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PUBLIC HEARINGS: A NEW ERA

NOVEMBER 27, 2020

Alyssa Bradley and Guy Patterson

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I. INTRODUCTION

When it comes to public hearings, it's easy to miss the fairness forest for the procedural trees. What do we mean by that? Public hearings are just one among a range of possible procedures available to make sure the people who might be affected by certain local government decisions are treated fairly by the municipal council or regional board making the decision. It's notoriously difficult to challenge these kinds of administrative decisions on their merits, that is, on the basis that the decision itself was somehow wrong, or incorrect. This is because judges are instructed to defer to administrative decision-makers, on the basis that the whole point of establishing a delegated decision-making body is that kind of body is better-equipped to make the kinds of decisions the legislature has entrusted to it. This is a bedrock principle of administrative law. To take one obvious example, local elected officials are thought to be best-placed to make decisions about local land use management. On the other hand, and perhaps as a result of the requirement to defer on the merits of a decision, courts are much more willing to second-guess a procedural choice, or misstep, sometimes regardless of any possible impact on the actual outcome of the decision. This context leaves lawyers constantly reminding local governments of the procedural traps awaiting the unwary, making it easy for both staff and elected officials to get bogged down in minutiae, while losing sight of the big picture: getting to good decisions, but only after a fair process.

In court proceedings, fairness means things like an unbiased and impartial judge; the right to representation by a lawyer; full disclosure of all relevant evidence; a chance to cross-examine witnesses and sometimes experts; and at least until recently, an in-person hearing with oral testimony. Before other tribunals, such as the newly-formed Civil Resolution Tribunal (CRT), the involvement of lawyers is deliberately circumscribed and the process takes place almost entirely on-line. So, in a CRT proceeding you might never see or hear from your opponent, or the person deciding your case. The overarching idea in all of this is that what's considered fair by way of procedures depends on factors like the nature of the decision, the type of decision-maker, the impact or significance of the decision, and the context in which the decision is made.

Local governments in BC make a range of decisions, with varying impacts on individual citizens, and communities. Accordingly, a range of procedures is typically available, or mandated. The baseline is that the decisions of most local government bodies must generally be made at a meeting that is open to the public, with notice of the meeting, and its agenda, having been published in advance. Sometimes public notice is required, but nothing more. In other cases, the decision-maker must hear from an individual affected, but not a broader public audience. The gold standard for local government procedures, of course, is the statutory public hearing, which is only required in advance of any of the following decisions:

- Adoption or amendment of an official community plan;

- Adoption or amendment of a zoning bylaw (unless waived where consistent with OCP);
- Discharge or amendment of land use contract affecting use or density or early termination of land use contract;
- Adoption or amendment (if not a minor amendment) of a phased development agreement bylaw;
- Designation of an area for possible temporary use permits (in zoning bylaw or OCP) or issuance of a temporary use permit in an area where no OCP;
- Adoption or amendment of a heritage revitalization agreement bylaw, if it would change use or density or alter zoning bylaw in relation to residential rental tenure;
- Adoption or amendment of a heritage designation bylaw; and,
- Designation of a heritage conservation area.

Whether dealing with open meetings or public hearings, or something in between, the lodestar remains the same: fairness to all those who might have an interest in the outcome of the decision, because even if they don't like the decision, they will very likely have to learn to live with it. On this view, it's easy to see why courts regard fairness as a duty owed by local governments to all those impacted by local government decisions, and why, at least in some cases, they have been so quick to overturn decisions on procedural fairness grounds.

In this paper we review the law of procedural fairness as it applies to public hearings in the context of local government land use management decisions, and provide a reminder of some of the key lessons from the case law on public hearings. In particular, we discuss the before, during and after of public hearings. None of this is groundbreaking, but it's still important, because disgruntled applicants, members of public, and of course their litigation counsel will be happy to scour the record for any hint of a procedural flaw. Finally, we turn to something new: public hearings during the COVID-19 pandemic. Since March of this year, local governments have been struggling to reconcile their duties, and desire, to hear from the public and invite participation at open, typically in-person, meetings and hearings, with the exigencies of a public health emergency involving a highly infectious and easily-transmitted virus for which there is (as of late 2020) no known cure or vaccine. This new world presents new opportunities, and of course new challenges, for public hearings. But the underlying principles remain the same: be fair.

II. PROCEDURAL FAIRNESS: STATUTE AND COMMON LAW

The common law of procedural fairness is rooted in the idea that people affected by decisions are entitled to be treated fairly by decision makers. What meets the standard for fairness depends on the circumstances, but as the Supreme Court of Canada held in a 1965 case called *Wiswell v Winnipeg*, there are cases in which a failure to follow self-imposed procedures may,

despite compliance with whatever steps are spelled out in any applicable statute, render a decision invalid. *Wiswell* arose on a very typical set of facts: landowners of an approximately 3.4-acre tract of urban land had applied to amend the relevant zoning from a low-density single-family designation to a much higher density zone, to make way for the construction of a multi-storey "luxury apartment".

Much like our own *Local Government Act* the governing statute in the *Wiswell* case required that public notice of the application be given in a local newspaper, and also required a public hearing. The municipal council also resolved, in accordance with its usual practice but not actually necessary under the statute, that a sign be posted on the subject property for 14 days in advance of the public hearing that was to be held in respect of the application. Unfortunately, the sign was never posted and no explanation for the failure to post the sign was provided.

Apparently as a result of the absence of any sign on the property, and despite the newspaper notices, an unincorporated local home owners' association did not learn about the rezoning decision until after the decision was made. The association's raison d'etre was to oppose densification and "to maintain the area in question as single-family dwelling area", and it had previously objected to the application. Not surprisingly, the association was upset about the final decision and claimed the failure to post the sign on the property in accordance with the resolution rendered the rezoning invalid. The association succeeded at trial but lost at the Court of Appeal, so the dispute ended up at the Supreme Court of Canada. In a 4-1 decision the Court agreed that the failure to post the sign was fatal. In its reasons the Court adopted a passage from the dissenting Court of Appeal judge, who had said:

> Then counsel argues as well that the governing statute does not call for notice. Hence, he says, notice was not required. I am unable to accept this contention. A long line of authorities, both old and recent, establish that in judicial or quasi-judicial proceedings notice is required unless the statute expressly dispenses with it. The mere silence of the statute is not enough to do away with notice. In such cases, as has been said, <u>the justice of the common law will supply the omission of the legislature</u> (emphasis added).

It's not clear that the result in this case would be the same today, and in fact the reasons of Judson J., the dissenting Supreme Court of Canada, might now be more persuasive. Here's what he said:

> I prefer to say that the municipality could not act without notice to those affected. But I think that they gave clear, reasonable and adequate notice and that failure to direct the posting of notices pursuant to their own internal regulations, which were subject to their own control, does not affect the validity

> of their by-law. This by-law was within the municipal function. The failure to post notices does not go to the question of jurisdiction nor is posting a condition precedent to the exercise of the statutory power. I think that this by-law was validly enacted and was not open to any successful attack.

Despite disagreeing in the result, both passages make it clear that notice is a common law procedural fairness requirement. The difference was about how much notice is required, and what the effect of failing to follow a self-imposed procedural step should be.

The key lesson from the case, which makes procedural fairness such a fruitful avenue for litigation against local governments, is the notion that the common law, also known as judge-made law, will "supply the omission of the legislature". Any common law right to procedural fairness will only be ousted by express statutory language. That is what makes it so difficult to be confident in the event of a challenge on procedural grounds, and so important to focus on what's fair in all the circumstances, not just what the statute says. The next section looks at just a handful of the BC cases in which judges have relied on both the statute and the common law to decide cases that, taken together, provide some guidance as to what should (and should not) be done before, during and after a public hearing.

III. PUBLIC HEARING PROCEDURES: BEFORE, DURING AND AFTER

A. Before the Hearing: Notice and Disclosure

The *Wiswell* case makes clear the importance of "notice" in the common law of procedural fairness: the majority and the dissenting judge agreed the municipality could not proceed without first giving "notice to those affected". The notice requirements in advance of a statutory public hearing in British Columbia are spelled out in section 466 of the *Local Government Act*, and there is no shortage of cases in which seemingly innocuous breaches of these provisions have been fatal to the validity of decisions. Most local government staff are well-aware of the importance of strict compliance with the notice provisions in the *Local Government Act*, but it never hurts to meticulously review section 466. The most recent example of a problematic notice comes from *Kelowna v Khurana*, where the Court found that a notice referring to a bylaw as a "housekeeping bylaw" did not meet the statutory requirement to inform members of the public of the "purpose of the bylaw". The Court in that case relied on a 1982 decision (*Peterson v Whistler (Resort Municipality)*) in which a notice was held to be deficient for using overly technical language and failing to mention, "even in the most general terms", what the bylaw in question actually intended to permit in the proposed new zones:

> Granted that one must not be unduly critical and should approach the notice in an attempt, within reason, to give validity to it. But it nevertheless appears to me

> that considering this notice as a whole it is fair to say that much of it is a collection of verbiage calculated, in general, rather to obscure and confuse than to reveal and inform. The reason for language is to communicate and to the extent that it fails to do so it fails in its essential purpose.

Assuming the notice is sufficient, the next step, and perhaps the most notoriously difficult, is another case of the wisdom of the common law supplementing the bare requirements of the statute.

Section 466 requires that copies of the proposed bylaw be made available for public inspection in advance of the public hearing. In the well-known case of *Pitt Polder Preservation Society v Pitt Meadows (District)*, the BC Court of Appeal confirmed that local governments must also make available for public inspection, in advance of the 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." Once again, the Court's apparent willingness to go beyond the words of statute is rooted in concerns for fairness to those affected:

> The right to be heard before Council makes a decision on proposed land use or zoning bylaws must encompass more than an opportunity to express approval or disapproval of the proposed bylaws. If the participatory process that is mandated by the statute is intended to provide Council with a meaningful examination and discussion of the issues material to Council's decision, it appears to me to have been essential for members of the public to have been given access to impact reports and other relevant documents in sufficient time to prepare reasoned presentations.

The lesson from *Pitt Polder*, and its predecessor cases, is that the local government must disclose, in advance of the hearing, any material that the council or board has or will consider in making its decision.

That lesson became "even more nuanced" in *Fisher Road Holdings v. Cowichan Valley Regional District*, where the Cowichan Valley Regional District was considering a board-initiated zoning amendment that would cause an existing composting facility to become lawfully non-conforming, thereby preventing expansion. The facility operator had already submitted for consideration an application to amend its waste management licence, to allow for expansion and additional waste management activities. In response to the licence amendment application (not the rezoning) a technical report had been prepared, and of course that report was familiar to the licence applicant. The report was not, however, included in the materials made available for public inspection in advance of the public hearing for the board-initiated proposed zoning amendment bylaw. The Court of Appeal, overturning the BC Supreme Court, held that the failure to include the report in the public hearing package was unfair, even though the operator had received the report well in advance of the hearing. The problem for the Court of Appeal was not that the report hadn't been disclosed (it had), but that the fact the report was not

specifically included in the public hearing package made it unclear that the board would consider the report in connection with its zoning amendment decision, as distinct from the licencing decision.

Mercifully, there are two cases, including one from the Court of Appeal, that seem to temper the enthusiasm of the Court for quashing bylaws on the basis of incomplete pre-hearing disclosure, of materials that may be relevant to the decision.

In *Community Association of New Yaletown v Vancouver*, the facts were arguably similar to *Pitt Polder* and *Fisher Road*, but the outcome was the opposite. In the two previous cases the BC Supreme Court had refused to quash the bylaws for alleged procedural defects, but the appeals were allowed (recall that in *Pitt Polder*, like *Wiswell*, the challenge had been initiated by a community group opposed to an up-zoning; in *Fisher Road* the challenge came from an owner aggrieved by a downzoning). In the *Yaletown* case a community group successfully argued in BC Supreme Court that the pre-hearing disclosure on a downtown high-rise development was deficient for failing to adequately explain the complicated relationship between the zoning amendment, a land exchange agreement the City had entered into with the applicant as part of the applicant's community amenity contribution, and the construction of another building on a nearby site that was also part of the land exchange and community amenity agreement. The unanimous Court of Appeal was not similarly persuaded. Importantly, the Court found that the City was not required to disclose the land exchange agreement itself as the public didn't have a right at the public hearing to comment on the agreement, and further, that the staff report which Council had received was all that the public was entitled to as a part of the public hearing relating to the zoning amendment. There was no obligation on the City to provide some kind of further summary or explanation for public disclosure purposes, beyond what was provided to Council to consider the zoning amendment: the staff report.

In *Vancouver Island Community Forest Action Network v. Langford (City)*, a community group argued that the City failed to disclose documents that would materially add to the public's understanding of a proposed rezoning, including documents not put before council in making its decision regarding the rezoning (such as an archaeological report). The Court held in general the public is entitled to receive in advance of the public hearing all documents put before council in making its decision. The Court commented, however, that the public may be entitled to more expansive or restricted access to documents depending on the circumstances. One factor the Court considered relevant in determining the level of disclosure required was the fact that Langford could have waived the hearing on the basis of OCP consistency.

B. During the Hearing: The Right to "Be Heard", by an Impartial Decision-maker

If a local government can make it as far as the public hearing itself, without a gaffe on the notice and disclosure requirements imposed by both common law and the statute, the *Langford* case also provides guidance on how to conduct a fair hearing. Section 465(2) of the LGA says all persons who believe their interest is affect by the proposed bylaw must be given a reasonable opportunity to be heard, or to present written submissions respecting the proposed

bylaw. A local government should therefore attempt to create a respectful, non-intimidating atmosphere at the public hearing. In *Langford* the Court confirmed, however, that a local government can limit individual submissions to a reasonable time, and prevent people from speaking other than on matters pertinent to the bylaw.

The common law also gives people whose rights, interests and privileges are affected by administrative tribunals the right to an unbiased decision maker. In the case of a locally elected council or board member, this means remaining amenable to persuasion, but does not preclude local government decision-makers from approaching a decision with strongly-held views, especially on questions of public policy. The Supreme Court of Canada in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 SCR 1170, explained the "amenable to persuasion" test as follows:

> The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

C. After the Hearing: Limits on Bylaw Changes, "New" Information, and Further Submissions

Once the public hearing is over there are, of course, more common law and statutory rules to be cognizant of. In fact, an entire paper prepared for the 2002 edition of this seminar was devoted to the question of what can and cannot happen "after the hearing"[1]. First of all, the bylaw can be adopted or defeated. It's important to keep in mind that the council or board always retains the discretion to say "yes" or "no", and short of things like targeted malice, bad faith, or corruption, that discretion can be exercised for any reason, or no reason at all. (Even after a bylaw is adopted or defeated, the local government can still change its mind, by reconsidering the adoption or defeat.)

[1] Anderson, Grant (2002) *After the Hearing*. (Paper presented at Young Anderson firm seminar, 2002)

Another option specifically authorized by section 470 of the *Local Government Act* is for the bylaw to be altered and then adopted, provided the alteration does not alter the use, increase the density, without the owner's consent, or decrease the density of any area from that originally specified in the bylaw; or alter the bylaw in relation to residential rental tenure in any area. These provisions are a refinement of earlier *Municipal Act* provisions, which authorized bylaw changes after a public hearing so long as the changes did not alter the "substance" of the bylaw. The restriction on making bylaw alterations that alter use or density prompts two classic planning law questions: what is use? And what is density? Neither term is helpfully defined in the *Local Government Act*, and recent authority leaves it up to the local government itself to decide, provided it doesn't do so unreasonably.

Probably the most common post-hearing conundrum arises from the rule against receiving "new information" after a public hearing. This rule is another case of the common law supplementing the statute, which authorizes certain post-hearing bylaw alterations but says nothing about the receipt of post-hearing information or submissions. It is also an extension of the pre-hearing disclosure principle from *Pitt Polder*, where the Court said anyone entitled to attend a hearing and make submissions to the decision maker must be entitled to disclosure, in advance, of material (such as planning staff reports and applicant's consultants' reports) to be considered by the decision maker. Without equal access to that information, the fairness of the hearing is compromised. On this view, it must also be unfair for the council or board, after the hearing, to receive new information that might be relevant to their decision. Equally, it is generally offside the common law for a council or board to hear further submissions from interested parties, after the hearing, on the substance of the bylaw, again because the point of the hearing is for the decision maker to hear from interested parties, and for the parties to be there to hear one another.

Despite the general rule against receiving truly new information after a hearing, and the dangers of receiving submissions from an applicant other than at a further public hearing, there are cases that temper the strictness of the manner in which these rules were first applied. It is generally permissible to receive further advice or clarification from staff, particularly in response to issues or questions raised at the hearing. However, staff should be careful not to serve as a mouthpiece for proponents or opponents looking to have another kick at the can, and should avoid introducing significant new reports, studies or other materials going to the substance of the bylaw. Similarly, while courts have strongly discouraged the receipt of post-hearing submissions from interested parties, they have acknowledged that it would be artificial and unrealistic to cut off all communication entirely. Slavish adherence to the "no further submissions" rule would seem to leave the whole process open to sabotage by any opponents who, by making themselves heard after hearing, would then have a basis for challenging a subsequently-adopted bylaw.

IV. PUBLIC HEARINGS IN THE PANDEMIC

A. The New Era of Electronic Public Hearings

The COVID-19 pandemic has presented new challenges for conducting public hearings. Ministerial Order No. M192 has provided some relief by enabling local governments to conduct public hearings using electronic or other communication facilities (such as by telephone), either in whole or in combination with some in-person attendance, in order to comply with public health orders and recommendations regarding gatherings and social distancing.

Local governments are still required to generally comply with procedural fairness requirements for public hearings noted above including notice, document disclosure and the opportunity to be heard - now just in the context of the electronic era.

The notice provisions in section 466 of the *Local Government Act* still apply with minor variations for public hearings held electronically. Order M192 now requires the notice of the public hearing to include instructions for how to participate in the public hearing electronically (or by other means such as by telephone).

The disclosure requirements before a public hearing also apply. Order M192 simply provides that material that is to be made available for public inspection for the public hearing may now be made available on-line or otherwise electronically rather than at a physical location. For many local governments, this should not be onerous. Even before the pandemic, public hearing packages were frequently available for inspection on-line in addition to inspection at local government offices. This practice can continue, but it's important to ensure consistency between physical and electronic versions of any material.

Local governments must also ensure that the public is still afforded a reasonable opportunity to provide oral or written submissions respecting the proposed bylaw at any electronic public hearing under section 465(2) of the *Local Government Act*. Order M192 makes clear that the "place" of a public hearing does not need to be a physical location for persons to make oral submissions and may include a public hearing that is conducted electronically.

There is no requirement for local governments to use "best efforts" to allow in-person attendance at a public hearing. However, if a local government wishes to conduct a public hearing with all or some in-person attendance, it will need to adhere to any applicable public health orders including the public health order regarding gatherings which currently limits the number of people in-person at the public hearing (at the time of writing this paper to no more than 50) and requires the collection of the contact information of any people in attendance.

Similar to pre-pandemic procedures, local governments must ensure that any written submissions received regarding the proposed bylaw are included in the material available for public inspection for the public hearing. Local governments should also ensure that persons who believe their interests are affected and wish to make oral submissions on the proposed

bylaw can be heard by the local government as well as the public. Technical difficulties may present a particular challenge in electronic public hearings requiring consideration of back up plans including potentially adjourning a hearing.

Order M192 applies to public hearings delegated to some council or board members in accordance with s. 469 of the *Local Government Act*. Order M192 also applies despite any applicable requirements in a local government's procedure bylaw.

B. Waiving Public Hearings

One option available to local governments to address the challenges with conducting public hearings in the pandemic era (and beyond), is waiving the holding of a public hearing altogether in certain circumstances. This is nothing new. Section 464(2) of the *Local Government Act* permits a local government to waive the holding of a public hearing where a proposed zoning bylaw is consistent with the official community plan in effect for the area. There is no requirement to provide the public an opportunity to be heard with respect the proposed bylaw in such circumstances. Presumably this is because the public's opportunity to be heard has already been addressed at the public hearing relating to the official community plan. If a local government waives a public hearing, it must simply give notice in accordance with section 467 of the *Local Government Act*.

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