorizing the levy, the condition was struck down. The Court of Appeal disagreed with the MGB and reinstated Condition 9. The Court held that section 655(1)(b)(i) of the MGA did allow the Subdivision Authority to impose the condition outside of an OSL regime. The wording of the section "to construct or pay for the construction of a road required to give access to the subdivision" included the ability to require an existing road to be upgraded if the upgrade was required to give access to the subdivision.

Conclusion – The condition of subdivision imposing a requirement to upgrade the access road was upheld.

Lessons Learned – Charges under section 655 are not OSL – Not all charges imposed on developers are OSL. These other charges include subdivision charges under section 655 or development charges under section 650 of the MGA. Charges that are not OSL do not need to be approved by bylaw.

B. Urban Development Institute v. Leduc (City)

2006 Alberta Court of Queen's Bench

After much consultation and expert analysis, the City of Leduc adopted an OSL bylaw for water and roads. Leduc's approach was to allocate only new costs to new developments. For example, for roads that would be expanded from two to four lanes because of new development, Leduc included the costs of the additional two lanes in the OSL calculations. The Urban Development Institute challenged the bylaw and argued that costs for highway improvements should not have been included in the OSL assessments as the improvements would have been necessary regardless of new development. In upholding Leduc's OSL Bylaw, the Court accepted the arguments put forward by Leduc and concluded that Leduc's approach was rational. The Court stated that "In summary, the City bylaw based on the premise that new development ought to pay for the increased costs by new development is rational and appropriate" (at para. 23). In regards to the argument that Leduc had inappropriately included costs for provincial highways, the Court concluded that Leduc had not included cost respecting infrastructure within the provincial highway profile or attributed to through traffic or existing traffic concerns.

Conclusion – The City's OSL Bylaw was upheld.

Lessons Learned – Inclusion of costs in levy calculations must be rational - An OSL bylaw must have a rational basis for including or excluding costs of new infrastructure in the levy calculations.

C. Keyland Development Corp. v. Cochrane (Town)

2007 Alberta Court of Queen's Bench

The Town of Cochrane passed an OSL bylaw that included the costs of a pump station upgrade, a twinning of an existing sewage line, a new water treatment plant, a new bridge and other projects at a total cost of $51,766,000. Cochrane said that the benefit to the existing town was $350,000. When the OSL of $82,763 per hectare was imposed against Keyland, the company challenged the bylaw by arguing that not all of the municipal improvements were necessary for its development and that the Bylaw did not comply with the *Principles and Criteria for Off-Site Levies Regulation*. The Court reviewed the *Principles and Criteria for Off-Site Levies Regulation* to determine the core obligations that must be met and articulated in a valid OSL bylaw. The Court concluded that mandated requirements included how the amount of the levy was calculated, a sharing of costs based on benefit, and a correlation between the levy and the impacts of development. In this case, the Court held the bylaw was deficient in all three requirements and the bylaw was quashed.

Conclusion – Cochrane's OSL Bylaw was quashed because it failed to comply with three requirements under the *Principles and Criteria for Off-Site Levies Regulation*.

Lessons Learned – OSL bylaws need to articulate how costs are calculated – Unsubstantiated estimates or projections of possible costs for the construction of municipal infrastructure are not sufficient.

OSL bylaws need to explain how benefit is allocated between new and existing development – Unsubstantiated or unexplained allocations of benefit, particularly if virtually no benefit is allocated to existing development, will not be acceptable.

Comply with the Regulation – OSL regimes must be established in compliance with the mandatory requirements of the Regulation.

D. ARW Development Corp. v. Beaumont (Town)

2011 Alberta Court of Appeal

The Town of Beaumont and ARW Development Corp. entered into a Master Agreement (MA) and Capital Contribution Agreement (CCA) in 1989. The MA did not deal with OSL and did not reference the CCA. Under the CCA, the developer agreed to develop 1,200 lots in phases and, prior to the issuance of a development permit for residential house construction on any lot in the development area, pay Beaumont $2,500 per lot for the first five years. The amount was thereafter adjustable.

For approximately twenty years, the developer and Beaumont executed addendums to the MA and CCA for each phase of the development. The latter agreements were identical to the original CCA, save for changes reflecting the number of lots in the phase and an application of the escalation formula in the original CCA. The developer completed construction of approximately 700 of the anticipated 1,200 residential lots in 14 phases and paid capital contribution levies for each lot as it was developed.

Section 648 of the MGA was amended in December 2003 to permit municipalities to charge roads to developers through OSL. In 2008 pursuant to section 648 of the MGA, Beaumont passed an OSL Bylaw imposing a levy on all "developable land" but excluding all "developed land." In 2009, the OSL Bylaw was amended. The developer's undeveloped lands were subject to the new OSL, which included costs for the specific roads that were also identified in the MA. The difference between the capital contribution levy rate under the original CCA and the new OSL rate was an increase of approximately $4.5 million.

The developer applied for an Order declaring the bylaw invalid. In the alternative, the developer applied for an Order declaring as invalid or setting aside the portions of the bylaw that charged the developer's lands in respect of the arterial road levy component of the OSL Bylaw. The application was granted in part.

The Court held that Beaumont had the authority to enact the OSL Bylaw, but that the contract between Beaumont and the developer effectively rendered the provisions in the bylaw that dealt with matters covered under the contract inoperable with respect to the developer's lands. Beaumont was bound by the contract and the commitments in the contract regarding the payment of OSL. The OSL Bylaw only applied to the developer's undeveloped lands to the extent that the levy was related to new or expanded roads required for or impacted by the developer's lands. The charges related to these roads were applicable to the developer's lands because at the time of the contracts (1989), it was not possible for Beaumont to impose an OSL for that type of infrastructure.

Conclusion – The contract between the developer and Beaumont determined the OSL to be paid by the developer.

Lessons Learned – Agreements remain binding – Where a municipality has entered into a contract with a developer that addresses OSL, that contract will govern the calculation of the OSL payable. Amendments to the OSL bylaw will not amend the terms of the contract.

Leviable[15] **Infrastructure** – Levies can only be imposed for the infrastructure specified in section 648 of the MGA.

E. Prairie Communities Development Corp. v. Okotoks (Town)

2011 Alberta Court of Appeal

By resolution, the Town of Okotoks Council adopted a Contribution and Recovery of Expenses Agreement (CREA) for use in conjunction with its standard Servicing and Construction Agreements (i.e. a development agreement). The CREA imposed charges, totaling $27,749/acre, for the following:

- Public facilities fee
- Engineering review and inspection fee
- Survey control stations fee
- Water and sewage fee
- Water license acquisition fee.

The fees had been adopted through the passage of an OSL bylaw. The bylaw and fees were challenged by a developer who argued that Okotoks was imposing fees that were not authorized by section 648 of the MGA. The public facilities fee, by way of example, was to cover the capital cost of expanding, upgrading or constructing public facilities such as police and fire services, arenas,

[15] Leviable means capable of being levied or levied upon.

water spray parks and similar facilities. Okotoks argued that the municipality's "natural person powers" under section 6 of the MGA allowed a municipality to "negotiate" with developers for the payment of the various fees. This section provides that a municipality has the capacity, rights, powers and privileges of a natural person, which includes the ability to enter into a contract with another party.

The Court of Appeal rejected that argument finding that the fees charged by Okotoks were not paid "voluntarily" but were a mandatory charge or levy. The Court held that Okotoks could not rely on its natural person powers to collect unauthorized assessments and levies. To quote the Court "...natural person powers do not extend to imposing fees or charges or coercing developers into agreements to 'voluntarily' pay for infrastructure deficits."[16]

The developer also challenged the validity of Okotoks' bylaw on the grounds that it did not comply with the *Principles and Criteria for Off-Site Levies Regulation,* arguing that the bylaw was contrary to Section 3 of the Regulation as it failed to allocate costs of the new infrastructure amongst all users. The Court found that in determining whether the bylaw complied with the *Principles and Criteria for Off-Site Levies Regulation* that it was necessary to consider benefit. The "but for" test[17] was not determinative according to the Court. Rather, Okotoks had a responsibility to allocate costs between new development and the existing residents in a "reasonable and responsible manner".[18]

The Court concluded that in most (but not all) projects, Okotoks appropriately allocated costs between the residents and developers. An exception was the allocation of costs of certain road infrastructure. In its Municipal Development Plan, Okotoks recognized that existing residents would benefit from the new bridge but the bylaw failed to disclose how Okotoks would share in the costs in the future. Okotoks argued that it would bear future costs of expanding the bridge but the Court did not find that argument persuasive.

Conclusion – The Council Resolution adopting the Contribution Agreement was declared invalid, given that recovery of the various fees including for public facilities were not authorized under the MGA, and the parts of the bylaw related to the bridge were quashed.

Lessons Learned – Breadth of municipal power – Natural person powers cannot be used to expand a municipality's power to impose a levy.

Leviable Infrastructure – Levies can only be imposed for the infrastructure specified in Section 648.

Allocation based on assessment of benefit – An OSL bylaw must allocate costs between existing residents and new development in a reasonable and responsible manner in consideration of the respective benefit to the groups.

Transparency – The allocation of costs must be apparent on the face of the OSL bylaw.

F. Kiewit Energy Corp v. Edmonton (Subdivision and Development Appeal Board)

2013 Alberta Court of Appeal

Kiewit was issued a development permit and was charged what the City of Edmonton referred to as a Sanitary Sewer Expansion Assessment. Several years later, Kiewit applied for another development permit and this time Edmonton imposed a condition requiring payment of an Arterial Roadway Levy. The condition requiring payment of the arterial roadway levy was appealed to the SDAB. The SDAB found that the Sanitary Sewer Expansion Assessment was not an OSL and upheld the condition requiring payment of the Arterial Roadway Levy. Kiewit appealed to the Court of Appeal. Edmonton argued that the Sanitary Sewer Expansion Assessment was imposed pursuant to section 650 of the MGA and was not an OSL. The Court of Appeal disagreed and held that the Sanitary Sewer Expansion Assessment was an OSL even though there was no specific bylaw creating the levy. The Court concluded that the Land Use Bylaw and provisions of the MG*A* allowed Edmonton to charge the Sanitary Sewer Expansion Assessment as an OSL.

Conclusion – The condition requiring payment of the Arterial Roadway Assessment was struck down because at the time the MGA only allowed OSL to be collected once for a parcel of land.[19]

[16] *Prairie Communities Development Corp v. Okotoks (Town)* 2011ABCA 315 at para 51 ("*Okotoks*").
[17] The "but for" test would result in the allocation of all infrastructure costs that would not be incurred but for the new development to developers.b
[18] *Okotoks, supra* note 16 at para 72.
[19] Following the *Kiewit* decision, Section 648 of the MGA was amended to allow OSL to be collected once for each category of infrastructure. Thus it became possible to collect a sanitary sewer levy at one point in time and a roadway levy from the same parcel of land at another point in time.

Lessons Learned – Whether a charge is an OSL is up to the Courts – Regardless of what authority the municipality thought it was relying on in imposing a charge, the Courts may characterize a charge as an OSL if the charge relates to the type of municipal infrastructure could be made the subject of an OSL.

G. Rosenthal Communities Inc. v. Edmonton (Subdivision and Development Appeal Board)

2015 Alberta Court of Appeal

The Subdivision Authority for the City of Edmonton imposed, as a condition of subdivision approval, a condition that required the developer to pay for the cost of constructing a sidewalk. The decision of the Subdivision Authority was appealed to the SDAB. The SDAB upheld the condition and the developer then appealed to the Alberta Court of Appeal. The developer argued that Edmonton's OSL Bylaw for Arterial Roads eliminated Edmonton's ability to rely upon section 655 of the MGA. The Court of Appeal held that the OSL Bylaw did not override or limit the authority of the Subdivision Authority pursuant to section 655 and that the condition was a valid condition. Although the OSL Bylaw obligated Edmonton to build two lanes of roadway, Edmonton was not obliged to build a sidewalk along the roadway as part of its OSL regime.

Conclusion – The adoption of an OSL bylaw does not eliminate a municipality's ability to rely on other authority it might have under the MGA to require developers to contribute to the costs of municipal infrastructure.

Lessons Learned – Imposing OSL does not preclude the use of other cost recovery mechanisms – OSL are but one tool in a municipality's tool box for requiring developers to contribute to the cost of municipal infrastructure and can be used in conjunction with other cost recovery mechanisms in appropriate circumstances.

Transparency – Clarity in what is included as part of the costs of construction can avoid challenges and uncertainty.

H. Marrazzo v. Leduc County (Subdivision and Development Appeal Board)

2016 Alberta Court of Appeal

Marrazzo applied for a development permit to construct an addition to an industrial shop/office. The Development Authority for Leduc County imposed a condition requiring that Marazzo pay OSL for water and roadways. The total amount Marazzo was required to pay was approximately $129,000.00. Marrazzo appealed the imposition of the condition related to the OSL on the grounds that the property had previously been subject to a sewer local improvement tax. The SDAB rejected that argument and upheld the condition. The SDAB held that the local improvement tax for sewers was not an OSL and that the taxes in question were for different purposes, namely roadways and water. Marrazzo applied for permission to appeal the decision of the SDAB. The Court of Appeal did not grant Marrazzo permission to appeal. One of the arguments Marrazzo made to the Court of Appeal was that the SDAB erred by failing to consider whether the OSL Bylaw satisfied the *Principles and Criteria for Off-Site Levies Regulation* and specifically, whether the impact of the addition justified the imposition of $129,000 in OSL.

Conclusion – Permission to appeal the decision of the SDAB was denied.

Lessons Learned – Assumption is that the OSL is Valid – When a developer appeals the imposition of an OSL to the SDAB, the SDAB's job is not to review the validity of the OSL bylaw.

A Local Improvement Tax does not Preclude the Imposition of an OSL – Property can be subject to local improvement taxes pursuant to a local improvement bylaw and an OSL charge.

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