A LEGAL REVIEW FOR MUNICIPALITIES:

Mandating Full Electrification for New Buildings in Ontario

January 2024

PREPARED FOR:

STAND.earth SAFE Cities Health, Safety, Equity, Climate

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Prepared by Krystal-Anne Roussel (B.A., J.D. 2020) for SAFE Cities

Reviewed by Canadian Environmental Law Association (CELA)

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EXECUTIVE SUMMARY

In response to the escalating need for environmental sustainability and the imperative to combat climate change, municipalities worldwide are adopting transformative measures. A prominent trend gaining traction involves the enforcement of municipal ordinances restricting the usage of fossil fuels in new construction.[1] This strategic move seeks to curb greenhouse gas (GHG) emissions by eliminating dependence on fossil fuels during the construction and operation of new structures. These policies also contribute to preserving public health and safety, especially in light of the evidence linking fossil fuel infrastructure and appliances to adverse human health effects, such as asthma, cancer, heart disease, and premature death.[2]

Amidst these developments, uncertainties persist regarding the legal authority granted to Ontario municipalities. Specifically, questions arise regarding the extent to which municipalities can impose restrictions on new fossil fuel infrastructure and mandate electrification in new buildings.

This Review explores the legal authority that Ontario municipalities might possess to implement similar policies for new buildings. Serving as a guide, this Review delineates legislative and policy pathways for mandating building electrification. Four options are explored, two of which are recommended:

1. **Enactment of a Municipal By-Law:** Leveraging authority under the Municipal Act (either to regulate the use and installation of heating and cooking appliances under section 125, or to pass by-laws related to health, safety, and environmental well-being), this Review proposes the enactment of a municipal by-law prohibiting the use and installation of new fossil fuel burning appliances in buildings.
2. **Utilizing Zoning By-Laws:** Municipalities can strategically craft zoning by-laws to restrict new fossil fuel infrastructure and mandate electrification in new buildings. This can be achieved by creating new prohibited land uses, making floor area ratio exclusions to encourage the construction and retrofitting of

energy-efficient buildings, and/or establishing a community planning permit system.

Overall, while both options have their advantages, utilizing zoning by-laws provides municipalities with a more flexible, comprehensive, and potentially effective approach to limit fossil fuels in new buildings.

Alternative approaches, such as financial incentives for building electrification, are outlined in Appendix A, offering a diverse range of options for municipalities to explore.

While the transition to fossil fuel-free buildings may pose challenges, Ontario municipalities possess substantial powers to address environmental concerns. The recommended measures establish a framework for municipalities to proactively transition towards a more sustainable and resilient future.

INTRODUCTION

Residential, commercial, and institutional buildings play a pivotal role in shaping Ontario's environmental landscape, accounting for a significant 25% of the province's greenhouse gas ("GHG") emissions in 2020.[3] The majority of these emissions stem from the combustion of fossil fuels like natural gas, heating oil, and propane for space and water heating.[4]

Aligned with Canada's commitment to achieving net-zero GHG emissions by 2050, the imperative to decarbonize building space and water heating becomes paramount. The *Transition Accelerator's Pathways to Net Zero* report identifies electrification as the most credible and compelling approach for widespread building decarbonization.[5] Furthermore, advancements in heat pump technologies bolster the efficient use of clean electricity, presenting a viable solution in the pursuit of sustainable alternatives.[6]

Beyond the immediate goal of mitigating GHG emissions, the reduction of fossil fuel usage in buildings brings forth multifaceted benefits. Notably, it enhances air quality and human health by curtailing nitrogen oxide emissions, a major contributor to smog formation.[7]

As governments, both federal and provincial, embark on the path to phasing out of fossil fuels and transitioning to renewable energy, uncertainty looms regarding the legal authority granted to Ontario municipalities. Specifically, questions arise regarding the extent to which municipalities can impose restrictions on new fossil fuel infrastructure and mandate electrification.

To respond to these questions, **SAFE (Stand Against Fossil Fuel Expansion) Cities** at Stand.earth has requested a legal analysis of relevant laws, regulations, by-laws, and policies related to municipal jurisdiction to mandate full electrification in new buildings in Ontario. SAFE Cities is a movement of neighbours, local groups, and elected officials working to keep their communities safe from fossil fuels. The goal of SAFE Cities is to support municipalities to enact policies that reduce greenhouse gas emissions from the use of fossil fuels.[8]

This Review serves as a guide for Ontario municipalities, outlining the legislative and policy avenues available to mandate building electrification.

LEGAL FRAMEWORK

This section provides a brief overview of the legal authority of Ontario municipalities impose restrictions on new fossil fuel infrastructure and mandate electrification in new buildings. It's important to note that the following comments are not intended as a formal legal opinion on these matters. If a municipality decides to pursue the options discussed in this Review, it is advisable for the municipality's legal team to conduct a thorough analysis to ensure that any initiatives align with the municipality's legal powers and does not conflict with any other applicable legislation.

A. Legislation and Policies

I. The Municipal Act

In Ontario, the *Municipal Act, 2001*, SO 2001, c. 25[9] (the "Municipal Act") is the primary piece of legislation applicable to municipalities (except Toronto)[10] and sets out the roles and responsibilities of municipal governments in Ontario. The Act outlines a broad and deferential approach to municipal powers:

> **8 (1)** "The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues"[11]

The Municipal Act also provides the ability for a municipality to pass by-laws respecting various matters, including to address climate change and environmental well-being. For example, sections 10(2) and 11(2) of the Act provide[12]:

10 (2) A single-tier municipality may pass by-laws respecting the following matters:

[…]

5. Economic, social and environmental well-being of the municipality, including respecting climate change.

[…]

6. Health, safety and well-being of persons.

[…]

8. Protection of persons and property, including consumer protection.

9. Animals.

10. Structures, including fences and signs.

[…]

11 (2) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting the following matters:

[…]

5. Economic, social and environmental well-being of the municipality, including respecting climate change.

[…]

6. Health, safety and well-being of persons.

In addition to the above general powers, the Municipal Act grants municipalities specific powers related to certain listed categories. For example, under the category of “Health,

Safety, and Nuisance", the Act gives municipalities the authority to regulate the use and installation of heating and cooking appliances, as outlined in section 125:

> **125** Without limiting sections 9, 10 and 11, a local municipality may regulate,
>
> (a) the use and installation of heating and cooking appliances;[13]

The Act also allows municipalities to participate in long-term energy planning for their community:

> **147 (1)** Without limiting sections 9, 10 and 11, a municipality may provide for or participate in long-term energy planning in the municipality.
>
> **Interpretation**
>
> (2) Long-term energy planning referred to in subsection (1) may include consideration of energy conservation, climate change, and green energy.[14]

The *City of Toronto Act, 2006*, S.O. 2006, c. 11 ("COTA") is the analogous piece of legislation applicable to the City of Toronto. COTA includes provisions similar to those mentioned above. Although COTA provides Toronto with some specialized tools and mechanisms, including enhanced revenue tools, distinct governance structures, and increased decision-making powers to address its unique challenges, it does not bring additional clarity or jurisdiction to Toronto concerning matters of building electrification when compared to the Municipal Act. However, notably, COTA does not include a provision analogous to section 125 of the Municipal Act, which grants municipalities the specific authority to regulate the use of and installation of heating and cooking appliances.

II. The Planning Act

The *Planning Act*, R.S.O. 1990, c. P.13 provides the framework and legislative authority for municipalities to engage in land use planning. Municipalities, in carrying out their responsibilities under the Planning Act, must have regard to matters of provincial interest. Section 2 of the Planning Act sets out these interests, which include:

- the conservation of natural resources
- **the supply, efficient use and conservation of energy and water**
- the orderly development of safe and healthy communities
- **the protection of public health and safety**
- **the mitigation of GHG emissions and adaptation to a changing climate**.[15]

The Planning Act also requires that municipal land use decisions be consistent with the Provincial Policy Statement, 2020 ("PPS").[16] The PPS provides policy direction on matters of provincial interest related to land use planning and development. According to section 1.8 of the PPS, planning authorities shall support energy conservation and efficiency, improved air quality, reduced GHG emissions, and prepare for the impacts of a changing climate through land use and development patterns which:

- "promote design and orientation which **maximizes energy efficiency and conservation**, and considers the mitigating effects of vegetation and green infrastructure"[17]

Pursuant to the PPS, planning authorities should also provide opportunities for the development of energy supply including electricity generation facilities and transmission and distribution systems, district energy, and renewable energy systems and alternative energy systems, to accommodate current and projected needs.[18]

III. The Ontario Building Code Act

The *Ontario Building Code Act, 1992*, S.O. 1992, c. 23[19] (the "OBCA") and O. Reg. 332/12[20] (the "Building Code") lay out the legislative framework governing the construction, renovation, demolition and change of use of buildings in Ontario. Municipalities are responsible for the enforcement of the OBCA and the Building Code within their jurisdiction.

The Building Code includes requirements for how energy efficient a building must be. [21] These requirements include specifications for the required thickness of insulation, maximum number and size of windows, and how efficient new mechanical systems must be.[22]

While the most obvious tool to mandate electrification in new buildings would be a stringent set of energy efficiency requirements, the OBCA does not allow municipalities to require

building construction standards above the minimum set out in the Act. Specifically, section 35 of the OBCA states:

> **Municipal by-laws**
>
> 35 (1) This Act and the building code supersede all municipal by-laws respecting the construction or demolition of buildings.[23]

“Construction" under the OBCA encompasses various building activities, including erection, installation, extension, or material alteration or repair of a building.[24] If a municipality decides to pursue one or more of the options discussed in this report, they will need to be mindful of this provision.

B. Jurisprudence

MUNICIPALITIES HAVE BROAD POWERS TO ADDRESS ENVIRONMENTAL ISSUES

The jurisprudence has granted municipalities extensive powers to tackle environmental concerns. In the pivotal case of *Spraytech v Hudson*, [2001] 2 SCR 241 [*Spraytech*], the Supreme Court of Canada (SCC) upheld a Quebec municipality's authority to enforce a by-law limiting non-essential pesticide use.[25] The SCC affirmed that municipalities possess general authority to enact by-laws promoting public health and safety. The burden of proof rests on challengers to demonstrate a by-law's invalidity, with a presumption favouring its legitimacy [26] Stressing deference to elected bodies, the SCC highlighted the importance of judicial restraint in interfering with municipal councils' responsibilities to constituents.[27] *Spraytech* stressed that environmental protection requires concerted efforts from all levels of government, recognizing municipalities as the government closest to affected citizens with a legitimate role in enhancing environmental safeguards.[28]

This precedent has been consistently upheld, notably in the case of C*roplife Canada v Toronto (City)*, [2005] OJ No 1896 [*Croplife*], where the Ontario Court of Appeal supported Toronto's pesticide by-law despite the absence of explicit authorization in the Municipal Act.[29] The court ruled that municipal powers should be broadly interpreted within statutory limits to serve the municipality's legitimate interests and those of its residents.[30] The SCC

declined to hear Croplife's appeal, effectively concluding the legal challenge against Toronto's pesticide by-law.

Additional cases, such as In *R v Drain*, 2006 ONCJ 186, have contributed to jurisprudence by interpreting municipal powers expansively. In *R v Drain*, the Ontario Court of Justice interpreted the term "well-being" in the Municipal Act expansively to encompass concerns related to the health, living conditions, and prosperity of the municipality's residents.[31] In this instance, the court determined that unregulated accumulation of waste and debris in neighbouring yards could adversely impact the well-being of the local community.

These rulings collectively establish a robust foundation for recognizing and upholding municipalities' broad authority in addressing environmental challenges.

MUNICIPALITIES MUST AVOID CONFLICT WITH PROVINCIAL STANDARDS

While municipalities wield broad authority to address environmental concerns, they must also navigate within defined limits. Specifically, municipal by-laws must not conflict with higher-level laws and regulations. While provincial or federal legislation does not automatically override municipal authority, a **genuine conflict** between municipal by-laws and provincial and/or federal laws renders the by-law invalid (e.g. one says "yes" while the other says "no").[32] Mere potential inconsistency is insufficient to invalidate a by-law, and the jurisprudence is clear that as long as the two laws don't conflict to the extent of rendering dual compliance impossible, **multiple jurisdictions can address different facets of the same subject matter or even the same subject matter with varying degrees of stringency.**[33]

In determining whether a municipal by-law conflicts with federal or provincial regulations, courts apply the "impossibility of dual compliance test." This test, established in *Multiple Access v McCutcheon,* [1982] 2 SCR 161, states that if it's possible to comply with both laws simultaneously, there's no conflict.[34] Regarding pesticide regulation in Spraytech, for example, the SCC noted that the federal and provincial legislation failed to differentiate between "cosmetic" and "necessary" uses of chemical controls, and in this absence municipalities should be able to respond to local concerns.[35] Further, the federal and provincial legislation did not take into account regional differences, community needs, and risk assessment regarding when and where pesticides may be applied.[36] In the end, the SCC found that since it was possible to mutually comply with the federal law, the provincial law and the bylaw, there was no conflict.[37]

This principle has also been upheld in the context of the *Ontario Building Code Act, 1992*, S.O. 1992, c. 23. In *A-Major Homes (Ontario) Inc. v Caledon (Town)*, [2017] OMBD No 519, for example, a settlement was reached between parties and the following policy was approved to be included in the Official Plan Amendment for the Town of Caledon.[38]

> "7.14.18.1.1 All residential homes in the Plan Area shall be designed and constructed with water and energy conservation, efficiency, and re-use systems and/or features that will reduce the rate of water and energy consumption and **exceed energy efficiency standards in the Building Code Act, 1992, S.O. 1992, c. 23**"[39]

Similarly, in *Tay Valley (Township) Zoning By-law No. 02-121 (Re)*, [2004] OMBD No 501, there was a potential conflict that arose in terms of setback from the water at a sewage disposal site, where the Township has required a setback of 15 m from water, whereas the Ontario Building Code recommended a setback of 0 m.[40] The Tribunal determined that **in order to guarantee no conflict with the Ontario Building Code, the water setback should be the greater of the two options**.[41]

It is important to note that provincial statutes, such as section 35 of the OBCA, may explicitly render municipal by-laws inoperable in specific areas. This provision emphasizes that the OBCA and the Building Code supersede all municipal by-laws concerning the **construction or demolition of buildings.**[42] Furthermore, in cases of conflicting treatment of the same subject matter, the OBCA or the Building Code prevails, rendering the by-law inoperative to the extent of any differences.[43]

In the pursuit of initiatives to mandate building electrification, municipalities must be vigilant of these provisions to ensure alignment with provincial standards and avert legal conflicts.

C. Opportunities for Action

The legal framework established by the jurisprudence and legislation grants municipalities substantial authority to tackle the environmental challenges arising from the use of fossil

fuels. This section outlines several legal pathways that Ontario municipalities can explore to mitigate these challenges.

Option 1: Enact a Municipal By-Law

The first legal avenue available to Ontario municipalities to impose restrictions on new fossil fuel infrastructure and mandate electrification in new buildings is through enacting a by-law using powers granted under the Municipal Act. **Firstly,** municipalities (excluding Toronto) can wield their legal authority under section 125 of the Municipal Act to enact a by-law regulating the use and/or installation of fossil fuel burning heating and cooking appliances in buildings.

Although the term “appliances” is not explicitly defined in the Municipal Act, it is safe to assume that fossil fuel burning systems for heating and cooking, such as space heaters, gas ranges and ovens, and furnaces, constitute “appliances.” This interpretation is reinforced by the Ontario Building Code, which defines "appliance" as a device converting fuel into energy, inclusive of all necessary components, controls, wiring, and piping.[44]

Numerous Ontario municipalities have effectively employed section 125 to enact by-laws regulating the installation and use of Outdoor Solid Fuel Combustion Appliances, aiming to mitigate environmental risks linked with outdoor burning of fossil fuels.[45] Several of these by-laws include broad prohibitions on installing Outdoor Solid Fuel Combustion Appliances within various zoning categories, such as a Village, Hamlet, or Residential zone.[46]

Secondly, municipalities can leverage the general powers granted to them under sections 10(2)6 and 8, and 11(2)6 and 8 of the Municipal Act (or section 8(2) of COTA) to enact a "burning by-law." Burning by-laws are a policy mechanism used by local governments to regulate, limit, and in some cases, completely ban, burning of solids, liquids, and or gases.[47]

Several Ontario municipalities have enacted “open-air burning by-laws”, for example, to regulate, limit, and/or prohibit burning of certain solids, liquids, and/or gases to address environmental concerns and safeguard public health and safety.[48] While existing burning by-laws primarily target activities like open-air leaf or garbage burning, there exists an opportunity to expand these prohibitions to encompass fossil fuels.

While not in Ontario, the City of Montreal serves as a notable example, having introduced a by-law on solid fuel-burning appliances in 2018.[49] This by-law prohibits burning of any solid

fuel in residences across all of Montreal's 19 boroughs, unless the stove or fireplace meets stringent emission standards. The enactment of this by-law in Montreal was prompted by the recognition that heating with wood is the most significant source of fine particle pollution in Montreal, posing substantial threats to both the environment and public health.[50]

In the Ontario context, municipalities are empowered under the above-mentioned sections of the Municipal Act to enact a similar burning by-law as a strategy to alleviate the negative impacts associated with combustion of fossil fuels. Such a by-law would require **careful consideration of human health and environmental effects linked with fossil fuel combustion and would need strong rationale tied to the objective of protecting human health and environmental well-being**, as outlined in the relevant sections of the Municipal Act.

Option 2: Utilize Zoning By-Laws

A zoning by-law is a planning tool permitted and passed under section 34 of the Planning Act. It allows municipalities to control:

- How land and buildings are used
- The type of buildings that can be constructed
- Where buildings can be located
- How tall a building can be
- How many residential units may be constructed
- How small or large a property may be
- The number of off-street parking or bicycle parking spaces required
- Other features related to the use of land

Section 34 of the Planning Act provides the following with regard to zoning by-laws:

> **Zoning by-laws**
>
> 34 (1) Zoning by-laws may be passed by the councils of local municipalities:
>
> **Restricting use of land**
>
> 1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.

Restricting erecting, locating or using of buildings

2. For prohibiting the erecting, locating or using of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

[...]

Construction of buildings or structures

4. For regulating the type of construction and the height, bulk, location, size, floor area, spacing, character and use of buildings or structures to be erected or located within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway, and the minimum frontage and depth of the parcel of land and the proportion of the area thereof that any building or structure may occupy.[51]

Municipalities can leverage zoning by-laws to curb fossil fuel use through strategies such as:

- Making fossil fuel burning appliances a prohibited land use
- Making floor area ratio exclusions to encourage energy efficient buildings to be built and retrofitted

a. Make Fossil Fuel Burning Appliances a Prohibited Land Use

Municipalities can define permitted and prohibited uses to make fossil fuel burning appliances a prohibited land use in their zoning by-laws. For example, the City of Ottawa's Zoning By-law 2008-250 was amended in 2012 to prohibit the use of hydronic heaters ("HH") for specific land-uses City-wide due to concerns regarding smoke and pollution from HH.[52] HHs are outdoor appliances used to heat homes and water by burning solid fuel such as wood or coal. Ottawa's Zoning By-law 2008-250 states:

Hydronic Heaters (Section 83)

83 (1) A Hydronic Heater is:

(a) not permitted on a lot within:

(i) areas A, B and C on Schedule 1; and,

(ii) the V1, V2, V3 and VM zones;

(b) Only permitted on a lot with an area equal to or greater than 8000 square metres, except in the AG zone;

(c) Required to be setback a minimum of:

(i) 30 metres from a lot line abutting a public street;

(ii) 15 metres from any other lot line; and,

(iii) 60 metres from a residential use building located on another lot,

(d) Required to have a chimney or stack which projects at least 3.66 metres above ground level;

(e) Notwithstanding clause (d), where a Hydronic Heater is within 92 metres of a residential use building located on another lot, the Hydronic Heater must have a chimney or stack or stack which projects at least 4.88 metres above ground level. (By-law 2012-344)[53]

A similar approach could be taken to restrict the installation and use of fossil fuel burning appliances in specific and/or general land use categories.

b. Add Floor Area Ratio Exclusions

Zoning by-laws can also be tweaked to encourage electrification by means of floor area ratio exclusions. For example, in 2020, Vancouver City Council approved changes to the Zoning and Development By-law to support zero emissions space and water heating in one to three storey residential buildings.[54] The changes allow the Director of Planning to provide additional height for increased roof insulation without reducing interior space and exclude up to 2.3 m2 per dwelling unit from the computation of floor area to accommodate zero emissions mechanical equipment for heating or hot water.

See section below about Official Plans as the first step to using this path.

Option 3: Utilize Site Plan Controls

Section 41 of the Planning Act enables the council of a local municipality to regulate certain matters on and around a development site, including exterior sustainable design features for buildings, via the site plan control process.

In several Ontario municipalities, this authority has been utilized to establish Green Development Standards ("GDS"). GDS serve as a framework to promote environmentally, socially, and economically sustainable development.[55] Integrated into the planning approvals process, these standards require developers to meet specific criteria, often including energy performance targets and/or carbon intensity limits which effectively require the installation of heat pumps or hybrid gas/electric systems.[56]

For instance, the Toronto Green Standard ("TGS") mandates that residential and commercial office buildings demonstrate an annual greenhouse gas intensity ("GHGI") below 15 kgCO2e/m2 for the first Tier.[57] To meet GHGI limits, the TGS encourages installation of low carbon fuel sources such as electric heat pumps.

While there have recently been some questions about the authority of Ontario municipalities to enact GDS in light of amendments made to the Planning Act under the *More Homes Built Faster Act* (Bill 23) in 2022[58], the Government of Ontario clarified that the Act's aim was not to prevent municipalities from implementing green standards but to prevent them from imposing unnecessary visual design requirements through site plans.[59] The government even reinforced the role of municipalities in addressing environmental issues through GDS, noting:

> Bill 23 was amended to maintain important *Planning Act* provisions related to sustainable design of landscape elements and to provide municipalities with the option to require site plan drawings to show municipal green building construction requirements that will be authorized by the Building Code and established by municipal by- law.
>
> **The government recognizes the important work being done by municipalities through green standards to encourage green-friendly development and is committed to supporting these efforts**.[60]

This provides clarity that site plan controls are another Planning Act mechanism municipalities can use to restrict fossil fuel infrastructure and encourage electrification in new buildings by requiring them to meet certain energy performance targets and/or carbon intensity limits through GDS.

See section below about Official Plans as the first step to using this path.

Option 4: Establish a Community Planning Permit Systems

Under section 70.2 of the Planning Act, municipalities may establish a Community Planning Permit System (CPPS) to make development approval processes more streamlined and efficient, and support local priorities (such as improving energy efficiency and reducing fossil fuel use and infrastructure).[61] The CPPS combines zoning, site plan and minor variance processes into one application and approval process with shorter approval timelines (45 days as opposed to 90 for traditional zoning).[62]

This versatile tool can be strategically employed to restrict fossil fuel infrastructure and mandate building electrification within communities by combining the zoning by-law and site plan control options outlined above into one permitting system. Municipalities can apply the CPPS to all of their municipality or to certain neighbourhoods or areas.

Municipalities can tailor the CPPS to meet their local needs as long as they meet the legislative and regulatory requirements outlined in Community Planning Permits, O Reg 173/16.[63] This Regulation provides the details for how a municipality can implement a CPPS.

It requires first that an Official Plan Amendment ("OPA") is passed that identifies the boundaries to which the CPPS applies and details the goals, criteria and conditions that may be included in the implementing CPPS by-law. Second, it requires a CPPS by-law be passed, which includes the following elements:

a. A description of the area to which the by-law applies;
b. The definitions of permitted and discretionary uses within the CPPS area;
c. The development standards with specified minimum and maximum standards; and

d. An outline of the conditions that the council may impose in making decisions about whether or not to issue a CPPS permit.[64]

Like a traditional zoning by-law, the CPPS by-law would contain a list of permitted uses and development standards, such as GDS. It could also contain other elements not found in a traditional zoning by-law, such as:

- land uses that are allowed, subject to certain conditions.
- classes of development or uses of land exempt from requiring a permit.[65]

Once a CPPS by-law is in effect, municipalities can issue permits to allow development to occur if an application meets the standards set out in the CPPS by-law.

Several municipalities have used the CPPS system to support environmental protection goals specific to their communities. For example, in 2017, the Town of Innisfil enacted Community Planning Permit By-law 062-17 to regulate land use and development on lands within the "Shoreline Permit Area" designation of the Town of Innisfil Official Plan for the promotion of ecologically sound and safe development along the Lake Simcoe shoreline.[66] Conditions for receiving approval for a Community Planning Permit under the by-law include, among other things, that development in the Shoreline Permit Area follow several guiding principles, including the use of sustainable/low impact design features.[67] The by-law also sets out permitted uses within the Shoreline Permit Area, which does not include gas bars or other fossil fuel infrastructure.

See section below about Official Plans as the first step to using this path.

An Important Note About Official Plans

An Official Plan is a policy document that guides the short-term and long-term development in a municipality.[68] It applies to all lands within the municipal boundary and the policies within it provide direction for the size and location of land uses, provision of municipal services and facilities, and preparation of regulatory by-laws to control the development and use of land.[69]

Section 16 of the Planning Act provides the following with regard to official plans:

> **Contents of official plan**
>
> 16 (1) An official plan shall contain,
>
> > (a) goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic, built and natural environment of the municipality or part of it, or an area that is without municipal organization;
>
> [...]
>
> **Climate change policies**
>
> (14) An official plan shall contain policies that identify goals, objectives and actions to mitigate greenhouse gas emissions and to provide for adaptation to a changing climate, including through increasing resiliency.[70]

Given that official plans govern all planning decisions within a municipality, zoning by-laws, site plan controls, and permitting systems (such as CPPS) must align with these plans. Therefore, **it is advisable for Ontario municipalities to initially incorporate policies into their official plans expressing a commitment to advancing green development, promoting building electrification, and discouraging fossil fuel infrastructure.** It is crucial to establish overarching policy goals within official plans concerning building electrification or opposition to fossil fuels before proceeding with the formulation of zoning by-laws, site plan controls, and permitting systems. This approach is vital because a zoning by-law prohibiting fossil fuel burning appliances, for example, may face appeal to the Ontario Land Tribunal and will only be upheld if it conforms to the Official Plan.

CONCLUSION

As municipalities worldwide grapple with the urgent need for environmental sustainability and the imperative to combat climate change, the adoption of transformative measures to tackle emissions from residential, commercial, and institutional building becomes paramount. This Review outlines several legal pathways available for Ontario municipalities to address this challenge by implementing policies to promote building electrification and restricting fossil fuel infrastructure. Key recommendations include:

1. **Enactment of a Municipal By-Law:** Leveraging authority under the Municipal Act (either to regulate the use and installation of heating and cooking appliances under section 125, or to pass by-laws related to health, safety, and environmental well-being), this Review proposes the enactment of a municipal by-law prohibiting the use and installation of new fossil fuel burning appliances in buildings. Such a by-law would require careful consideration of human health and environmental effects linked with fossil fuel combustion, as outlined in the relevant sections of the Municipal Act.
2. **Utilizing Zoning By-Laws:** Municipalities can strategically craft zoning by-laws to restrict new fossil fuel infrastructure and mandate electrification in new buildings. This can be achieved by creating new prohibited land uses, making floor area ratio exclusions to encourage the construction and retrofitting of energy-efficient buildings, and/or establishing a community planning permit system.

Both options have their merits, but the second option, utilizing zoning by-laws, might be a more effective path forward for municipalities to limit fossil fuels in new buildings for several reasons:

- **Flexibility:** Zoning by-laws offer greater flexibility in tailoring regulations to the specific needs and characteristics of each municipality. This allows for nuanced approaches that consider local factors such as population density, existing infrastructure, and particular environmental concerns.
- **Comprehensive Approach:** Zoning by-laws can address multiple aspects of fossil fuel use in buildings, including not just heating and cooking appliances but also overall infrastructure (e.g. through floor area exclusions and ceiling height

allowances). This comprehensive approach ensures that the transition to cleaner energy sources is more holistic and impactful.

- **Legal Framework:** While both options involve legal frameworks, zoning by-laws are specifically designed to regulate land use and development, making them a more direct and potentially robust tool for addressing energy-related issues in building construction.

Overall, while both options have their advantages, utilizing zoning by-laws provides municipalities with a more flexible, comprehensive, and potentially effective approach to limit fossil fuels in new buildings.

Other options discussed in this Review, such as utilizing site plan controls or establishing a Community Planning Permit System (CPPS), are not as advantageous for several reasons. For instance, site plan controls often entail regulating numerous building elements, which can go beyond addressing heating needs specifically, thus lacking the necessary focus and efficiency in reducing fossil fuel usage. Additionally, while site plan controls, or Green Development Standards, may encourage the installation of low carbon fuel sources through measures like greenhouse gas intensity limits, they do not directly restrict or limit fossil fuel usage in new constructions. The final option, establishing a CPPS, merges site plan control and zoning processes, which is a complex undertaking that might surpass the scope necessary for curbing fossil fuel usage in new buildings.

Prior to moving forward with any of these options (with the exception of Option 1), it is advisable for Ontario municipalities to initially incorporate policies into their official plans expressing a commitment to advancing green development and promoting building electrification.

It’s important to note that the options presented in this Review do not constitute formal legal advice, and there is always the possibility of a municipality facing legal challenges as a result of any initiative to restrict fossil fuel infrastructure and increase building electrification due to potential conflicts with provincial jurisdiction. Should a municipality choose to pursue any of the options discussed herein, it is recommended that the municipality's legal team conducts a comprehensive analysis to ensure alignment with the municipality's legal authority and to identify any potential conflicts with other relevant legislation.

Alternative approaches such as financial incentives for building electrification, outlined in Appendix A, broaden the range of options available.

While the transition to fossil fuel-free buildings may not be straightforward, Ontario municipalities possess substantial powers to address environmental concerns and foster sustainable development. By leveraging the recommended measures outlined in this Review, municipalities can proactively contribute to building a more resilient and environmentally conscious future for their communities.

APPENDIX A: ALTERNATIVE APPROACHES

In addition to legally enforceable tools like zoning by-laws and site plan controls, municipalities can harness alternative mechanisms to encourage building electrification and combat climate change. These non-binding approaches provide flexibility and avenues for collaboration. Three key avenues include resolutions, investment policies, and incentive programs.

I. Law Reform

Municipalities can advocate for legislative reform at the provincial level to secure greater powers to enact more robust building policies. Collaboration with organizations such as the Association of Municipalities Ontario can be instrumental in advancing proposals for legislative amendments.

One avenue for reform involves seeking greater autonomy in adopting building codes that exceed the provincial standards set out in the Ontario Building Code Act (OBCA) and Building Code. By securing this autonomy, municipalities can tailor building regulations to better address local environmental concerns and enhance sustainability efforts.

Furthermore, municipalities may advocate for provincial law reform to grant them authority to pass by-laws restricting or imposing conditions on new residential natural gas connections. Currently, section 42 of the *Ontario Energy Board Act, 1998* provides that a gas distributor **must** provide gas distribution services to any building along the line of any of the gas distributor's distribution pipelines upon the request of the owner, occupant or other person in charge of the building.[71] In 2022, MPP Ted Hsu introduced Bill 29, the *Think Twice Before You Choose Natural Gas Act (Ontario Energy Board Amendment), 2022*.[72] This

proposed bill aimed to amend the *Ontario Energy Board Act, 1998*, allowing municipalities to impose conditions on new residential gas connections in accordance with local emission reduction goals. Although Bill 29 did not progress beyond second reading, municipalities can continue to advocate for similar legislative changes to empower local environmental initiatives.

II. Resolutions

Municipalities can utilize resolutions as powerful expressions of intent and commitment.[73] While non-binding, Resolutions serve as public statements of a municipality's dedication to specific goals. Municipal councils can pass resolutions to promoting green development and discouraging fossil fuel usage. This approach can act as a catalyst for community engagement and awareness, fostering a shared vision for sustainable urban planning.

One example of this kind of catalyst resolution could be to endorse the call for a Fossil Fuel Non-Proliferation Treaty to end the expansion of oil, gas and coal, and wind down existing production in keeping with what science shows is needed to address the climate crisis.[74]

III. Investment Policies

Municipal investment policies present another avenue to drive building electrification.[75] By aligning investment strategies with green development objectives, municipalities can divest from fossil fuel-related ventures and prioritize investments in renewable energy and energy-efficient projects. This financial approach not only supports environmentally friendly initiatives but also signals a municipality's commitment to responsible and sustainable development.

IV. Incentive Programs

Municipalities can also design incentive programs that encourage building electrification. For example, under section 28 of the Planning Act, establish community improvement plans

(CIPs) to promote sustainability within a designated community improvement project area. These plans can include financial incentives for green building practices, including building electrification. Section 28 provides the following:

> **Community improvement project area**
>
> 28 (1) In this section,
>
> "community improvement" means the planning or replanning, design or redesign, resubdivision, clearance, development or redevelopment, construction, reconstruction and rehabilitation, improvement of energy efficiency, or any of them, of a community improvement project area, and the provision of such residential, commercial, industrial, public, recreational, institutional, religious, charitable or other uses, buildings, structures, works, improvements or facilities, or spaces therefore, as may be appropriate or necessary Designation of community improvement project area;
>
> "community improvement plan" means a plan for the community improvement of a community improvement project area;
>
> "community improvement project area" means a municipality or an area within a municipality, the community improvement of which in the opinion of the council is desirable because of age, dilapidation, overcrowding, faulty arrangement, unsuitability of buildings or for any other environmental, social or community economic development reason.
>
> […]
>
> **Designation of community improvement project area**
>
> (2) Where there is an official plan in effect in a local municipality or in a prescribed upper-tier municipality that contains provisions relating to community improvement in the municipality, the council may, by by-law, designate the whole or any part of an area covered by such an official plan as a community improvement project area.
>
> **Acquisition and clearance of land**
>
> (3) When a by-law has been passed under subsection (2), the municipality may,
>
> (a) acquire land within the community improvement project area;

(b) hold land acquired before or after the passing of the by-law within the community improvement project area; and

(c) clear, grade or otherwise prepare the land for community improvement

[...]

Powers of council re land

(6) For the purpose of carrying out a community improvement plan that has come into effect, the municipality may,

(a) construct, repair, rehabilitate or improve buildings on land acquired or held by it in the community improvement project area in conformity with the community improvement plan, and sell, lease or otherwise dispose of any such buildings and the land appurtenant thereto;

(b) sell, lease or otherwise dispose of any land acquired or held by it in the community improvement project area to any person or governmental authority for use in conformity with the community improvement plan.

Grants or loans re eligible costs

(7) For the purpose of carrying out a municipality's community improvement plan that has come into effect, the municipality may make grants or loans, in conformity with the community improvement plan, to registered owners, assessed owners and tenants of lands and buildings within the community improvement project area, and to any person to whom such an owner or tenant has assigned the right to receive a grant or loan, to pay for the whole or any part of the eligible costs of the community improvement plan. 2006, c. 23, s. 14 (8).

Eligible costs

(7.1) For the purposes of subsection (7), the eligible costs of a community improvement plan may include costs related to environmental site assessment, environmental remediation, development, redevelopment, construction and reconstruction of lands and buildings for rehabilitation purposes or for the provision of energy efficient uses, buildings, structures, works, improvements or facilities.[76]

One example of how CIPs can be used to encourage building electrification can be seen in the City of Dryden, which offers an Energy Efficiency Grant to property owners, existing and

future business owners, and tenants (with the property owner's permission) for proposed projects that meet the general and program-specific Eligibility Requirements outlined in the CIP.[77] The grant is meant to encourage property owners to improve energy efficiency of existing commercial/industrial buildings, and to facilitate the installation of small-scale renewable energy systems. Eligible costs include the purchase and installation of energy-efficient heating/cooling/ventilation products (e.g. central air conditioners, heat pumps, furnaces/boilers, windows and doors with the EnergySTAR certification).

In addition to the CIP mechanism, the *Development Charges Act, 1997*, S.O. 1997, c. 27, gives municipalities the authority to impose development charges on new developments.[78] A number of municipalities in Ontario already offer financial incentives to developers of green buildings through reductions in development charges. For example:

- The Town of Caledon offers a 5%-10% reduction in development charges for developments implementing specified energy-efficiency measures. LEED certification qualifies for reductions of between 20% - 27.5% for commercial development and 30%-44.5% for industrial development (depending on the LEED rating achieved).[79]
- The City of Toronto offers a 20% reduction in development charges for buildings that achieve both Tier 1 and Tier 2 of the Toronto Green Standard.[80]

Other municipalities can similarly consider adjusting these charges to provide incentives for or promote electrification in new buildings.

APPENDIX B: ENDNOTES

[1] See for example: https://stand.earth/press-releases/sacramento-city-council-passes-ordinance-to-electrify-new-buildings-accelerate-transition-away-from-fossil-fuels/; https://stand.earth/insights/cities-counties-pick-up-federal-governments-slack-on-climate-change-by-freezing-fossil-fuel-infrastructure/

[2] See for example: https://www.eesi.org/papers/view/fact-sheet-climate-environmental-and-health-impacts-of-fossil-fuels-2021; https://www.clasp.ngo/wp-content/uploads/2023/05/The-Public-Health-and-Environmental-Impacts-of-Cooking-with-Gas-.pdf; https://rmi.org/wp-content/uploads/2022/02/gas_appliance_equity_factsheet.pdf; https://www.hsph.harvard.edu/c-change/news/natural-gas-used-in-homes/; https://www.hsph.harvard.edu/c-change/news/natural-gas-used-in-homes/

[3] https://www.cer-rec.gc.ca/en/data-analysis/energy-markets/provincial-territorial-energy-profiles/provincial-territorial-energy-profiles-ontario.html

[4] https://www.auditor.on.ca/en/content/annualreports/arreports/en20/ENV_reducinggreenhousegasemissions_en20.pdf

[5] https://transitionaccelerator.ca/wp-content/uploads/2023/06/BDA-The-Case-for-Building-Electrification-in-Canada.pdf

[6] https://transitionaccelerator.ca/wp-content/uploads/2023/06/BDA-The-Case-for-Building-Electrification-in-Canada.pdf

[7] https://www.auditor.on.ca/en/content/annualreports/arreports/en20/ENV_reducinggreenhousegasemissions_en20.pdf

[8] http://stand.earth/our-work/programs/safe-cities/

[9] *Municipal Act, 2001*, SO 2001, c. 25 [Municipal Act].

[10] The *City of Toronto Act, 2006*, S.O. 2006, c. 11 [COTA] is the analogous piece of legislation applicable to the City of Toronto.

[11] Municipal Act at s 8(1).

[12] Municipal Act at ss 10(2) and 11(2).

[13] Municipal Act at s 125.

[14] Municipal Act at s 147.

[15] *Planning Act*, R.S.O. 1990, c. P.13 at s 2.

[16] https://www.ontario.ca/page/provincial-policy-statement-2020

[17] https://www.ontario.ca/page/provincial-policy-statement-2020

[18] https://www.ontario.ca/page/provincial-policy-statement-2020

[19] *Ontario Building Code Act, 1992*, S.O. 1992, c. 23 [OBCA].

[20] O. Reg. 332/12: BUILDING CODE [Building Code].

[21] O. Reg. 332/12: BUILDING CODE at Part 12.
[22] O. Reg. 332/12: BUILDING CODE at Part 12.
[23] OBCA at s 35.
[24] OBCA at s 1.
[25] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 SCR 241 [Spraytech].
[26] Spraytech at paras 10, 21.
[27] Spraytech at para 23.
[28] Spraytech at para 3.
[29] *Croplife Canada v Toronto (City)*, [2005] OJ No 1896 [Croplife].
[30] Croplife at para 37.
[31] *R v Drain*, 2006 ONCJ 186.
[32] *Multiple Access v McCutcheon*, [1982] 2 SCR 161 [Multiple Access].
[33] Multiple Access.
[34] Multiple Access.
[35] Spraytech.
[36] Spraytech.
[37] Spraytech.
[38] A-Major Homes (Ontario) Inc. v Caledon (Town), [2017] OMBD No 519 [A-Major Homes].
[39] A-Major Homes.
[40] Tay Valley (Township) Zoning By-law No. 02-121 (Re), [2004] OMBD No 501 [Tay Valley].
[41] Tay Valley.
[42] Ontario Building Code Act, 1992, S.O. 1992, c. 23 at s 35.
[43] Ontario Building Code Act, 1992, S.O. 1992, c. 23 at s 35.
[44] OBCA at s 1.
[45] See for example: https://www.springwater.ca/en/township-hall/resources/Documents/By-laws/2007-098-Outdoor-Furnace.pdf; https://www.uxbridge.ca/en/resourcesGeneral/Documents/Outdoor-Solid-Fuel-Combustion-Appliances-By-law.pdf
[46] See for example: https://www.leeds1000islands.ca/en/growing/resources/Documents/01-090-By-law-To-Regulate-Outdoor-Furnaces.pdf; https://www.mississippimills.ca/en/build-and-invest/resources/Documents/Building/Outdoor-Wood-Burning-Appliances-By-Law.pdf; https://www.southfrontenac.net/en/living-here/resources/By-law-2017-50---To-Regulate-Outdoor-Solid-Fuel-Burning-Appliances.pdf.
[47] https://perma.cc/25M6-AWQ9
[48] See for example: https://www.greatersudbury.ca/sites/sudburyen/assets/File/Open_Air_Burning_Bylaw_May_29_2009.pdf; https://www.mississauga.ca/wp-content/uploads/2019/06/21133325/Open-Air-Burning-By-law-0140-2018.pdf; https://citybellevilleon.civicweb.net/document/16313/; https://carletonplace.ca/photos/custom/BY-LAW-NO-21-2004-Open-Air-Burning.pdf
[49] https://ville.montreal.qc.ca/pls/portal/docs/PAGE/ENVIRO_FR/MEDIA/DOCUMENTS/CODIFICATION_15_069_AN.PDF
[50] https://montrealgazette.com/news/local-news/montreals-wood-burning-ban-starts-oct-1-what-you-need-to-

know#:~:text=Remember%20that%20as%20of%20Monday.of%20fine%20particles%20per%20hour).

[51] Planning Act at s 34.

[52] https://documents.ottawa.ca/sites/documents/files/documents/zoning_bylaw_part3_en.pdf#nameddest=hydronicheaters

[53] https://documents.ottawa.ca/sites/documents/files/documents/zoning_bylaw_part3_en.pdf#nameddest=hydronicheaters

[54] https://bylaws.vancouver.ca/zoning/zoning-by-law-section-10.pdf

[55] https://www.cleanairpartnership.org/wp-content/uploads/2021/10/Municipal-Green-Development-Standards-Final.pdf

[56] For example: Ajax, Pickering, Whitby, Halton Hills, Brampton, East Gwillimbury, Vaughan, Aurora, King, Markham, Richmond Hill, Toronto.

[57] https://www.toronto.ca/city-government/planning-development/official-plan-guidelines/toronto-green-standard/toronto-green-standard-version-4/mid-to-high-rise-residential-non-residential-version-4/buildings-energy-emissions-resilience/#:~:text=Residential%20and%20commercial%20projects%20must,intensity%20of%20400%20kgCO2e%2Fm2.

[58] https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-23

[59] https://ero.ontario.ca/notice/019-6163

[60] https://pub-ottawa.escribemeetings.com/filestream.ashx?DocumentId=128120

[61] https://www.ontario.ca/page/community-planning-permit-system

[62] https://pub-markham.escribemeetings.com/filestream.ashx?DocumentId=72731

[63] https://www.canlii.org/en/on/laws/regu/o-reg-173-16/latest/o-reg-173-16.html

[64] Community Planning Permits, O Reg 173/16.

[65] Community Planning Permits, O Reg 173/16.

[66] https://innisfil.ca/en/building-and-development/resources/Documents/CPPSBookletFINAL-compressed-size.pdf

[67] https://innisfil.ca/en/building-and-development/resources/Documents/CPPSBookletFINAL-compressed-size.pdf

[68] https://www.ptbocounty.ca/en/growing/resources/New-Official-Plan/What-is-an-OP.pdf

[69] https://www.ptbocounty.ca/en/growing/resources/New-Official-Plan/What-is-an-OP.pdf

[70] Planning Act at s 16.

[71] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B at s 42.

[72] https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-29#:~:text=Section%2042%20of%20the%20Act,by%2Dlaw%20establishing%20limits%20on

[73] Several Ontario municipalities have already endorsed gas power phase-out. See: https://www.cleanairalliance.org/ontario-municipalities-that-have-endorsed-gas-power-phase-out/

[74] https://fossilfueltreaty.org/; See sample municipal resolution here: https://drive.google.com/file/d/1YZpMQ-3asrY1YbDVqq1AGP3FvOfUsWqz/view

[75] See for example the City of Toronto's Investment Policy, which excludes fossil fuels from the portfolio: https://www.toronto.ca/legdocs/mmis/2019/ib/bgrd/backgroundfile-132447.pdf

[76] Planning Act at s 28.

[77] https://www.dryden.ca/en/business/community-improvement-plan.aspx#:~:text=Energy%20Efficiency%20Grant,-PURPOSE&text=PROGRAM%20DETAILS-

.A%20grant%20for%20up%20to%20half%20(50%25)%20of%20eligible,to%20a%20maximum%20of%20%2415%2C000.

[78] *Development Charges Act, 1997*, S.O. 1997, c. 27.

[79] https://www.caledon.ca/uploads/14/Doc_637202992128221378.pdf?ts=638418668213087794

[80] https://www.toronto.ca/city-government/planning-development/official-plan-guidelines/toronto-green-standard/development-charge-refund-program/