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BULLETIN

COVID-19 - PROVINCIAL OPTIONS FOR MODIFYING MEETING RULES

Pandemics and the need for “social distancing” were not at top of mind when the meeting rules in the *Local Government Act* and *Community Charter* were drafted. As a result we’ve been scrambling with you over the last few days to find the best mechanisms for relaxing the rules so that councils and boards can continue important business free of some of the usual meeting restrictions and notice requirements and without the usual gatherings of the public that the open meeting rule and electronic meeting rules require.

This bulletin discusses two options for temporarily modifying statutory or bylaw meeting rules. The first option is for the Province to temporarily modify any problematic meeting rules by way of order under the *Emergency Program Act*. The second option is for the Province to modify municipal meeting requirements and conditions by regulations under section 281 of the *Community Charter* (municipalities) and section 296 of the *Local Government Act* (regional districts).

Before turning to the options, we highlight some of the problems they would be designed to address.

Under section 127 of the *Community Charter*, electronic meetings or electronic participation by members is only permitted to the extent it is permitted by procedure bylaw. Many procedure bylaws include limits on electronic meetings (only in the case of urgency for example) or on the rights of individual members to participate electronically in relation to specific meetings (limits for example on the number of members who may participate electronically at regular meetings or on the type of meeting in which electronic participation is permitted). A bylaw amendment is necessary to alter or remove these limitations, which is a time-consuming process, particularly given the requirement that notice of the amendment be given in accordance with section 94.

And there are statutory limitations. Under section 128 only special meetings may be held electronically, and while electronic participation may be facilitated by procedure bylaw for members in relation to non-electronic meetings, that participation is allowed only where the member is “unable to attend,” which while probably not an impediment in current circumstances (it seems reasonable to give a wide scope to the concept of inability given the seriousness of the health risk), it creates at least some ambiguity.

Perhaps the most difficult statutory limitation arises in relation to the open-meeting rule in section 89. While there is some uncertainty about whether the requirement that a non-electronic meeting be “open to the public” means the public must be able to physically attend at the place where the members are meeting, that is probably the case. In any event, with electronic meetings, there is no doubt that a public gathering must be permitted. The legislation requires that a place be made available where the public may gather to hear or watch and hear the meeting participants (see section 128 of the *Community Charter* for municipalities and the *Regional District Electronic Meetings Regulation* for regional districts). Given that section 90 of the *Community Charter* does not allow a municipality to close a meeting to the public in the event of a pandemic, these rules are serious impediments to local governments’ social distancing objectives.

There are also notice requirements that are potentially problematic. Under section 127 of the *Community Charter*, for example, notice of meetings must be posted at the regular council meeting place and left with each member at the place to which the member has directed notice be sent. These rules could be problematic in the event municipal halls are closed to the public. The notice requirements may be waived under section 127 (4), but only by a vote taken at a meeting and only by requirement by a unanimous vote of all council members, not just those at the meeting.

These are some of the issues local governments are grappling with. We turn now to discuss two options for dealing with them.

Option 1 – Ministerial Order Under the *Emergency Program Act*

On March 18, 2020, the Province declared British Columbia to be in a state of emergency. As we understand it, that declaration was made under section 9 of the *Emergency Program Act*. During the period for which the declaration remains in effect, the Minister of Public Safety and Solicitor General has the very broad powers set out in section 10 (1) of the Act. That section is as follows:

Powers of minister in declared state of emergency

10 (1) After a declaration of a state of emergency is made under section 9 (1) and for the duration of the state of emergency, the minister may do all acts and implement all procedures that the minister considers necessary to prevent, respond to or alleviate the effects of an emergency or a disaster, including any or all of the following:

- (a) implement a Provincial emergency plan or any Provincial emergency measures;
- (b) authorize a local authority to implement a local emergency plan or emergency measures for all or any part

of the jurisdictional area for which the local authority has responsibility;

(c) require a local authority for a municipality or an electoral area to implement a local emergency plan or emergency measures for all or any part of the municipality or electoral area for which the local authority has responsibility;

(d) acquire or use any land or personal property considered necessary to prevent, respond to or alleviate the effects of an emergency or disaster;

(e) authorize or require any person to render assistance of a type that the person is qualified to provide or that otherwise is or may be required to prevent, respond to or alleviate the effects of an emergency or disaster;

(f) control or prohibit travel to or from any area of British Columbia;

(g) provide for the restoration of essential facilities and the distribution of essential supplies and provide, maintain and coordinate emergency medical, welfare and other essential services in any part of British Columbia;

(h) cause the evacuation of persons and the removal of livestock, animals and personal property from any area of British Columbia that is or may be affected by an emergency or a disaster and make arrangements for the adequate care and protection of those persons, livestock, animals and personal property;

(i) authorize the entry into any building or on any land, without warrant, by any person in the course of implementing an emergency plan or program or if otherwise considered by the minister to be necessary to prevent, respond to or alleviate the effects of an emergency or disaster;

(j) cause the demolition or removal of any trees, structures or crops if the demolition or removal is considered by the minister to be necessary or appropriate in order to prevent,

respond to or alleviate the effects of an emergency or disaster;

(k) construct works considered by the minister to be necessary or appropriate to prevent, respond to or alleviate the effects of an emergency or disaster;

(l) procure, fix prices for or ration food, clothing, fuel, equipment, medical supplies or other essential supplies and the use of any property, services, resources or equipment within any part of British Columbia for the duration of the state of emergency.

The opening words of subsection (1) of section 10 provide that the minister may do “all” acts and implement “all” procedures the minister considers necessary to respond to the emergency. Paragraph (1) (a) allows the minister to “implement ... any Provincial emergency measures” and paragraph (b) allows the minister to “authorize a local authority to implement ... emergency measures.” In our view, these powers are clearly broad enough to allow the minister to put in place new local government meeting requirements to govern during the pandemic. Moreover, if there was any doubt about that, it seems to be answered by section 26 of the Act, which is as follows:

Conflict

26 Unless otherwise provided for in a declaration of a state of emergency made under section 9 (1) or in an extension of the duration of a declaration under section 9 (4), if there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, this Act and the regulations made under this Act prevail during the time that the declaration of a state of emergency made under section 9 (1) and any extension of the duration of that declaration is in effect.

This section says that during a provincial declaration of emergency, a “regulation” made under the *Emergency Program Act* prevails over “any other Act or regulations.” Section 1 of the *Interpretation Act* provides that in provincial enactments the term “regulation” includes “orders” and “rules” enacted in execution of a power under an Act. As noted, during a provincial emergency declaration, the minister is authorized under section 10 of the *Emergency Program Act* to implement any emergency “measures” he considers necessary to respond to the emergency. Those measures may include the issuance of “orders” or the making of “rules” and if they do, section 26 says the orders or rules prevail over any conflicting enactments.

In short, we think it is clear that under section 10 the Minister could modify local government meeting rules during the period of the provincial emergency declaration to allow local governments to continue to conduct important business while maintaining social distance.

One advantage a ministerial order under the *Emergency Program Act* has over the regulation option discussed below is that it could be done very quickly and the order could be very simple.

Option 2 – Regulations Under Section 281 of the *Community Charter* and Section 296 of the *Local Government Act*

Sections 281 of the *Community Charter* and 296 of the *Local Government Act* are as follows:

Regulations providing additional powers and exceptions

281 (1) Despite this or any other Act, the Lieutenant Governor in Council may, by regulation, do one or more of the following in relation to a specified municipality or a described class of municipalities:

(a) provide a power, including a power to regulate, prohibit and impose requirements;

(b) provide an exception to or a modification of a requirement or condition established by an enactment;

(c) establish any terms and conditions the Lieutenant Governor in Council considers appropriate regarding a power, modification or exception under this section;

(d) authorize a minister to establish any terms and conditions the minister considers appropriate regarding a power, modification or exception under this section.

(2) As restrictions, a regulation made under this section may not do any of the following:

(a) override an absolute prohibition contained in an enactment;

(b) confer an authority to impose a new tax;

(c) confer an authority to grant a new tax exemption;

(d) eliminate a requirement for obtaining the assent of the electors, unless that requirement is modified by replacing it

with a requirement for obtaining the approval of the electors by alternative approval process.

Additional powers and exceptions provided by regulation

296 (1) Despite this or any other Act, the Lieutenant Governor in Council may, by regulation, do one or more of the following in relation to a specified regional district or a described class of regional districts:

(a) provide a power, including a power to regulate, prohibit and impose requirements;

(b) provide that a power conferred under paragraph (a) may be exercised only as a regulatory service;

(c) provide an exception to or a modification of a requirement or condition established by an enactment;

(d) establish any terms and conditions the Lieutenant Governor in Council considers appropriate regarding a power, modification or exception under this section;

(e) authorize a minister to establish any terms and conditions the minister considers appropriate regarding a power, modification or exception under this section.

(2) As restrictions, a regulation under this section may not do any of the following:

(a) override an absolute prohibition contained in an enactment;

(b) confer an authority to impose a new tax;

(c) confer an authority to grant a new tax exemption;

(d) eliminate a requirement for obtaining the assent of the electors, unless that requirement is modified by replacing it with a requirement for obtaining approval of the electors by alternative approval process.

These sections provide broad authority for the Lieutenant Governor in Council to enact regulations for both municipalities and regional districts altering the usual meeting rules. Under subsection (1) (a) of these sections, a regulation may provide new powers altogether and under subsection (1) (b) it can provide exceptions to or modifications of requirements or conditions

established by an enactment. The meeting rules of concern seem to clearly constitute “requirements” or “conditions” established by enactments.

The only potential problem with the application of these sections is the restriction in subsection (2) (a) against overriding “an absolute prohibition.” It is not entirely clear what that means. It is not clear for example whether the requirement in section 89 of the *Community Charter* that meetings be open to the public, except as allowed under Division 3 of Part 4 of the *Community Charter*, is simply a “requirement” or “condition” that may be modified or an “absolute prohibition” against holding closed meetings other than as allowed in section 90. In our view, the open-meeting rule would likely not be considered an “absolute prohibition” for the purposes of these sections and thus we think that it and the other problematic meeting rules discussed above are probably modifiable by regulation under them.

Given the importance of the issues that Covid-19 raises for local governments, please watch our website for updates. In the meantime, please reach out to any of the Partners if you have any questions.

Gregg Cockrill

***** To access all information that Young, Anderson has posted in relation to COVID-19, please click on the following link: <https://www.younganderson.ca/blog/post/covid-19-latest-updates>.**