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BARRISTERS & SOLICITORS

OFFICIAL COMMUNITY PLANS

NOVEMBER 26, 2021

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I. INTRODUCTION

If you like watching paint dry, or getting a root canal, or having your eyes poked out, you might also enjoy perusing some of the legislation promulgated by our provincial Legislature or federal Parliament. If you are involved in the development or adoption of an official community plan (OCP) for a British Columbia local government, we urge you to overcome whatever reluctance you might have to read the relevant legislation, starting with Division 4 of Part 14 of the *Local Government Act* (LGA). Admittedly, these provisions can't hold a candle to Jane Jacobs for readability, but they are far more accessible and straightforward than many statutes. More importantly, they reveal in reasonably plain language the Legislature's view of what local government land use planning is all about. In fact, local government planners grappling with any aspect of their Part 14 powers should consider at least glancing at Division 4. And again, anyone tasked with the development or administration oF an OCP would do well to take a deeper dive. The provisions are instructive and empowering. And if that is not enough to keep your attention, some are legally binding, meaning that failure to account for them can invalidate even the best-laid plans.

If the threat of invalidity is not enough to convince you, what about the possibility the governing statute can also provide a useful road map for your official community planning journey? If OCPs can trace their lineage to the earliest documented examples of human settlement planning, which might have involved nothing more than a skeletal outline of buildings and pathways oriented to a central geographic, military or religious reference point, the contemporary project has become more elaborate and likely more complex. Today's OCPs invariably occupy hundreds of pages of text, with a sometimes-dizzying array of maps and other schedules and appendices, and often add cross-references to other plans or standards, either previously developed or proposed for future incorporation. (The precise legal status of these ancillary plans can be hard to decipher.) This result is not surprising, given the breadth of research and community consultation that often lies behind an OCP, together with the intra- and inter-governmental referrals that may or must be undertaken before adoption, nor is it necessarily detrimental. But it reinforces our conviction that like the pre-adoption consultation process, early and ongoing reference to Division 4 of Part 14 of the LGA should at least be a consideration in the preparation or amendment of any OCP, and perhaps most amendments, too.

If you accept our invitation to read the statute, this paper attempts to make the task a little easier. First, we review the mandatory and optional content requirements set out in ss. 473 and 474 of the LGA. Here we suggest, at least for legal purposes, that the statute provides a useful starting point for the table of contents. Next, we tackle public consultation and other special pre-adoption procedures, set out in ss. 475 – 477, which also attach to OCP amendments. We then mention the far-reaching legal effect of an adopted plan, before turning to some of the nuances of designating development permit areas and temporary use permit areas, as well as

drafting development permit area guidelines. In the penultimate section we turn to the cases, which provide further insight into some of the key topics already discussed: content (especially as regards development permit guidelines); consultation; and the consistency rule. And finally, in case you needed further convincing of the importance of OCPs, or this paper, we address recent news from the Province, that public hearings will no longer be required for zoning bylaws that are consistent with an OCP.

II. OCP

A. Content (Mandatory and Optional)

Before turning specifically to the "content" requirements set out in section 473, it is worth noting both section 471, which does not use the term "definition", but says:

> an official community plan is a statement of objectives and policies to guide decisions on planning and land use management, within the area covered by the plan, respecting the purposes of local government;

and section 472:

> to the extent that it deals with these matters, an official community plan should work towards the purpose and goals referred to in section 428 [*purpose of regional growth strategy*].

The purpose and goals in section 428 should, at least in the view of one of the authors of this paper, be required reading for every practicing planner in British Columbia. Here they are:

- The purpose of a regional growth strategy is to promote human settlement that is socially, economically and environmentally healthy and that makes efficient use of public facilities and services, land and other resources.
- Without limiting the above, to the extent that a regional growth strategy deals with these matters, it should work towards but not be limited to the following:
  - Avoiding urban sprawl and ensuring that development takes place where adequate facilities exist or can be provided in a timely, economic and efficient manner;
  - Settlement patterns that minimize the use of automobiles and encourage walking, bicycling and the efficient use of public transit;
  - The efficient movement of goods and people while making effective use of transportation and utility corridors;
  - Protecting environmentally sensitive areas;

- Maintaining the integrity of a secure and productive resource base, including the agricultural land reserve;
- Economic development that supports the unique character of communities;
- Reducing and preventing air, land and water pollution;
- Adequate, affordable and appropriate housing;
- Adequate inventories of suitable land and resources for future settlement;
- Protecting the quality and quantity of ground water and surface water;
- Settlement patterns that minimize the risks associated with natural hazards;
- Preserving, creating and linking urban and rural open space, including parks and recreation areas;
- Planning for energy supply and promoting efficient use, conservation and alternative forms of energy;
- Good stewardship of land, sites and structures with cultural heritage value.

The "purposes of local government", at least for municipalities, are stated in section 7 of the *Community Charter* and are broad, but section 471 constrains the scope of an OCP to providing guidance for "decisions on planning and land use management, within the area covered by the plan". Planning and land use management is also a broad subject matter, but as far as OCP content is concerned it is probably limited to the scope of Part 14 (Planning and Land Use Management) and perhaps Part 15 (Heritage Conservation) of the LGA.

On the question of scope, section 428 (cited above) is a useful and comprehensive guide, and insofar as an OCP includes statements and objectives unrelated to what is addressed in Parts 14 or 15, or s. 428, those elements of the plan are not what the Legislature had in mind. It is probably also safe to assume the "decisions" to be guided by an OCP are those of the adopting local government, although it is common for OCPs to include statements providing guidance to other agencies, especially those of the provincial and federal government. To the extent those decision-makers might be amenable to persuasion, a local government need not be shy about attempting to persuade them, especially since they are among those with whom consultation might BE required (more on that below). Taking a bold tack vis-à-vis other agencies might be particularly appropriate when it comes to subdivision approving officers who are, according to settled caselaw, independent of the local government, but whose jurisdiction is squarely within

the realm of land use management, and who are entitled to consider OCP policies before exercising their (independent) discretion. In the fine tradition of Vancouver's decision to use its procurement powers to admonish apartheid in South Africa (*Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC)), OCPs also tend to include at least some guidance on matters extending well beyond "the area covered by the plan". As to plan area, section 471 can only be interpreted as authorizing OCPs for either the whole or only part of a municipality or regional district, because section 472 allows for the adoption of "one or more official community plans", as long as each plan is adopted by bylaw, as a schedule to the adopting bylaw, and includes a designation of the area it covers. Drafters should be careful to follow these instructions.

Regardless of the area covered by an OCP, everything else the statute says about OCPs, including all of the mandatory content requirements, applies. For mandatory content, section 473 is the most significant, but not the only, place to go. Sections 446 and 447 of the LGA say that if a regional growth strategy overlaps with an area covered by an OCP, the OCP must include a "regional context statement", accepted by the regional board, identifying:

- "The relationship between" the OCP and the regional growth strategy; and
- How the OCP "is to be made consistent with the regional growth strategy over time".

Jumping ahead to Part 15 of the LGA, if a local government wants to designate a heritage conservation area under section 614, it must do so in an OCP, similar to the designation of a development permit area. Back to Part 14, but still outside Division 4, we find that local governments hoping to rely on their authority to regulate or authorize development using development permits or temporary use permits must also include the relevant designations in an OCP. More on those matters below.

On to the main event for required OCP content. Careful readers of section 473 will soon discover the section's relative brevity masks a fairly onerous list of requirements. We do not have any cases on the consequences of a failure to include in an OCP all of the required content, but if the matter were to end up in litigation, it would not be a good time to rely on the sometimes-comforting severance clauses that commonly appear in local government bylaws (and contracts). Probably the most obvious thing to think about for section 473 purposes, and likely top-of-mind if you have not been living in a cave for the past two decades, is housing needs. This is the OCP topic on which the Legislature has spoken most clearly. Section 473(1)(a) has long-required every OCP to include "statements and map designations for the area covered by the plan respecting … the approximate location, amount, type and density of residential development required to meet anticipated housing needs over a period of at least 5 years". A more recently added pre-requisite is the preparation of a housing needs report (Part 14, Division 22 of the LGA). The report must be considered when developing an OCP, or amending an OCP's policies "respecting affordable housing, rental housing and special needs housing". These policies are all mandated for inclusion by section 472(2) of the LGA.

The remaining mandatory topics in section 473(1), which must also be addressed with both statements and map designations in an OCP, include:

- The approximate location, amount and type of present and proposed commercial, industrial, institutional, agricultural, recreational and public utility land uses;
- The approximate location and area of sand and gravel deposits that are suitable for future sand and gravel extraction;
- Restrictions on the use of land that is subject to hazardous conditions or that is environmentally sensitive to development;
- The approximate location and phasing of any major road, sewer and water systems;
- The approximate location and type of present and proposed public facilities, including schools, parks and waste treatment and disposal sites.

This list is not a short one. We recommend checking it at least twice before getting carried away by the rising tide of optional content.

And speaking of rising tides, there is one further area of mandatory OCP content to be noted. Section 473(3) of the LGA says: "an official community plan must include targets for the reduction of greenhouse gas emissions in the area covered by the plan, and policies and actions of the local government proposed with respect to achieving those targets." After this, it is on to the list of matters an OCP "may include". (Section 474(4) allows for provincial policy guidelines, which must be "considered" in the development of an OCP, but so far, no such guidelines have been promulgated.)

It is unclear precisely what the Legislature intended by giving a very broad scope to the purpose of an OCP, stating mandatory content, and then proceeding to specifically enumerate certain categories of optional content. Is the idea to restrict the scope of optional content to what is mentioned in section 474, despite the apparently broad scope of an OCP, or is section 474 just there to provide some food for thought, perhaps some inspiration to expand an OCP beyond the horizons of section 473 mandatory content? Section 474(2) provides some support for the latter interpretation, because it specifically restricts a local government to stating broad objectives in relation to matters outside its jurisdiction, unless the matter is ministerially required or authorized to be included. The legal status of unauthorized content is probably that it should not be considered part of the OCP, and severance, as opposed to quashing the rest of the OCP, would likely be in order. Given the amount of work it takes just to get through the mandatory and authorized optional content, uncertainty as to the precise legal implications of including unauthorized content perhaps is not the only reason to leave it out.

One area that seems ripe for the Legislature's attention as far as OCP content is concerned, given the adoption of the *Declaration ON the Rights of Indigenous Peoples Act*, is the absence of any explicit requirement to consider, incorporate or somehow acknowledge the relationship between planning and land use management under Part 14, and planning by or even the existence of, the First Nations whose territory the rest of us now occupy. This relationship is addressed as part of the pre-adoption consultation considerations, which we turn to in the next section, but perhaps even a tentative step on the required content or substance of an OCP would be welcome. In the meantime, optional content to fill this gap is an option.

B. Pre-adoption Procedures: Consultation and Public Hearing

Enough on content. We know that procedure is everyone's darling, and OCPs come with special procedural requirements. Some steps along the way are absolute, others leave much to the discretion of local elected officials, and therefore rely on sound advice from staff. All of the steps require at least some form of attention before adoption is lawful, and again, this includes adoption of a new OCP or any amendment of an existing OCP.

Section 475 is the starting point, and at least on its face gives local governments almost a blank slate: the obligation on a proposing local government, during the development of an OCP, is to "provide one or more opportunities it considers appropriate for consultation with persons, organizations and authorities it considers will be affected". Clearly, the local government gets to decide who it considers will be affected. Only then must it provide any consultation opportunities at all, and the opportunities to be provided need only be what the local government considers appropriate. The local government must consider whether consultation opportunities should be early and ongoing, and must 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;
- Boards of education, greater boards and improvement district boards;
- The Provincial and federal governments and their agencies.

The key here is for the local government, meaning the council or board unless delegated, to turn its mind to the question of appropriate consultation opportunities, which by extension likely means receiving advice from staff on the same question. If you went to planning school, or something like it, section 475 is nothing if not an invitation to put theory into practice. The

only caveat, which might not seem apparent on initial review of section 475, is that the statute only requires a local government to "provide opportunities" for consultation. If no one takes those opportunities, no matter how appropriate, early, and ongoing they are, then apparently no actual consultation is required. The exception is that if the plan might affect agricultural land, the local government must consult with (not just provide an opportunity for consultation to) the Agricultural Land Commission. The statute also states that all section 475 consultation is in addition to the required public hearing for an OCP.

Even more specifically than for agricultural land, the LGA imposes special OCP consultation requirements with school districts, including a requirement to consult "at least once every calendar year", and to seek input on:

- The 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 the school facilities referred to in paragraph (a);
- The type of school anticipated to be required on the sites referred to in paragraph (b);
- When the school facilities and support services referred to in paragraph (a) are anticipated to be required;
- How the existing and proposed school facilities relate to existing or proposed community facilities in the area.

Again, it is worth reading the statute: the above sounds like a reasonable template even for non-mandatory consultation, with other relevant entities, on a range of planning and land use management decisions.

Finally, an OCP comes with unique "adoption procedures", set out in section 477 of the LGA. Every reading of an OCP bylaw must receive an affirmative vote of a majority vote of all council or board members. After first reading, and before the public hearing (which itself must occur before 3rd reading) the local government must consider the OCP in conjunction with its financial plan and any applicable waste management plan, and refer the plan to the Agricultural Land Commission for comment. It is common practice, and recommended, to document these steps by resolution, recorded in meeting minutes or as recitals to the OCP bylaw itself, or both. Diligent record keeping during the development and adoption of an OCP will assist in making sure all necessary steps are taken, and in providing evidence that the steps were in fact taken, in the event of a challenge.

C. Legal Effect: Bylaws and Works Must be "Consistent"

Assuming an OCP includes all required content, and is adopted only after proper consultation consideration and following necessary adoption procedures, its legal effect is determined by section 478 of the LGA. The first part of section 478 tells us what an OCP does not do:

> An official community plan does not commit or authorize a municipality, regional district or improvement district to proceed with any project that is specified in the plan.

Subsection (2) of section 478 says what an OCP does do, which is to constrain subsequent "bylaws enacted or works undertaken". After adoption of an OCP, those things (bylaw and works) "must be consistent with" the plan. The application of this consistency rule has been the subject of most OCP-related litigation, which is addressed later in this paper, but the critical point seems to be that except where an OCP puts land within a development permit or heritage conservation area, and thereby requires some kind of permit for most subsequent development on that land, an OCP itself has no immediate or direct impact on land use. Its principal effect is to act as a check on further bylaws, such as zoning bylaws, and works, such as the extension of a road network, or water, sewer or drainage infrastructure. In this way an OCP, even without immediate or direct effect, can of course have profound impacts on future growth and settlement patterns.

III. DEVELOPMENT PERMITS

A. Development Permits: What are They?

The first questions one might ask are what is a development permit and why might a local government want to use one? Development permits are a tool for local government to control and manage development of land within their municipal boundaries. They provide development management by allowing for certain land use regulations to be varied or supplemented and through guidelines which can impose conditions on the sequence and timing of construction, and/or provide further requirements or conditions as set out in section 491.

The first step when a development permit system is established is to designate one or more geographic areas for which the scheme applies, otherwise known as a development permit area (DPA). A DPA is established within an OCP, as are the majority of the requirements of a DPA. Once the DPA has been established, section 489 of the LGA then requires a development permit before certain activities can be undertaken within that area. These are:

- Subdivision of land within the area;
- Beginning construction of, addition to or alteration of a building or other structure;

- Altering land within an area designated under section 488 (1) (a) or (b) *[natural environment, hazardous conditions]*;

- Altering land, a building, or other structure on that land within an area designated under section 488 (1) (d), (h), (i) or (j) *[revitalization, energy conservation, water conservation, greenhouse gas reduction]*.

The local government may set out exemptions to the above list so that a development permit will only apply to certain types of activities that engage these restrictions. For example, the local government could exclude any construction performed by the local government from needing a development permit.

Once the DPA has been established, the local government must designate the purpose of the DPA. There are a limited number of allowable designations set out in section 488 of the LGA. The local government must choose one or more of these designations for each DPA:

- Protection of the natural environment, its ecosystems and biological diversity;

- Protection of development from hazardous conditions;

- Protection of farming;

- Revitalization of an area in which a commercial use is permitted;

- Establishment of objectives for the form and character of intensive residential development;

- Establishment of objectives for the form and character of commercial, industrial or multi-family residential development;

- In relation to an area in a resort region, establishment of objectives for the form and character of development in the resort region;

- Establishment of objectives to promote energy conservation;

- Establishment of objectives to promote water conservation;

- Establishment of objectives to promote the reduction of greenhouse gas emissions.

Once the DPA has its designated purpose(s) it must do two very important things. It must (a) describe the special conditions or objectives that justify the designation, and (b) specify guidelines respecting the manner by which the special conditions or objectives will be addressed.

When describing the special conditions or objectives that justify the designation, it is beneficial to give more information than just repeating the designation from the LGA. For example, a DPA with a designation of section 488(1)(b) "protection of development from hazardous conditions" should identify the hazard, such as flooding or steep slopes. Alternatively, the objectives could be set out, such as providing more small-scale shopping opportunities within walking distance of residences.

The guidelines required by section 489(2)(b) will likely make up the lengthiest part of the development permit chapter of an OCP, or may be included in a zoning bylaw. Either way, the guidelines set out how the local government wishes to achieve its objectives or address the special conditions identified in section 489(2)(a). The content of the guidelines is subject to the authority that may be set out in a development permit, which is divided into general and specific authorities (ss. 490 and 491). This restriction on the content of the guidelines to only the specific authorities which may be placed in a development permit was recently confirmed by the BCSC in *Wilson v. Cowichan Valley (Regional District)*, 2021 BCSC 1735, where portions of an OCP were found to be invalid as they exceeded the authority of the local government to adopt. So, it is important to understand what may be lawfully included in guidelines.

B. Development Permits – What Can They Do?

As mentioned above, a development permit, issued by resolution, allows a local government to manage development within a given area. A development permit allows a local government to manage development through three primary tools, which are set out in section 490(1):

- Vary or supplement a land use regulation bylaw or a bylaw under Division 11 *[Subdivision and Development: Requirements and Related Matters]*;
- Include requirements and conditions or set standards under section 491 *[development permits: specific authorities]*;
- Impose conditions respecting the sequence and timing of construction.

These are the general authorities of a development permit. The power to vary or supplement land use regulations and impose conditions on the sequencing and timing of construction apply to all development permits, while the ability to include requirements/conditions or set standards (the specific authorities) are dependent on the designation(s) of the DPA. In this way, the LGA has specified exactly what tools a local government may use in achieving specific goals identified for the DPA. These specific authorities are set out in greater detail under section 491.

C. Guidelines – Specific Authorities

The designations available for DPAs each have their own specific authorities included in section 491 of the LGA. When crafting DPA guidelines, local governments must ensure that the requirements set out in the guidelines fall within the authorities provided by the LGA, or other

powers granted to land use permits. The table included as Appendix A to this paper identifies the specific authorities granted to each designation. While these authorities are broad, it is a worthwhile exercise for local governments to review draft DPA guidelines and confirm that each requirement or regulation has been authorized in the LGA. In addition to these specific authorities, local governments may also include those powers within the general authorities as well as general land use permit authorities such as requiring securities (s. 502) or require development information (s. 485).

As an additional note on drafting guidelines, where strict language has been used it will result in strict interpretation. If the guidelines state that certain requirements must be included (or excluded), permits will be expected to reflect that. That is not necessarily a bad thing, but it is important to recognize the effect it will have. Alternatively, building in more flexible language into guidelines will provide more flexibility for a local government down the line, again not an inherently good or bad thing but a result that should be understood. For a detailed discussion on how the courts have interpreted guidelines, please see section B of the caselaw review below.

IV. TEMPORARY USE PERMITS

A. Temporary Use Permits – What are They?

Temporary use permits more or less do exactly what they sound like, they allow for an area to temporarily have a use that otherwise would not be permitted in that area. They can be viewed as a tool for local government to allow for uses that satisfy a temporary need (such as a work camp or emergency area), or a way to test the waters of a new use for which the local government may not want to commit to and risk a lawful non-conforming use. In order to issue a temporary use permit, the local government must first designate an area within an OCP in which they may be issued. The temporary use permit must then be applied for by the owner of the land in question.

Through section 493 of the LGA, temporary use permits allow for a use not permitted by a zoning bylaw, specify the conditions under which the temporary use may be carried on, and allow for and regulate the construction of buildings or structures respecting the use allowed under the permit. Temporary use permits are generally issued by resolution, and their issuance can be delegated to staff, though any decision by staff to issue or not issue a temporary use permit can be reconsidered by council if the applicant disagrees with staff.

B. Notice, But Not Usually a Hearing

Temporary use permits are somewhat unique within the LGA in that they can alter land use, albeit temporarily, without a public hearing. Also, because TUPs are issued by resolution, or by bylaw if there is no OCP, they are not subject to the OCP consistency rule.

The LGA does require that public notice be given before passing a resolution to issue a TUP, and the notice must state the following:

- In general terms, the purpose of the proposed permit;
- The land or lands that are the subject of the proposed permit;
- The place where and the times and dates when copies of the proposed permit may be inspected;
- The time and date when and, if applicable, the place where the resolution will be considered; and
- If the meeting at which the resolution will be considered is conducted by means of electronic or other communication facilities, the way in which the meeting is to be conducted by those means.

If the local government is proposing to issue a TUP by bylaw under s. 493(1)(b), the notice and hearing provisions under ss. 464, 465, 466, 469, and 470 of the LGA apply.

C. Temporary by Design

The substantial power to alter land use without a public hearing is tempered with some limitations on the use of these permits. One such limitation is their temporary nature, which is set out at section 497. The maximum initial length that a temporary use permit may permit a designated use is three years, though a local government may limit that time period when the permit is issued. The LGA states that a temporary use permit may be renewed only once, but it requires that the owner applies for this renewal.

D. Temporary Use Permit Conditions

Pursuant to ss. 492(b), 493(2)(b), 495, and 496, local governments may specify conditions which will apply to the issuance of a temporary use permit. Section 492 is for general conditions, stated in an OCP or zoning bylaw. Section 493(2)(b) authorizes conditions specified in a TUP itself, which seems to authorize conditions tailored to the particularities of the use and land that are the subject of the permit. The conditions permitted under ss. 495 and 496 relate to what happens to the land after the permit expires. These sections allow a local government to require some assurance from the property owner that once the permit has expired the land will be returned to the same state it was prior to the use. The assurance comes in the form of an undertaking from the owner, which is attached to the permit, that buildings will be removed from the land and/or the land will be restored to a standard set in the permit, by a date set in the permit. If the land owner fails to fulfill this undertaking, then the local government may undertake the work at the owner's expense.

As the risk always exists that an owner may no longer be available or able to pay for the demolition of buildings or restoration of land, as a further condition to a temporary use permit, the local government may require a security be collected from the owner in order to guarantee the terms are fulfilled.

E. Do Not Forget

Section 503 of the LGA requires a local government to provide notice to the Land Title Office whenever any development permit or a temporary use permit is issued so that notice can be placed on title. This requirement also includes amendments or cancelation of the permit, which might be more easily forgotten. Once notice has been placed on title, the terms of the permit become binding on any person who acquires an interest in the lands for so long as the permit is valid.

V. CASELAW

There is no doubt the OCP legislation, including the TUP and especially development permit provisions, leave some questions unanswered and perhaps some room for interpretation as to the precise scope of, and potential limits on, local government jurisdiction. The balance of this paper reviews the cases in which these matters have been judicially considered. As noted above, there do not appear to be any cases on mandatory and optional content requirements, so we begin with consultation.

A. OCP Consultation Obligations

In *Gardner v. Williams Lake (City)*, 2006 BCCA 307, the British Columbia Court of Appeal addressed the scope of what is now section 475 of the LGA. The appellant, Mr. Gardner, challenged the validity of an OCP amendment bylaw enacted to accommodate a large retail shopping centre. Mr. Gardner argued the City had not met its consultation obligations.

The Court of Appeal distinguished the local government's duty to consult on an OCP from the broad scope of the duty imposed on the Crown in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73. The Court characterized the local government's duty as follows:

- The consultation, at a minimum, "anticipates bi-lateral communication in which the person consulted has the opportunity to question, to receive explanation and to provide comment to the local government upon the proposal";

- The term "consultation" in section 879 includes "informal communications, meetings, open houses, delegations, and correspondence", meaning that "those consulted have the opportunity to question and provide their comment, and that the local government weigh that comment, before advancing in the legislative process";

- The consultation must also be meaningful. In other words, "the consulting body must do more than pay lip service to the requirement".

The Court of Appeal stated all that is required by section 475 is an opportunity for consultation, which was provided by a notice of a public information meeting (as distinct from the public hearing) given to persons affected by the proposal, including the appellant.

B. Guidelines for Development Permit Areas

In *Washi Beam Holdings Corp. v. West Vancouver (District)*, 1999 CanLII 6503 (BC SC), the petitioner challenged the quality, and the very existence, of development permit guidelines in an OCP. The Court concluded that council has discretion to allow or deny a development permit application on a case-by-case basis, but the discretion must only be exercised according to previously-adopted guidelines. The petitioner had a development permit refused based on a planner's report that recommended rejection of the application "because it [did] not comply with municipal policies to foster compatibility of development, to ensure that new development [was] supporting of other policies and regulations, and to protect the character of the municipality".

The Court reviewed the OCP, which contained no separate "guidelines" section, and decided that "a guideline may exist without specifically being referenced by usage of that term". The Court did say the words used in the OCP must provide some guidance for land owners who seek to develop their property. The Court said the OCP was poorly drafted, confusing, and contained few guidelines, but found one guideline, that was held sufficient: "... to protect the character of the Municipality and to guide design of any multiple family development ..." and to "... foster compatibility of development". The lesson from this case is not to rely on it when drafting DP guidelines, but to draft guidelines so that you do not have to rely on it in subsequent litigation.

In *Loewen v. Coquitlam (City)*, 1999 CanLII 6285 (BCSC), another perhaps surprising result but this time going against the local government, the Court quashed a development permit because it did not comply with <u>every</u> OCP guideline.

The court cited *Westfair Foods Ltd. v. Saanich (District)*, (1997), 38 MPLR (2d) 202 (BCSC), for the proposition that a municipal council's discretion to issue or refuse a development permit is limited under the *Municipal Act* and must be exercised in accordance with the guidelines in an OCP.

Unfortunately, the guidelines under review in *Loewen*, at least according to the Court, required compliance with all of the guidelines. A City planner's memo reviewed the proposed building design and site development in relation to the OCP in terms of the design guidelines for new multi-family developments and stated that "a number of the guidelines have been met". The Court inferred from this that not all of the guidelines had been met, there was no evidence that the council had turned its mind to whether non-compliance with any guideline was acceptable. Thus, the council did not act in conformity with its apparently self-imposed obligation to require compliance with all guidelines. The Court quashed the development permit.

In *511784 B.C. Ltd. v. Salmon Arm (District)*, 2001 BCSC 245, the Court considered the level of particularity required in development permit guidelines. The petitioners proposed to build apartment buildings and single-family residential dwellings. Neighbouring properties objected and the developer was unable to reach a consensus with them. The council rejected the developer's application and recommended specific amendments to the proposed development plan. The petitioners sought an order for mandamus to compel the council to issue the development permit on the ground that the guidelines were not valid. The petitioners alleged that the District's guidelines were too vague and uncertain, and were discriminatory.

The Court held that:

> The objectives and guidelines in the OCP must be sufficiently broad and lacking in precision in order to give Council the necessary flexibility to exercise its discretion on a case-by-case basis. The requirement for certainty and precision attaches to regulatory powers but not to discretionary powers. The purpose of a judicially constructed certainty requirement is to avoid transforming regulatory power into a discretionary power.
>
> The authority to issue development permits is a discretionary power, not a regulatory power, and the requirement for certainty and precision attaches only to regulatory powers. However, once a council has exercised its discretion to issue a development permit, the need for certainty is met in the requirements and conditions contained within the development permit itself.

The Court concluded that the wording of the guidelines was sufficiently certain to provide direction to the council in the exercise of its discretion to issue development permits.

Also, the Court rejected the allegation of discrimination on the basis that all discretionary powers are exercised in a discriminatory way. The exercise of discretionary power is only unlawful if the discretion is exercised in an improper discriminatory manner, that is for some improper purpose or on some irrelevant basis. There was no evidence in the case that the council acted discriminatorily.

C. OCP Consistency Requirements

Rogers v. Saanich (District), 1983 CanLII 321 (BCSC), was a leading case providing guidance on the meaning of "consistency" for almost three decades. The District had passed a bylaw rezoning two acres of agricultural land for housing in contemplation of a later subdivision into eight smaller parcels. Among grounds to quash the decision was that contrary to the provisions of the *Municipal Act*, the District had enacted provisions and proposed to undertake works contrary to or at variance with the District's OCP, and had enacted a bylaw which would impair or impede the ultimate realization of all or part of the objectives of the OCP.

At the time, Central Saanich had a new OCP which by its terms was designed to "provide a broad framework for a later, more intensive, identification of issues, problems, and policy development."

The Court reviewed some Canadian cases dealing with the interpretation of OCPs and noted that those cases were diverse but that they had a common theme – "the written efforts of planners are really objectives and unless there is an absolute and direct collision they should be regarded, generally speaking, as statements of policy and not to be construed as would-be acts of Parliament." The Court continued:

> Applying that above general principle, I simply cannot find any collision between the rezoning of two acres and Sections 1, 1(a), 1(d), the greenbelt concept of s. 2.7 or the rural area concept of 2.8 which I cannot consider apart from the provisions of the community plan as leading to the conclusion that the bylaw subverts the official regional plan, and I so find.
>
> Nor can I find any such direct collision with the official community plan. The goal and the objectives I consider to be worthy but vague. In fact, Map 1-B might well be taken to be statement that the Scoones, Rogers and Hutchison land is really slated for residential property, read in conjunction with the structure map and with policy s. 1.1 (which it specifically went against when it passed the by-law sponsoring Scoones's application for removal from the ALR) and 1.2 on p. 16.

The Court held that there was no direct conflict between the bylaw and the OCP. Therefore, the validity of the bylaw could not be impeached.

In *Western ARP Services LTD. v. Capital (Regional District)*, 1986 CanLII 729 (BCCA), the British Columbia Court of Appeal considered the issue of what is required in order to quash a municipal bylaw for conflicting with an OCP. The District had enacted a subdivision bylaw regulating, among other things, minimum lot sizes in subdivisions. The bylaw was amended to increase a minimum lot size to 100 hectares, as opposed to 12 hectares contemplated by the OCP. The Court said the bylaw was "clearly in conflict" with the OCP, and agreed with the lower court the whole bylaw must be quashed. (The Court also considered and rejected an argument for severance, that is, quashing only part of the bylaw).

In at least three cases, *Vancouver (City) v. Simpson*, 1976 CanLII 148 (SCC), *Cole v. Anderson*, 1995 CanLII 2170 (BC CA), and *Wyles v. Penticton (City)*, 28 MPLR (2d) 250 (BCSC), the courts have found that an approving officer may refuse a subdivision application relying on the OCP, even though approving officers are not specifically obliged to require or even consider OCP compliance. In *Wyles*, the approving officer refused to approve a plan of subdivision of the appellants' land. The land was a 35-acre parcel zoned agricultural and formerly used as a gravel pit which the appellants wished to subdivide into six parcels of two hectares each. The plan of subdivision satisfied the requirements of the applicable zoning bylaw. Nonetheless, the officer concluded that the proposed subdivision was not in the public interest essentially because it

was not consistent with the OCP. The appellants argued that the disapproval was made on a "specious or totally inadequate factual basis" and that the officer erred in looking to the OCP to determine whether the proposed subdivision was in the public interest. The Court held that the approving officer was entitled to consider the OCP in determining what was in the public interest and that, having done so, it cannot be said that his decision was based on a totally inadequate factual basis. The Court found that the approving officer was "honestly endeavouring to comply with the duties imposed on (him) by the legislature in planning the coherent and logical development of (his) areas."

The leading OCP consistency case is now *Residents and Ratepayers of Central Saanich Society v. Central Saanich (District)*, 2011 BCCA 484. In that case, residents of the District sought to quash a bylaw permitting a subdivision of 13 hectares of farmland into 57 residential lots on the grounds that it was inconsistent with the District's OCP. The land was zoned agricultural and the OCP designated this land as rural. The OCP contained policies that specifically preserved rural lands for rural uses rather than using them as a reserve for future residential, commercial or industrial uses. The landowner made three subdivision proposals and after a number of amendments, the council passed a resolution changing the zoning of the land from agricultural to rural estate. This new zoning permitted a 57-unit development on a 13-hectare site. The Society argued that this development was too dense to be fairly characterized as rural and thus the bylaw was inconsistent with the OCP. In response to the Society's argument, the Court commented:

> The Society's argument ignores the rather unusual nature of an OCP as a 'visionary' set of policies and objectives that are for the most part laid out in broad strokes. Very little is actually "prohibited", and the definitions of various terms of art used in the plan leaves municipal councils with some latitude in practical application.

The Court of Appeal took a much broader view of the matter than the Society. The Court indicated that:

> The OCP does not speak only to lot size or density. As has been explained, it speaks also to other environmental, economic and social goals, including protecting environmentally sensitive areas, ensuring a "range of housing opportunities", creating "walkable neighbourhoods", supporting economic development, protecting natural ecosystems, protecting water quantity and quality, etc. Bylaw 1712 furthered many of these goals, and most importantly, ensured that the balance of 235 acres owned by Mr. Vantreight would remain farmland in perpetuity. It seems to me that, judged on a standard of reasonableness, the council was permitted to weigh these positive and negative factors in making its decision and to determine that the proposed development, considered as a whole and in conjunction with the other concessions insisted upon by the District, was consistent with the OCP's "vision" of Rural lands.

The Court of Appeal held that the bylaw was sufficiently consistent with the OCP, and was valid.

More recently, in *Wells v. Victoria (City)*, 2019 BCSC 2267, a zoning bylaw was challenged on the basis that it was inconsistent with the OCP. The City adopted the zoning bylaw and authorized the issuance of a development permit for a 2.5-storey multi-unit residential development. The petitioner submitted that the bylaw was inconsistent with the OCP, which included a 2-storey limit for buildings in the area.

The City had originally received, and rejected, an application for a three-storey building containing multiple units. That proposal was rejected, among other reasons, for being inconsistent with the OCP. After several changes to the proposal, it was considered by staff to be consistent with the OCP. The Court noted that the question of the consistency of the bylaw with the OCP was a live issue for City staff and council and was given specific consideration. The Court reviewed the OCP and stated that its provisions are to make "the form, place character, use and density guidelines" something less than strict, mandatory, or immutable. Accordingly, the two-storey maximum was "not an upper limit that can never be exceeded. It is a guideline, which means that it is not mandatory or immutable and need not be strictly complied with." The Court also reasoned that:

> … the [bylaw] and the building application were approved by Council to achieve various policy objectives that are set out in the OCP and elsewhere. These policy objectives include: to increase the population within walking distance of town centres and transit routes; to add ground-oriented structures to areas where such structures are lacking; to increase housing supply, diversify home ownership options, and support a wide range of housing choices; and to increase affordable housing. There is a clear need to balance these various policy objectives against density, building height, and built form. The need to balance these various objectives is another reason why the entries in Figure 8 of the OCP are properly considered to be non-mandatory guidelines.

The Court concluded that the City's determination that the bylaw was consistent with the OCP was a decision that is "within the range of acceptable outcomes and is therefore not liable to be set aside on judicial review."

Finally, in the recent case *O'Shea/Oceanmount Community Association v. Gibsons (Town)*, 2020 BCSC 698, the Court discussed the nature of relationships between a zoning bylaw and an OCP and the extent to which the bylaw should be consistent with the OCP. The Association challenged the validity of the zoning amendment bylaw approving a high-density residential development on the grounds that it is in conflict with the Town's OCP.

The Court considered the purpose and effect of an OCP, and citing *G.S.R. Capital Group Inc. v. The City of White Rock*, 2020 BCSC 489, the Court affirmed that "OCPs do not commit or authorize a local government to proceed with any project specified in the plan, but all bylaws enacted or works undertaken by the local government after the OCP has been adopted must be

consistent with the OCP." The Court stated that the OCP is a broad policy document. Unlike the OCP, zoning bylaws are a more specific form of land use control and are used to establish a more detailed regulatory framework such as proscribing building height, setback and parking standards.

The Court formulated some important principles on the question of whether a particular zoning bylaw is consistent with an OCP:

- An OCP is a policy document which is not to be given the same level of scrutiny "as would-be acts of Parliament";
- An OCP is meant to capture a long-term vision or philosophy and cannot be construed with the scrutiny afforded a statute;
- Inconsistency with an OCP is only established if there is a clear or specific contradiction between the OCP and the bylaw in question;
- When judged on a standard of reasonableness, consistency is considered holistically, and in conjunction with other considerations that may have factored into the making of the decision by the municipality; and
- Summarized the consistency analysis citing *Greater Vancouver (Regional District) v. Langley (Township)*, 2014 BCSC 414: "Therefore I determine that "consistent" as used in the [LGA] is not an exacting standard and it must take into account the wide variety of factors that are identified in what is fundamentally a policy document meant to guide planning decisions. To paraphrase from *Catalyst*, the test I will apply is: The OCP and regional context statement are consistent if a reasonable body, informed by all applicable factors, could determine that they are."

The Association argued that the bylaw was inconsistent with the OCP since the bylaw permitted the development (and future developments) to be constructed at a density that exceeds the limits set out in the OCP and excluded the units per hectare measurement set out in the OCP.

The bylaw authorized an 87-unit development on 1.93 hectares, which is 45 units per hectare. The OCP provided for "generally 20 to 25 units per hectare". The Court found that the word "generally" in the OCP should be interpreted as "usually"; therefore, 25 units is not the maximum allowable density for units and there may be deviation from this number. The Court further looked at the DPA provisions and noted that the DPA allowed "approximately 16 housing units per acre", or a density of approximately 40 units per hectare. The proposed development would have approximately five additional units per hectare. The Court found that such deviation is within a range of reasonable options open to the council.

The Court noted that while there may appear to be some inconsistencies with the OCP when parsed into smaller sections, those inconsistencies are minor, and when viewed as a whole they disappear. The Court concluded that the bylaw was within a range of reasonable outcome available to the Town and dismissed the petition.

VI. CONCLUSION

Local governments have always had the authority to waive a public hearing if a zoning bylaw is consistent with the applicable OCP, and since zoning bylaws must be consistent with OCPs, it is perhaps surprising how many public hearings are actually held. Those involved with, and observing, local government processes have been known to question the value of public hearings, especially relative to the administrative headaches they can cause. Yet at least until the pandemic forced a re-think, waiver was infrequently relied on. Now the provincial government is proposing legislation that would, at least on its face, make public hearings even more explicitly optional by stating that a local government is not required to hold a public hearing if a zoning bylaw is consistent with the relevant OCP. Whether or not this change is ever enacted, and whatever formulation the Province settles on as regards final wording, it reinforces the role of an OCP as backbone to the exercise of a local government's formidable planning and land use management authority.

Appendix A – DPA Specific Authorities

Section 488 designation	Associated authorities
(a) protection of the natural environment, its ecosystems and biological diversity	A development permit may do one or more of the following: (a) specify areas of land that must remain free of development, except in accordance with any conditions contained in the permit; (b) require specified natural features or areas to be preserved, protected, restored or enhanced in accordance with the permit; (c) require natural water courses to be dedicated; (d) require works to be constructed to preserve, protect, restore or enhance natural water courses or other specified natural features of the environment; (e) require protection measures, including that vegetation or trees be planted or retained in order to (i) preserve, protect, restore or enhance fish habitat or riparian areas, (ii) control drainage, or (iii) control erosion or protect banks.
(b) protection of development from hazardous conditions	A development permit may do one or more of the following: (a) specify areas of land that may be subject to flooding, mud flows, torrents of debris, erosion, land slip, rock falls, subsidence, tsunami, avalanche or wildfire, or to another hazard if this other hazard is specified under section 488 (1) (b), as areas that must remain free of development, except in accordance with any conditions contained in the permit; (c) require, in an area that the permit designates as containing unstable soil or water which is subject to

	degradation, that no septic tank, drainage and deposit fields or irrigation or water systems be constructed; (d) in relation to wildfire hazard, include requirements respecting the character of the development, including landscaping, and the siting, form, exterior design and finish of buildings and other structures; (e) in relation to wildfire hazard, establish restrictions on the type and placement of trees and other vegetation in proximity to the development. The above Conditions and requirements may vary the use or density of land, but only as they relate to health, safety or protection of property from damage. Before issuing a development permit for land within a development permit area designated under section 488 (1) (b), a local government may require the applicant to provide a report to assist the local government in determining what conditions or requirements it will impose in the development permit.
(c) protection of farming	A development permit may include requirements for screening, landscaping, fencing and siting of buildings or other structures, in order to provide for the buffering or separation of development from farming on adjoining or reasonably adjacent land.
(d) revitalization of an area in which a commercial use is permitted	A development permit may include requirements respecting the character of the development, including landscaping, and the siting, form, exterior design and finish of buildings and other structures
(e) establishment of objectives for the form and character of intensive residential development	A development permit may include requirements respecting the character of the development, including landscaping, and the siting, form, exterior design and finish of buildings and other structures
(f) establishment of objectives for the form and character of	A development permit may include requirements respecting the character of the development, but only in

commercial, industrial or multi-family residential development	relation to the general character of the development and not to particulars of the landscaping or of the exterior design and finish of buildings and other structures
(g) in relation to an area in a resort region, establishment of objectives for the form and character of development in the resort region	A development permit may include requirements respecting the character of the development, including landscaping, and the siting, form, exterior design and finish of buildings and other structures
(h) establishment of objectives to promote energy conservation	A development permit may include requirements respecting the following in order to provide for energy conservation: (a) landscaping; (b) siting of buildings and other structures; (c) form and exterior design of buildings and other structures; (d) specific features in the development; (e) machinery, equipment and systems external to buildings and other structures. Or establish restrictions on the type and placement of trees and other vegetation in proximity to the buildings and other structures in order to provide for energy conservation.
(i) establishment of objectives to promote water conservation	A development permit may include requirements respecting the following in order to provide for water conservation: (a) landscaping; (b) siting of buildings and other structures; (c) form and exterior design of buildings and other structures; (d) specific features in the development;

	(e) machinery, equipment and systems external to buildings and other structures. Or establish restrictions on the type and placement of trees and other vegetation in proximity to the buildings and other structures in order to provide for water conservation.
(j) establishment of objectives to promote the reduction of greenhouse gas emissions	A development permit may include requirements respecting the following in order to provide for the reduction of greenhouse gas emissions: (a) landscaping; (b) siting of buildings and other structures; (c) form and exterior design of buildings and other structures; (d) specific features in the development; (e) machinery, equipment and systems external to buildings and other structures; Or establish restrictions on the type and placement of trees and other vegetation in proximity to the buildings and other structures in order to provide the reduction of greenhouse gas emissions.

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