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DEVELOPMENT APPROVALS UNDER PART 26:

WHAT'S NEW (AND WHAT'S OLD)

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I. INTRODUCTION

Over the past year we have received several questions on the process around considering official community plan bylaws and zoning bylaws and amendments to these bylaws. This paper seeks to provide a refresher on the statutory and common law requirements associated with the adoption of these bylaws, and some checklists for consideration by local governments during the process.

A. Special Requirements for OCPs and Amendments

1. Adoption Procedures

Section 882 of the *Local Government Act* requires that an official community plan and all amendments thereto be adopted in accordance with the requirements of that section.

Section 882(2) requires that each reading of a municipal bylaw receive an affirmative vote of a majority of all council members and each reading of a regional district bylaw receive an affirmative vote of a majority of all directors entitled to vote on the bylaw. Section 123(6) of the *Community Charter* provides that a requirement under an enactment for an affirmative vote of a specified portion of all members of a council means an affirmative vote of that portion of the number of members of which the council is fixed under s. 118 of the *Charter*. For example, if the size of council is fixed at 7, 4 council members must vote in the affirmative for the reading of the bylaw to pass. The calculation of votes is not based on the number of council members that are eligible to vote or that are present at the meeting when the reading of the bylaw is being considered (*Millenium Properties Ltd. v. West Vancouver (District)*, 2005 BCSC 1494).

Section 882(3) requires that after first reading of an OCP or any amendment thereto, the local government must, in sequence:

- Consider the bylaw in conjunction with its financial plan
- Consider the bylaw in conjunction with any waste management plan that is applicable in the municipality or regional district
- If the plan applies to land in an agricultural land reserve refer the plan to the Agricultural Land Commission for comment
- Hold a public hearing

Reading this section in a literal way requires that the local government to undertake the above steps <u>in sequence</u>. It is not clear what the court would decide if the local government failed to do so (such as considering the waste management plan before the financial plan which would

seem like a minor technicality) but to avoid any possible argument it is recommended that the steps be done in the order specified under s. 882(3).

The requirement to consider the bylaw in conjunction with the "financial plan" clearly refers to the financial plan that a municipality must adopt annually under s. 165 of the *Charter* and that a regional district must adopt annually under s. 815 of the *LGA*. The requirement to consider the bylaw in conjunction with "any waste management plan that is applicable in the municipality or regional district" is not as clear but likely requires a local government to, after first reading, consider the bylaw in conjunction with any waste management plan applicable in the local government that has been submitted and approved by the Minister of Environment under the *Environmental Management Act* or any predecessor legislation. This would include any municipal or regional solid waste management plan and any liquid waste management plan that applies in the local government. In support of this interpretation, s. 37 of the *EMA* provides that a bylaw that conflicts with an approved waste management plan under the *EMA* is without effect to the extent of the conflict. If there are changes to the proposed bylaw in respect of any waste management issues after first reading, it is recommended that the bylaw be considered in conjunction with the local government's waste management plan again to avoid any possible argument that the requirements of s. 882(2) have not been complied with.

A local government can delegate to staff consideration of the bylaw in conjunction with its financial plan and waste management plan. Pursuant to s. 154 of the *Charter*, council may, by bylaw, delegate its powers, duties and functions (subject to the exceptions in s. 154(2)) to among others, an officer or employee of the municipality. If the council or board have delegated this duty or function to staff, it should be clear in a report to the council or board prior to second reading of the bylaw, that staff have considered the bylaw in conjunction with the financial plan and any waste management plan and whether any issues have been identified. It may make sense to delegate this function to a staff member who has particular expertise and knowledge in the plans. If the council or board has not delegated this duty or function, the council or board should pass a resolution prior to second reading of the bylaw making it clear that the council or board has considered the bylaw in conjunction with the financial plan and waste management plan and whether any issues have been identified in respect of the bylaw.

Pursuant to s. 882(4), a regional district may only adopt an OCP or any amendment thereto with the approval of the Minister of Community, Sport and Cultural Development unless exempted by regulation. Ministerial approval of an OCP or any amendment thereto is also required for the Resort Municipality of Whistler pursuant to s. 11 of the *Resort Municipality of Whistler Act*.

In addition, if a regional growth strategy applies to all or part of the same area of a municipality as an OCP, the OCP must include a regional context statement that is accepted in accordance with s. 866 by the board of the regional district for which the regional growth strategy is adopted. Pursuant to s. 866(4), a municipality must also submit any amendments to the regional context statement for acceptance by the board and review the regional context

statement at least every 5 years after its latest acceptance by the board and, if no amendment is proposed, submit the statement to the board for its continued acceptance.

2. Consultation

Section 879 of the *LGA* requires a local government to provide one or more opportunities it considers appropriate for consultation with persons, organizations and authorities it considers will be affected by the proposed OCP and any amendments thereto. The requirement to consult under s. 879 is in addition to the public hearing requirement.

Section 879(2)(a) requires the local government to consider whether the opportunities for consultation should be early and ongoing. Section 879(2)(b) further requires the local government to specifically consider whether consultation is required with:

- the board of the regional district in which the area covered by the plan is located, in the case of a municipal official community plan,
- the board of any regional district that is adjacent to the area covered by the plan,
- the council of any municipality that is adjacent to the area covered by the plan,
- first nations,
- school district boards, greater boards and improvement district boards, and
- the Provincial and federal governments and their agencies.

In *Gardner v. Williams Lake (City)*, 2006 BCCA 307, the B.C. Court of Appeal considered the consultation obligations pursuant to s. 879 and held that the standard of review to be applied by the court in reviewing a local government's actions regarding consultation is that of patent unreasonableness and commented as follows:

> What, then, is the content of the "consultation" required? Section 879(1) establishes the requirement that the City provide "one or more opportunities <u>it considers appropriate</u> for consultation with persons, organizations and authorities <u>it considers will be affected</u>". With the words "it considers appropriate" and "it considers will be affected", the Legislature has expressed its intention that the nature of the opportunities to consult, and the persons or entities consulted, are matters to be decided by the City Council. A challenge to the City Council's decision on any of these matters is thus a challenge to a decision expressly within the Council's legislative competence. On the authority of Nanaimo

> (City) v. Rascal Trucking Ltd., supra, a court may not interfere with a decision of that nature unless it is patently unreasonable.

More recently, in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, the Supreme Court of Canada held that the appropriate standard of review to be applied in reviewing bylaws passed by municipal councils is reasonableness. The Court recognized that a democratically elected municipal council should be afforded a high level of deference given the broad array of social, economic and demographic factors relating to the community as a whole that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside.

A court therefore should not interfere with a local government's decision regarding consultation pursuant to s. 879 unless the local government fails to meet the statutory requirements of s. 879 (such as by failing to specifically consider whether consultation is required with the listed persons, organizations and authorities under s. 879(2)(b)) or their decision in respect of consultation is unreasonable.

The consultation process is generally less rigorous than the public hearing process. In *Henry v. Coldstream (District)*, 2006 BCSC 1301, the court commented as follows:

> In the context of consultation under s. 879, as distinct from a public hearing under s. 882 or 890 of the LGA, the process is less rigorous involving "informal communications, meetings, open houses, delegations and correspondence." ... While the objective of the consultation requirement represents a significant step in a municipal legislative process respecting the development of an official community plan and must therefore be meaningful, it does not have the same requirements as a public hearing. The reason is that the consultation requirement is part of an evaluative process rather than a determinative process and its nature and extent is therefore left in large measure to the discretion of the local government which has "a vantage point of intimate knowledge of the community and the official community plan already in place…"... Its effectiveness must in large measure be judged in that light.

To meet the requirements of s. 879, prior to the public hearing in respect of the bylaw, the council or board should consider its obligations under s. 879 and then pass a resolution indicating that it has specifically considered whether consultation is required with the persons, organizations and authorities listed in s. 879(2)(b) and that it considers certain specified persons, organizations and authorities may be affected by the bylaw and that the bylaw should be referred to those persons, organizations, and authorities to provide an opportunity for consultation regarding the bylaw. The resolution should further indicate that the council or

board has considered whether the opportunities for consultation with those persons, organizations and authorities should be early and ongoing. The council or board may also wish to consider and direct that a public information meeting be held or that other forms of consultation be conducted in respect of the bylaw.

In addition to the requirement in s. 879 for consultation, consultation is required with school districts and the Agricultural Land Commission in certain circumstances. Section 881 requires a local government that has adopted or proposes to adopt or amend an OCP for an area that includes the whole or any part of one or more school districts to consult with the boards of education for those school districts at the time of preparing or amending the OCP and at least once in each calendar year. Section 881(2) requires the local government to seek input of the boards of education regarding the information specifically listed in that section. In addition, as noted above, if the OCP or any amendment thereto applies to land in an agricultural land reserve established under the *Agricultural Land Commission Act*, the bylaw must be referred to the Agricultural Land Commission for comment.

After the consultation process, we suggest that a staff report to the council or board summarize any public information meetings and any referral responses and attach them to the report for consideration by the council or board. The council or board should then review its obligations under s. 879 regarding consultation and consider whether the steps taken by the local government to consult with persons, organizations and authorities it considers may be affected by the bylaw are sufficient pursuant to s. 879 or whether further consultation is required. The council or board should pass a resolution to that effect.

If the council or board consider the steps taken to consult to be sufficient and it wishes to proceed with a public hearing, it should then pass a resolution referring the proposed bylaw to a public hearing and directing staff to schedule the public hearing and to give notice.

An OCP checklist is included with this paper for reference during the process in considering OCP bylaws.

B. Notices of Public Hearing

Public hearings should be scheduled to provide adequate time for the public to inform themselves of the issues and to form a reasoned view as to the effect of the bylaw on their property interest. The length of time may depend on the circumstances. Bylaws that engage technical issues will require more notice than those that do not. Technical reports should be made available to the public in advance of the public hearing to allow for sufficient time for the public to review the reports and to prepare any comments in respect of the reports.

Section 892 of the *LGA* requires that notice of a public hearing be given in strict accordance with the requirements set out in that section. Failure to meet the requirements will result in the bylaw passed in contravention thereof to be quashed on the grounds of lack of proper notice as required by the statute. Notification procedures are an easy target to attack the bylaw

and care should be taken in ensuring that the public hearing notice meets the statutory requirements.

Section 892(2) requires that the notice of the public hearing contain the following information:

- The time and date of hearing
- The place of the hearing
- In general terms, the purpose of the bylaw
- The land or lands that are the subject of the bylaw
- The place where and the times and dates when copies of the bylaw may be inspected

In setting out the purpose of the bylaw, the notice is not required to set out the provisions of the bylaw, but its intent in general terms. There should be sufficient information in the notice for a person to decide whether they may be affected by the bylaw and whether they wish to seek further information regarding the bylaw. It is not recommended that the notice attempt to set out the provisions of the bylaw because: 1) the provisions could be quite lengthy; and 2) if the provisions are described incorrectly, the bylaw could be subject to challenge. If the bylaw designates or amends a development permit area, there should be a specific reference to this in the notice given the implications of development permit requirements for property owners.

In describing the lands that are the subject of the bylaw, the notice should identify the lands by their civic address. For certainty, the lands may also be identified by their legal description. In doing so, care should be taken to ensure that the legal description reflects the legal description shown on the assessment roll for the lands. In addition, if the bylaw alters the permitted use or density of an area, s. 892(4) and (5) provide that the notice must include either: 1) a sketch that identifies the area that is the subject of the bylaw alteration (including the name of any adjoining roads), or 2) if the area can be clearly identified in a manner other than a sketch, identification of the area in that manner. The notice should make it clear which lands are the subject of the bylaw by outlining in bold or shading the lands in question on the sketch and identifying recognizable features such as nearby highways and watercourses.

In describing the place where and the times and dates when copies of the bylaw may be inspected, the notice should expressly exclude holidays and state that the bylaw and relevant materials are available for public inspection up to a set time before the public hearing.

In addition, the notice should indicate that persons who believe that their interest in property is affected by the bylaw will be afforded an opportunity to be heard at the public hearing or to present written submissions respecting matters contained in the bylaw. With respect to written submissions, it is recommended that the notice make it clear that written submissions will only be accepted by the local government in a certain manner (such as by e-mail to the corporate

officer or by hand delivery to the municipal hall) by a set time before the public hearing to avoid the issue of written submissions being e-mailed or otherwise delivered to the municipal hall during or after the public hearing.

Section 892(3) requires that notice be published in at least 2 consecutive issues of a newspaper, the last publication to appear not less than 3 and not more than 10 days before the hearing. Section 892(4) requires that if the bylaw alters the permitted use or density of any area, the notice must also be mailed or otherwise delivered at least 10 days before the hearing to:

- the owners as shown on the assessment roll as at the date of the first reading of the bylaw, and

- to any tenant in occupation as at the date of mailing or delivery of the notice

of all parcels any part of which is subject of the bylaw or is within a distance specified by bylaw from that part of the area that is subject to the bylaw.

If 10 or more parcels owned by 10 or more persons are the subject of the bylaw, s. 892(7) provides that the requirement in s. 892(4) to mail notice does not apply.

The obligation to deliver individual notices is considered satisfied if a reasonable effort was made to mail or otherwise deliver the notice. What constitutes a "reasonable effort" will depend on the circumstances. It does not require the local government to send the notice by personal service or registered mail and prove receipt of notice. It does likely require, at a minimum, that the local government mail the notice to each parcel and any other address on the assessment roll for the owner of the parcel. In addition, the local government may require, by bylaw, the posting of a notice on the land that is the subject of the bylaw to provide additional notice.

Section 894(3) rules out the quashing of a bylaw on the grounds that an owner or occupier

- didn't receive notice if the court is satisfied that there was a reasonable effort to mail or otherwise deliver the notice, or
- who attended the hearing or who can otherwise be shown to have been aware of the hearing did not see or receive the notice and was not prejudiced by not seeing or receiving it.

A public hearing checklist is included with this paper for consideration in preparing public hearing notices.

C. Waiver of Public Hearing and Notice of Waiver

A local government can waive the holding of a public hearing on a proposed zoning bylaw if an OCP is in effect for the area that is subject of the bylaw and the bylaw is consistent with the

OCP. To waive the holding of a public hearing, the local government must give notice in accordance with s. 893.

Section 893(2) requires that the notice of waiver of the public hearing contain the following information:

- In general terms, the purpose of the bylaw
- The land or lands that are the subject of the bylaw
- The place where and the times and dates when copies of the bylaw may be inspected

The same requirements noted above for notice of a public hearing equally apply to a notice to waive the holding of a public hearing except that the last publication for the newspaper notice is to be less than 3 and not more than 10 days before the bylaw is given third reading and the individual notice is to be mailed or otherwise delivered at least 10 days before the bylaw is given third reading (s. 893(3)).

D. Delegation of Public Hearing

A local government may delegate the holding of a public hearing. Pursuant to s. 155 of the *Charter*, a local government may only delegate the holding of a public hearing to one or more council or board members.

If the local government delegates the holding of a public hearing, s. 891(1) requires that the notice under s. 892 indicate that the hearing is to be held by a delegate. In addition, the resolution or bylaw effecting the delegation must be available for public inspection along with the proposed bylaw.

If the public hearing is delegated, the local government must not adopt the bylaw until the delegate reports to the other council or board members, either orally or in writing, the views expressed at the hearing.

E. Information Disclosure Prior to and at the Hearing

Section 890 requires that the public hearing be held "after first reading of the bylaw and before third reading". Reading that requirement in an excessively literal way does not leave any room for second reading of the bylaw, so one must assume that the public hearing could be held either after or before second reading. The requirement for at least first reading sets the table for s. 892(2)(e) which requires that the notice of public hearing state "the place where and the times and dates when copies of the bylaw may be inspected". This section works arm in arm with s. 97(1)(a) of the *Community Charter*, which requires that "all bylaws and all proposed bylaws that have been given first reading" be available for public inspection at the municipal hall during regular office hours.

Over the years a small mountain of case law has accumulated on the question of what documents in addition to the proposed bylaw members of the public are entitled inspect prior to a public hearing. While there may be minor differences of opinion among legal counsel as to which case establishes the current "high water mark" for document disclosure obligations, the Court of Appeal's decision in *Pitt Polder Preservation Society v. Pitt Meadows (District),* 2000 BCCA 415 is a reasonable point of reference. In that case Madam Justice Rowles expressed the following summary of the cases to that point in time (at para. 54):

> In my opinion, the cases to which I have just referred support the view that in order to provide the opportunity for informed, thoughtful and rational presentations in relation to the proposed land use and zoning bylaws it is necessary that interested members of the public have the opportunity to examine in advance of a public hearing not only the proposed bylaws but also reports and other documents that are material to the approval, amendment or rejection of the bylaws by local government.

The principle that courts are applying when dealing with disclosure in the context of a public hearing is the *audi alteram partem* principle, stated as follows by Fenlon, J. in *Vancouver Island Community Forest Action Network v. Langford (City)*, 2010 BCSC 1357 (at para. 27): "a decision maker must hear both sides, and both sides must have the opportunity to hear or see what the other has put before the decision maker". (We will refer to this case as *VICFAN*.) Note that Rowles, J.A. refers to "reports and other documents". Disclosure in this context is about documentary information and not information that has not been reduced to writing. Note also the reference in *VICFAN* to "what the other has put before the decision maker". Disclosure in the context of public hearings under Part 26 is about documentary information that has been put before the municipal council or regional board as a council or board. It does not encompass documentary information that individual members of a council or board may have read, been given or otherwise been exposed to, whether or not that information is within the control of the local government. If a particular document cannot play a role in the decision of the council or board because the council or board has not seen it, then there cannot be a duty to disclose it to the public under this body of case law. (The document may nonetheless be subject to disclosure under the information and privacy legislation if it is under the control of the local government.) That point was usefully reinforced in *Eaton v. Vancouver (City)*, 2008 BCSC 1080, which dealt with whether the City was required to disclose financial information that had been provided by a developer to City staff to enable them to prepare a staff report and recommendations to council on a proposed rezoning. The answer was "no" – non-disclosure of the documents could not breach the *audi alteram partem* principle if the council itself had not seen the documents in question.

There is in the *VICFAN* case an interesting summary of the case law on information disclosure, given in relation to the Court's conclusion that there is no hard-and-fast rule as regards the scope of document disclosure required in connection with a public hearing. The court lists a number of questions that previous cases had addressed in relation to whether the public is

entitled to expansive or restricted access to documents, referring to the relevant cases whose names will be familiar to many readers of this paper:

- Does the bylaw create a conflict of interest for the municipality? *(Eddington)*
- Does the rezoning significantly affect only one or two people, or is it a broad legislative decision? *(Jones)*
- Do the disputed records add anything to the debate? *(Jones; Harrison; Hubbard)*
- Does the contemplated rezoning result in a significant change in land use from the previous zoning? *(Pitt Polder)*
- Do the disputed records pertain to the concerns of the petitioner? (*Botteril v. Cranbrook (City)*,
- Was the public hearing mandatory? *(CPR)*
- Was the petitioner already aware of the contents of the records? *(CPR)*
- Are the documents relevant to zoning, or are they relevant to site-specific development or other concerns? *(Eaton, Hastings Park Conservancy v. Vancouver (City), Eadie)*
- If the impugned document is an agreement, was that agreement still subject to negotiation? *(Hastings Park)*

The volatility of the law in relation to this topic can be seen in the fact that in relation to two of these questions (those addressed in *Canadian Pacific Railway v. Vancouver (City)* 2004 BCCA 192), developments in the law since 2010 have likely changed the advice that most legal counsel would give on the scope of the disclosure duty. With regards to whether the public hearing was mandatory (the notion here is that if a local government is under no legal obligation to hold a hearing, any information disclosure that has been made is more than the public was entitled to receive and the standard of disclosure is therefore lower), the B.C. Supreme Court accepted in *Fisher Road Holdings Ltd. v. Cowichan Valley (Regional District)* 2011 BCSC 1540 that it was relevant to the extent of required disclosure that the Regional District was entitled under s. 890(4) to waive the public hearing on the zoning amendment bylaw under attack (because an OCP was in place and the bylaw was consistent with the OCP). The Court cited with approval and applied the following conclusion in the *VICFAN* case:

> It follows that the City could have passed the Bylaw without disclosing any documents and without holding a public hearing at all. Having decided to give the public a further chance to be heard, however, the City was required to do so in a procedurally fair manner. Nonetheless, the statutory right to opt out of such a

> hearing when a zoning bylaw is consistent with a previously passed OCP bylaw underscores the extent to which the public's interest in being heard has already been addressed, and supports a lower level of disclosure.

The Supreme Court in *Fisher Road Holdings* was dealing with the Regional District's failure to include among the documents disclosed prior to and at a public hearing on a zoning amendment dealing with composting uses, certain technical reports that had been provided to it in connection with an application to amend a composting licence for a facility that would also be affected by the zoning amendment. The reports played a role in the proceedings of a citizens' advisory committee established to review the licence application and make recommendations to the Regional District. The application to quash the bylaw failed because the petitioner (which had made the licence application and had itself provided the material in question to the Regional District) was obviously in possession of a copy of the material in question and was therefore not prejudiced by any failure of the Regional District to disclose it.

However, the Court of Appeal allowed the petitioner's appeal, relying on the wording of the Regional District's public hearing notice stating that the proposed bylaw "and relevant support material" could be examined at its offices, and the statement of the public hearing chair that "all the file information" was on a table in the hearing venue. The reports in question were not included in that material, though the Court of Appeal noted that third reading of the bylaw was "apparently based, in part" on the reports, presumably because reports on the environmental effects of composting operations would obviously be relevant to a contemporaneous zoning amendment dealing with composting uses. The Court of Appeal posed the question in the case, to which its answer would be "no", as follows:

> Here, the question to be asked is even more nuanced than in Pitt Polder. It is whether disclosure of the CVRD's intention to rely upon the EBA report and the report of the citizen's advisory committee not only with respect to Fisher Road's application to amend its licence, but also with respect to the proposed down-sizing Bylaw was adequate to permit members of the public, including Fisher Road, to prepare an intelligent or reasoned response to those reports in the context of the Bylaw.

The Supreme Court's error, in the view of the Court of Appeal, was "assuming that what was relevant to the licensing amendment application would be assumed by the public to be relevant to the Bylaw amendment process, when the notice issued by the CVRD respecting that process, and the statement of the CVRD's delegate at the November 30, 2010 meeting, are inconsistent with, and indeed contrary to, such an assumption". In other words, "whether the petitioner was already aware of the contents of the records" was a factor of little significance since the duty of disclosure was owed to the public generally. In our view, while the contents of the public hearing notice and the chair's statement at the hearing played a role in this decision, the optimal solution is not to avoid giving written or oral descriptions of the material that the local

government is providing, but to take a more comprehensive view of what is relevant in the council's or board's consideration of a proposed bylaw and must therefore be disclosed.

In addition to the proposed bylaw, we have been advising clients to include in an accurately indexed set of public hearing disclosure materials the following categories of documents, in addition to the proposed bylaw itself:

- Any previous drafts of the bylaw considered by the council or board or in committee
- In the case of privately-initiated bylaw amendments, the applications including all related environmental impact studies, traffic studies, servicing studies, market studies and so forth provided by the applicant (which the applicant must be advised to submit prior the publication date of the first public hearing notice)
- Related staff and advisory planning commission reports including any PowerPoint or other presentation materials
- Related agreements such as s. 219 covenants, in the form in which they exist at the time of publication of the first hearing notice
- Minutes of all council or board meetings including committee meetings at which the bylaw or application has been discussed
- Written submissions from the applicant or the public on the bylaw received up to the date of the public hearing, including any council or board member or staff responses to such submissions that are made available to the council or board as a whole
- Minutes and other records pertaining to public consultation opportunities that have been provided in relation to the bylaw and that the council or board has received or will receive
- Written comments or referral responses from persons and government agencies that have been asked to comment on the bylaw
- Bylaw amendment applications pertaining to the same lands that have been considered during the current term of office of the council or board or the prior term of office of any sitting council or board member
- Any related permit applications such as development permit applications that will be considered by the council or board prior to the vote on adoption of the bylaw

- Internal correspondence such as memoranda and e-mails related to the bylaw and circulated to all council and board members

- Other bylaw amendment applications that are in progress pertaining to the same land

While such materials may be posted on local government websites or placed at other venues such as branch libraries for easier access, the paper copy located at the "front counter" at the municipal hall or regional district office should be the focus of the local government's disclosure efforts. It should be updated daily (including updates to the index) as additional materials that the council or board will be considering are received, and taken to the hearing venue to be available for inspection until the close of the hearing, along with the written submissions that are being made at the hearing venue. The person presiding at the hearing should ensure that all written submissions are handed to the chair or responsible staff member prior to the close of the hearing.

F. Conduct of the Hearing

Section 890(3.1) enables the chair of the public hearing to "establish procedural rules for the conduct of the hearing". In comparison with complaints about information disclosure, actual hearing procedures are the subject of relatively little litigation, the most common complaint being about the perceived lack of impartiality of the chair. In some cases, the application of the local government's meeting procedure bylaw to public hearing proceedings has been discussed, without analysis as to whether a public hearing is actually a council or board meeting to which that bylaw applies, or some other type of proceeding. There are a number of indications in s. 890 that suggest that a public hearing is not intended to be held as a council or board meeting or committee meeting, including the obvious fact that persons who are not members have a right to speak; the requirement in s. 890(6) for a fair and accurate written report of the hearing (which would be redundant if the hearing is a council or board meeting because other legislation already requires accurate minutes of such proceedings to be kept – see s. 148(a) of the *Community Charter*); and the fact that the holding of the hearing can be delegated to as few as a single council or board member and the application of the meeting procedure bylaw would make very little sense in the context of such a hearing. If a public hearing is not convened as a council or board meeting, of course, it would not be possible for the council or board to give third reading or adopt the bylaw at the hearing.

The following issues, with our usual recommendation with regard to them, have been surfacing over the past few years:

- Hearing venues – it is essential that the hearing venue have sufficient capacity to accommodate all those who wish to attend, and be equipped to enable them to at least hear the proceedings.

- Speaker's lists and time limits – this is a legitimate and effective way to manage hearings at which hundreds or even dozens of speakers wish to be heard. The chair should make it clear that speakers are not allowed to reallocate their unexpired or unused time to other speakers.

- Video and PowerPoint presentations – there is no obligation to provide facilities for the use of these media. If they are provided, speakers should be instructed to make their presentation to the council or board and not to the public, and any applicable time limits should apply.

- Private recording of proceedings – in the age of mobile devices with recording capability it is probably futile to attempt to stop this practice regardless of the chilling effect it might have on the making of oral submissions by persons who do not wish to be recorded and the fact that altered versions of these recordings could in theory show up on YouTube or other internet media. We have probably reached the point where there is a common law right to record these proceedings. However, the local government does not have to facilitate such recording by providing space for intrusive camera and lighting equipment and so forth.

- Relevance of presentations – given the relaxed standard that a court would likely apply to this question, it's a poor idea to attempt to rule a speaker out of order on the grounds that their submission is irrelevant to the bylaw. Rely on the speaker's time limit to minimize the wastage of time on submissions of dubious relevance.

- Council and board member conduct – those "hearing" submissions from the public should ask questions of speakers only on points of clarification and not to make political points. They should be discouraged from working at laptops or consulting their mobile phones while submissions are being made.

- Temporary absence of council or board members – the chair should recess the hearing every 1 ½ hours or so to enable council or board members to attend to personal needs and check their mobile phones.

G. Fair and Accurate Summary of Representations

As noted earlier, s. 890 requires that a written report of each public hearing be prepared, certified as being fair and accurate by the "person preparing it", and maintained as a public record. The statute does not specify who may or must prepare it, and does not require that the person who prepares the report must have been present at the hearing. The report must contain "a summary of the nature of the representations respecting the bylaw that were made

at the hearing". A number of questions can arise from this requirement. It should be noted at the outset that if a bylaw is ever attacked on the basis of a failure to comply with this requirement, it seems that the local government could easily make the proceedings moot by preparing the report; there is no time specified in the legislation for the report to be prepared and certified.

The legislation requires a "summary". This suggests that simply certifying public hearing "minutes" taken by local government staff in respect of the oral submissions would not be sufficient; the statute appears to require at least a crude analysis of representations so that they can be summarized in some way. A simple statement that in general X% of submissions appeared to favour the bylaw and Y% appeared to oppose the bylaw would probably suffice, though a listing of the principal points that were made for and against wouldn't hurt. Though s. 890 refers to the representations "that were made at the hearing", the summary should address written submissions made prior to the hearing since these are notionally being made "at the hearing" if the local government has invited members of the public to make them in that fashion.

Many local governments arrange for "minutes" to be taken at public hearings by corporate staff. If another local government staff member is preparing the summary required by s. 890, steps should be taken to ensure that there is no lack of consistency between the summary and the minutes. Note that s. 894(2) permits a member of a council or board who was not present at a hearing to vote on the adoption of the bylaw if they have been given "an oral or written report of the public hearing" by an officer or employee of the local government or any delegate who conducted the hearing. The obvious occasion for an "oral report" would be the scenario where a council or board member arrives too late to hear submissions, but in time to vote on bylaw adoption. The summary prepared for the purposes of s. 890(6) could serve as the "written report of the public hearing" for the purpose of s. 894(2) if it is given to the member who was absent by an officer or employee. (Again the statute does not address who may or must prepare this written report; it only addresses who must give it to the member who was absent in order that they may vote.)

In general, our suggestion in regard to minutes and reports is that local governments focus on the report that is required by s. 890(6) including the requirement for a summary of the representations. While it's a good practice to make the written submissions part of the "public record" along with the summary, there is no requirement for minutes of the hearing to be taken to document the oral submissions unless such a requirement arises under a local procedure bylaw. Nor is there any requirement that such minutes form part of the "public record" – though there is no reason not to take and include such minutes as long as they do not introduce any issue as to the fairness or accuracy of the official summary prepared to comply with s. 890(6).

H. Post-hearing Representations

Hearing from a person interested in a bylaw after a public hearing has closed would be an obvious breach of the *audi alteram partem* rule. After pre-hearing disclosure, post-hearing representations are probably the most frequently cited procedural errors in relation to bylaws that have been through a public hearing process. The procedure followed by the City of New Westminster in the series of events that led to the dismissal of a recent negligence claim against it *(P.S.D. Enterprises Ltd. v. New Westminster (City)* 2012 BCCA 319) was implicitly endorsed by the Court: the City warned members of the public by means of its standard public hearing notice, and a notice on its regular council meeting "delegation" form, that the Council would not hear representations regarding a bylaw that had been subject to a hearing and not yet adopted.

The leading case in this area remains *Hubbard v. West Vancouver (District)*, 2005 BCCA 633 in which the Court of Appeal allowed the District's appeal of a B.C. Supreme Court decision that quashed a zoning amendment bylaw on the grounds that the Council had improperly considered a staff report that followed up on objections to the bylaw that had been raised at the public hearing. The Court of Appeal's decision does not identify a clear criterion or principle that enables us to distinguish permissible follow-up after a public hearing from "new information" that would trigger a need for a further hearing, but the following passage (para. 24 of the decision) at least identifies the nature of the staff report in issue and how it related to what had been addressed at the hearing, and enables us to proceed by analogy:

> I disagree with the chambers judge that there was anything that emanated from Mr. Nicholls' report to council in July 2003 that was really new that required a further public hearing for input from the public. What Mr. Nicholls said about adjournment was essentially irrelevant because council had already decided at the 14 July 2003 public hearing that no adjournment would be ordered. Concerning the effect of this rezoning on the character of the municipality generally, (the "thin edge of the wedge" issue), the report simply observed that this was a rather special site, being one of a few in the District that would not necessarily set any precedent if it was zoned for multi-family use. The report noted that the traffic increase to be expected from this development was minimal, having regard to the fact that the area was located near the civic centre and the West Community Health Unit, public facilities that would be expected to generate considerable traffic. Accordingly, the director anticipated that no significant traffic consequences should arise from the proposed development. Such a comment could scarcely be any great revelation to councillors and the location of these public facilities and traffic patterns would be something that would be clearly known to all attending the July public hearing. It seems to me that this comment about traffic density from the director was clearly within the bounds of the permissible under the decided cases.

There are two things that local governments can do to greatly diminish the possibility of a bylaw being challenged successfully on the basis of procedurally unfair post-hearing representations. The first is to refrain from combining permit application procedures with bylaw amendment application procedures. Making the adoption of a zoning amendment bylaw, for example, conditional on the passage of a resolution authorizing the issuance of a DP or development variance permit for the land in question inevitably exposes the council or board to information about the project in question that could easily be "material to the approval, amendment or rejection of the bylaws by local government" (to use the words of Madam Justice Rowles in *Pitt Polder*). It's preferable to conclude the bylaw amendment procedure before placing the DP application before the elected officials. Those local governments that approach this matter on the basis that the bylaw amendment will not be made until the design of the project is "nailed down" with a development permit incorporating the drawings presented to secure the rezoning, should remember that the issuance of a DP authorizes the development but does not require it; the owner can simply abandon the DP and apply for another one.

The other is to reduce the length of time that elapses between the public hearing and the adoption of the bylaw. We have noted a tendency for local governments to attempt to capture as "rezoning conditions" to be satisfied prior to bylaw adoption, a host of development-related matters the settlement of which may take months if not years, during which information "material to the approval, amendment or rejection of the bylaws by local government" can easily come to the attention of the council or board. These include, in addition to development permit requirements, works and services agreements, housing agreements, DCC front-ender agreements, phased development agreements, and so on. Many of these matters could, and should, be deferred until the OCP or zoning amendment bylaw has been adopted if the local government has leverage after exercising its discretion with respect of the bylaw, as it usually does, to address these other matters.

I. Post-hearing Bylaw Alterations

The *Local Government Act* is very restrictive as regards what can be done with a bylaw after a public hearing to give effect to the representations that were made at the hearing. The local government may not (according to s. 894) alter the use of any area from that originally specified in the bylaw, increase the density of any area from that originally specified, or decrease the density unless the owner consents to the decrease. (By contrast, the City of Vancouver under its Charter can "pass the proposed by-law in its original form or as altered to give effect to such representations made at the hearing as the Council deems fit".) This means, for example, that a bylaw that proposes to rezone a number of different parcels of land from a residential zone to a commercial zone cannot (without a further public hearing) be altered after a hearing by dropping one of the parcels from the bylaw, even if the owner of that parcel consents. (That result can only be avoided by preparing separate bylaws for each parcel, and

after the public hearing abandoning the bylaw for any parcel that is not going to be rezoned.) Consent of an owner to a density reduction should be obtained in writing.

Situations in which a local government wishes to change a zoning bylaw in a way that is not allowed by s. 894 without holding a further hearing, to accommodate and give effect to representations made at a public hearing, may be appropriate for the use of a public hearing waiver. These are often situations in which an additional public hearing is going to be merely a re-run of the first hearing revealing no new opinions or insights into the proposed bylaw, undertaken only to comply with the statute. The notice of waiver of public hearing could state specifically that the hearing is being waived because the proposed bylaw is an altered version of a bylaw that has already been the subject of a public hearing, and that has been altered only to give effect to the representations that were made at that hearing.

The proper way to "alter" a proposed bylaw is for the council or board to pass a resolution to alter the proposed bylaw, either setting out within the text of the resolution the alteration that is being made (e.g. "Moved that proposed Zoning Amendment Bylaw No. 999 be revised by removing the permitted use "marijuana dispensary" from the list of permitted uses in the LSD Zone") or by referring to a list of recommended alterations in a staff report (e.g. "Moved that proposed Zoning Amendment Bylaw No. 999 be revised by incorporating into the bylaw the changes listed on pages 3 and 4 of the November 30, 2012 staff report on the proposed bylaw"). It would be prudent for a council or board resolution effecting any alteration of the bylaw that requires owner consent, to contain a recital to the effect that such consent has been given. The bylaw may then be given third reading "as revised".

J. External Approvals after Third Reading

Zoning bylaws require the approval of the Minister of Transportation and Infrastructure pursuant to s. 52 of the *Transportation Act* (the 800-metre rule), and some regional district OCP and zoning bylaws require approval by the Minister of Community Development. The timing of such approvals is governed by s. 135(4) of the *Community Charter*: the approval must be obtained after the bylaw has been given third reading and before it is adopted. Because this timing is dictated by statute, providing information to the council or board with respect to the approval process after the public hearing has closed and before the bylaw is adopted cannot be a breach of procedural fairness in relation to the hearing.

K. One-day Rule

Section 135 of the *Community Charter* also stipulates that there must be one day between third reading of a bylaw and adoption of that bylaw. However, that rule is displaced by s. 890(9) of the *Local Government Act* which allows third reading and adoption of an official community plan or zoning bylaw to occur at the same meeting.

L. Reconsideration

All bylaws including bylaws amending OCPs and zoning bylaws are subject to the reconsideration process. Mayors may initiate reconsideration under s. 131 of the *Community Charter* within 30 days of the original decision, and most council and board procedure bylaws provide for reconsideration following passage, by majority vote, of a motion to reconsider introduced by a member who voted on the prevailing side on the original motion. If the procedure bylaw is silent on the matter, incorporation of Robert's Rules would import the rule that a member who voted on the prevailing side may introduce a motion to reconsider. Once the mayor or chair has initiated reconsideration or a motion to reconsider has passed, the motion to adopt the bylaw is back on the table to be voted on again, as if the first vote on adoption had not occurred.

Civic elections sometimes result in reconsideration of bylaws already adopted. In *Witt v. Surrey (District)*, [1989] B.C.J. No. 886, Mayor Bose exercised his power under what is now s. 131 to bring an adopted zoning amendment bylaw back for reconsideration. No public hearing was held and the bylaw was defeated on reconsideration. Applying what is now the rule in s. 131(3)(b) that, on reconsideration, the Council has the same authority it had on the original consideration of the matter, "subject to the same conditions that applied to the original consideration", the B.C. Supreme Court held that the Council could not reconsider the bylaw without holding a further public hearing. While the Court's reasoning included reference to the requirement (no longer contained in s. 131) that a mayor initiating reconsideration state his reasons and the Court considered that the public ought to have an opportunity to address those reasons at a further hearing, it is likely that the same result would obtain under the "same conditions" aspect of s. 131: one of the conditions that applies to the original consideration of a zoning amendment bylaw is the requirement to hold a public hearing.

By contrast, in *Royal Oak College v. Burnaby (District)*, [1993] B.C.J. No. 469 the B.C. Supreme Court upheld the adoption without further public hearing, upon reconsideration following defeat at a previous meeting, of a zoning amendment bylaw that permitted the establishment of an AirCare testing station. Neighbours opposed to the bylaw attacked this procedure on the grounds that, as in *Witt*, a further public hearing was required. That argument failed, the Court reaching the following conclusion:

> In my view, the right to notice of reconsideration of a defeated bylaw will be triggered when council proposes to entertain something which is substantially different from that which was addressed at the public hearing. That did not occur in this case. The reconsideration moved by Councillor Drummond was based on a clarification of the developer's position regarding flexibility in hours of operation. The College had already made its point at the public hearing that evening and weekend hours of operation would adversely affect the College.

Thus it does not appear necessary to give further notice or hold a further hearing in relation to reconsideration of a proposed bylaw that has been defeated, as long as reconsideration is not

initiated by the mayor (thereby attracting the "same conditions" rule in s. 131) and the application of the usual post-hearing rules on bylaw alterations and new information does not produce such procedural requirements. While reconsideration of the adoption of any type of bylaw is rare, it can occur and in the case of reconsideration initiated by a council or board member under the meeting procedure bylaw or Robert's Rules, it can occur beyond the 30-day period specified in s. 131 in relation to the powers of the mayor.

M. Re-application

Many development application procedures bylaws enacted under s. 895 of the *Local Government Act* prohibit an applicant from re-applying for a bylaw amendment until a specified period of time, usually a year, has passed following the local government's rejection of the same application. Section 895(3) specifies that any such time limit may be varied in relation to a specific reapplication by an affirmative vote of at least 2/3 of the members eligible to vote on the application. This gives a newly elected board or council an opportunity to avoid the effect of a rejection by their predecessors in office, or to change their mind about the potential acceptability of a particular application that they have themselves rejected. The issue that usually arises under such procedures bylaws when the local government is not willing to vary the reapplication period, is what constitutes a "reapplication" – how different does an application have to be to constitute a new application rather than a reapplication? Because s. 895 is generally giving rights to owners to apply to amend bylaws that restrict property rights, and these provisions are merely entitling owners to make applications that (except in the case of development permits) the local government is entitled to reject, it is likely that such bylaw provisions would be interpreted generously in favour of the owner to make an application. Thus relatively minor changes are likely sufficient to make an application a new one that the local government must consider.

Local Government Act

PUBLIC HEARING NOTICE CHECKLIST

Name of Local Government ______________

Bylaw Name & Number ______________

"Notice of Public Hearing" ______________

Time of Hearing ______________

Date of Hearing ______________

Place of Hearing: civic address ______________
municipality or locale ______________

Purpose Statement (in general terms) ______________

Development Permit Requirement (for OCP Bylaw) ______________

Land Subject to Bylaw: civic address ______________
legal description (optional) ______________

If Bylaw alters Use or Density (unless 10 or more parcels owned by 10 or more persons are the subject of Bylaw alteration):

Sketch ______________
- boundary of area ______________
- shading of area and legend ______________
- name of adjoining roads ______________
- identifying features ______________

Mail (all parcels subject of the Bylaw alteration or within a distance specified by bylaw from the area that is subject to the Bylaw alteration)
- owners ______________
- tenants ______________

Place to Inspect Bylaw ______________

Dates to Inspect Bylaw (expressly exclude holidays) ______________

Times to Inspect Bylaw ______________

Opportunity to be heard ______________
- Written submissions – manner and time ______________

Officer issuing Notice ______________

Date of Notice ______________

Notice of Hearing by Delegate (if applicable) ______________

Local Government Act

ADOPTION OR AMENDMENT TO OFFICIAL COMMUNITY PLAN CHECKLIST

First reading of bylaw – affirmative vote of a majority of all council or board members ______________

Council or Board Resolution or Delegate and Report to Council or Board: ______________

Consider bylaw in conjunction with financial plan ______________

Consider bylaw in conjunction with any municipal ore regional waste management plan applicable in local government (including solid and liquid waste management plans) ______________

If bylaw applies to land in ALR, refer to ALC for comment ______________

If bylaw is for an area that includes the whole or part of a school district, seek input of board on: ______________

- actual and anticipated needs for school facilities and support services in the school districts ______________
- the size, number and location of the sites anticipated to be required for school facilities ______________
- the type of school anticipated to be required on the sites ______________
- when the school facilities and support services are anticipated to be required ______________
- how the existing and proposed school facilities relate to existing and proposed community facilities in the area ______________

Council or Board Resolution: ______________

Consider who may be affected by bylaw and refer bylaw to specified persons, organizations and authorities ______________

Consider whether consultation should be early and ongoing ______________

Specifically consider whether consultation is required with:

- the board of the regional district in which the area covered by the plan is located, in the case of a municipal official community plan ______________
- the board of any regional district that is adjacent to the area covered by the plan ______________

____

- the council of any municipality that is adjacent to the area covered by the plan _____________
- First nations _____________
- the school district boards, greater boards and improvement district boards _____________
- the provincial and federal governments and their agencies

Public information meeting or other forms of consultation? _____________

Council Resolution: _____________

Review steps and referral responses attached to staff report (including school district and ALC comments under ss. 881 and 882 if applicable) _____________

Consider whether consultation pursuant to s. 879 (and ss. 881 and 882 if applicable) is sufficient _____________

If sufficient, refer to public hearing _____________

Public hearing binder with all relevant documents, indexed (a copy for the public to view and a copy for the local governments record) _____________

Public hearing notice (see checklist) _____________

Public hearing _____________

Second reading of bylaw (may be before or after public hearing) - affirmative vote of a majority of all council or board members _____________

Third reading of bylaw - affirmative vote of a majority of all council or board members _____________

Regional board acceptance of regional context statement (if required) _____________

Ministerial approval of bylaw (if required) _____________

Adoption of bylaw - affirmative vote of a majority of all council or board members _____________