

BCLI Study Paper 13

# STUDY PAPER ON PUBLIC HEARINGS

An Examination of Public Participation in the  
Adoption of Local Bylaws on Land Use and Planning





# **Study Paper on Public Hearings:**

**An Examination of Public Participation in  
the Adoption of Local Bylaws on Land Use  
and Planning**

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# Introductory Note

## **Study Paper on Public Hearings: An Examination of Public Participation in the Adoption of Local Bylaws on Land Use and Planning**

In British Columbia, provincial legislation has created a legal framework for local control of land use and planning. This legal framework enables cities, towns, districts, villages, and regional districts to adopt large-scale official community plans and targeted zoning bylaws. Public hearings, which give the public a forum to express its views on proposed plans and bylaws before their adoption, are a key part of this legal framework.

This study paper is intended to give a detailed picture of the law on public hearings in British Columbia. The paper traces the origins of the legislative requirement to hold a public hearing in early land use legislation. The paper describes the ways in which that legislation has developed, in tandem with case law, over the course of a century. The paper also examines statements in the case law and commentary explaining the purposes of public hearings and sets out arguments evaluating the pros and cons of the current law.

BCLI has published this study paper in support of the Renovate the Public Hearing Project, which is being carried out by the Strengthening Canadian Democracy Initiative at Simon Fraser University Morris J. Wosk Centre for Dialogue.

A handwritten signature in dark ink, appearing to read 'Emily L. Clough', with a long, sweeping horizontal line extending to the right.

Emily L. Clough  
Chair,

British Columbia Law Institute  
March 2022

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# EXECUTIVE SUMMARY

## **An overview of public hearings**

Provincial legislation gives local governments the power to make decision about the use of land and plans for the future development of land in the locality. But this legislation imposes some requirements on the exercise of this power. One of these requirements is the subject of this study paper: the requirement to hold a public hearing before a local government adopts a land use planning bylaw.

Public hearings have been a feature of British Columbia land use law for nearly a century. But there has been renewed interest recently in them and their place in the province's legislative framework for land use and planning.

## **The goals of this study paper**

BCLI has prepared this study paper as a means to enhance understanding of the law on public hearings. The study paper aims to achieve this goal through a detailed examination of British Columbia's law on public hearings. It seeks answers to a series of questions: Where did the legislative requirement to hold a public hearing on a land use bylaw come from? How has it changed since it first appeared in British Columbia law? How have court cases considering the legislation contributed to the development of the law? Where does the law on public hearings currently stand? What purposes does the law intend to achieve? And what have legal commentators said about the current law's successes and failures in achieving those purposes?

The primary mode of explanation in this study paper is descriptive. The study paper aims to give readers a detailed picture of the past development of the law and the current state of the law.

## **The Renovate the Public Hearing Project**

BCLI has published this study paper to support the work of the Strengthening Canadian Democracy Initiative, Morris J. Wosk Centre for Dialogue, Simon Fraser University, in carrying out its Renovate the Public Hearing Project. This project has a law-reform focus.

In the Renovate the Public Hearing Project, the Strengthening Canadian Democracy Initiative intends to act as a convenor and a catalyst for reforms to BC's public hear-

ing legislative requirement, as a means to enhance social justice, build community, and strengthen democratic culture.

The project has three planned streams of work: a legal review, pilots of proposed reforms with local governments, and evaluations of the reforms. This study paper contributes to the project's legal review.

The study paper also forms the basis of future elements of the project, including public consultations and the development of recommendations for law reform.

## **Summary of the study paper**

This study paper consists of six chapters.

It begins with an introductory chapter, which provides an overview of the subject and discusses the goals of the study paper.

The second chapter discusses land use law in British Columbia in broad, general terms. Its goal is to introduce readers to the specialized words and concepts that are used in this area of the law, which provides the context for the study paper's examination of public hearings.

Chapter three is the heart of the study paper and its longest chapter. This chapter describes the development of the law on public hearings in British Columbia. It begins by tracing the origins of the legislative requirement to hold a public hearing, which go back to British Columbia's first statute on land use planning, enacted in 1925. It then follows the development of the legislation, focusing on milestone enactments in 1957 and 1985. The chapter also describes the role that court decisions have played in the development of the law on public hearings. It closes with a snapshot of the current law, drawing on present-day legislation and leading judgments from the case law.

The study paper's fourth chapter examines the purposes of a legislative requirement to hold a public hearing. Courts and commentators have articulated a number of statements of the law's purposes. Their focus is on its potential to achieve broad goals that enhance local democracy.

Chapter five sets out commentary that has evaluated the current law on public hearings. It notes that arguments in favour of the current law stress its ability to meet the law's goals and fulfil its purposes. On the other hand, arguments criticizing the cur-

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rent law focus on ways in which it may be seen as failing to enhance local democracy.

Finally, the study paper concludes with a chapter summing up its main points and discussing future developments planned for the Renovate the Public Hearing Project.

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# Chapter 1. Introduction

## Introduction to the Public Hearings Project and Its Goals

### About public hearings on land use bylaws

Public hearings are an integral part of land use planning and management. Whenever a city, town, or regional district wants to plan for or manage the use of land within its boundaries—say by creating a comprehensive official community plan or by zoning—it must adopt or amend a bylaw. As part of this bylaw process, provincial legislation requires the local government to first hold “a public hearing on the bylaw for the purpose of allowing the public to make representations to the local government respecting matters contained in the proposed bylaw.”<sup>1</sup>

As one commentator has observed, public hearings are “a revered idea that is vigorously applauded by virtually everyone,” because they provide for “[p]articipation of the governed in their government.”<sup>2</sup> For this reason, public hearings can be called a “cornerstone of democracy.”<sup>3</sup>

And yet there have always been concerns about this participation of the governed going awry, weakening the public hearing’s contribution to effective local governance. As a law professor recently put it, if someone were to enter a hall in which “normally mild-mannered neighbors turn a public forum into a knock-down, drag-out civic brawl, as their three-minute remarks escalate into raised voices, bad-faith accusations, conspiracy theories, and every so often, actual blows,” then “it is a safe bet that the subject is one of two things: a proposal for a new real estate development in the neighborhood or for a redesign of the local streets.”<sup>4</sup>

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1. *Local Government Act*, RSBC 2015, c 1, s 464 (1).
  2. Sherry R Arnstein, “A Ladder of Citizen Participation” (1969) 35:4 J Am Plan Assoc 216 at 216.
  3. *Ibid.*
  4. Noah M Kazis, “Transportation, Land Use, and the Sources of Hyper-Localism” (2021) 106:5 Iowa L Rev 2339 at 2340 [footnotes omitted] (a “proposal for a new real estate development” is typically the trigger for a public hearing on a land use bylaw).
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## **Public hearings in the public eye**

Concerns about the affordability of housing in British Columbia have recently prompted a fresh look at public hearings. A recent provincial-government report “engaged a broad range of stakeholders” on local governments’ track records in approving new housing developments.<sup>5</sup> After noting that this report’s consultation reflected “significant interest in and high importance placed on increasing the efficiency and effectiveness of the public input process,”<sup>6</sup> the report recommended a “[p]rovincial review of public hearings and consideration of alternative options for more meaningful, earlier public input and in different formats.”<sup>7</sup>

A subsequent report by a joint British Columbia–Canada expert panel examining housing supply and affordability has endorsed this recommendation.<sup>8</sup> In calling for reform, the expert panel pointed to public hearings as part of a “fraught process” that has stymied new housing construction in British Columbia and contributed to a housing-affordability crisis in this province.<sup>9</sup>

Finally, last year saw the first indication that legislative reform may be on the horizon. In its fall session, the legislative assembly passed amendments to local-government law, one of which affected the provisions on public hearings.<sup>10</sup> But it should be noted that the reach of this change was modest.<sup>11</sup> A full-scale review and re-evaluation of the public hearing remains an unrealized goal.

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5. British Columbia, Ministry of Municipal Affairs, *Development Approvals Process Review: Final Report from a Province-Wide Consultation* (September 2019), online (pdf): *Government of British Columbia* <[www2.gov.bc.ca/assets/gov/british-columbians-our-governments/local-governments/planning-land use/dapr\\_2019\\_report.pdf](http://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/local-governments/planning-land-use/dapr_2019_report.pdf)> at 3 [*Development Approvals Process Review*].
  6. *Ibid* at 15.
  7. *Ibid* at 24 (the report ranked this recommendation as being of “high importance”).
  8. See Canada-British Columbia Expert Panel on the Future of Housing Supply and Affordability, *Opening Doors: Unlocking Housing Supply for Affordability: Final Report of the Canada-British Columbia Expert Panel on the Future of Housing Supply and Affordability* (June 2021), online (pdf): *govTogetherBC* <[engage.gov.bc.ca/app/uploads/sites/121/2021/06/Opening-Doors\\_BC-Expert-Panel\\_Final-Report\\_Jun16.pdf](http://engage.gov.bc.ca/app/uploads/sites/121/2021/06/Opening-Doors_BC-Expert-Panel_Final-Report_Jun16.pdf)> [*Opening Doors*] at 26.
  9. *Ibid* at 25.
  10. See *Municipal Affairs Statutes Amendment Act (No 2), 2021*, SBC 2021, c 30, s 26 (repealing and replacing s 464 (2) of the *Local Government Act*, *supra* note 1—in force 25 November 2021).
  11. The amendment simply clarified when a local government may decide *not* to hold a public hearing.
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## **About the Public Hearings Project**

It is against this backdrop that BCLI began work on its Public Hearings Project in November 2021. Even though the timing of this project has placed it in proximity to these recent calls for reform of public hearings and legislative changes, and even though BCLI as a law-reform organization often carries out projects that aim at recommending what British Columbia law on a given topic should be in the future,<sup>12</sup> the Public Hearings Project is geared more toward legal research than legislative law reform.<sup>13</sup> The project's overriding goal is to produce this study paper as a comprehensive legal-research document.

This study paper's purpose is to examine the legislative requirement for public hearings on land use bylaws. This examination raises a number of questions. Where did this legislative requirement come from? How has it changed since it first appeared in British Columbia law? How have court cases considering the legislation contributed to the development of the law? Where does the law on public hearings currently stand? Striking out with a broader view, what purposes does the law intend to achieve? And what have commentators said about the law's successes and failures in achieving those purposes?

BCLI has sought answers to these questions by examining a number of legal sources. First and foremost, this study paper engages continuously with British Columbia's nearly hundred-year history with local land use legislation. In addition, this study paper draws on decisions of British Columbia's courts, which have—by virtue of interpreting that legislation—become an important source of the province's law on public hearings in their own right.

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12. See e.g. British Columbia Law Institute, *Report on Modernizing the Child, Family and Community Service Act*, Report 92 (May 2021), online: <[www.bcli.org/publication/92-report-on-modernizing-the-child-family-and-community-service-act](http://www.bcli.org/publication/92-report-on-modernizing-the-child-family-and-community-service-act)>; British Columbia Law Institute, *Report on Pension Division: A Review of Part 6 of the Family Law Act*, Report 91 (March 2021), online: <[www.bcli.org/publication/report-on-pension-division-a-review-of-part-6-of-the-family-law-act](http://www.bcli.org/publication/report-on-pension-division-a-review-of-part-6-of-the-family-law-act)> (examples of recent BCLI law-reform reports).
  13. See e.g. British Columbia Law Institute, *Study Paper on Youth Aging into the Community*, Study Paper 11 (May 2021), online: <[www.bcli.org/publication/study-paper-on-youth-aging-into-the-community](http://www.bcli.org/publication/study-paper-on-youth-aging-into-the-community)> (example of a recent research publication that surveys the law on youth transitioning from the care of the child-protection system to adulthood in the community).
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Finally, this study paper draws on commentary on public hearings found in textbooks and scholarly journals. Because legislation on public hearings exists in all Canadian provinces and territories<sup>14</sup>—as well as in many US states<sup>15</sup>—this study paper has taken a broad view, examining British Columbia sources but supplementing them with commentary on Canadian and American law generally. This approach is justified because commentary often tries to articulate and evaluate the underlying purposes of public-hearings legislation. These purposes tend to be similar across Canadian and American legislation, uniting British Columbia’s approaches to public hearings with those taken in other North American jurisdictions. Since this study paper’s focus is on the law of public hearings, the bulk of the commentary considered comes from the legal and planning professions.

The Public Hearings Project’s goals and purposes—as well as its short timeline—have marked the project in specific ways. Most notably, they have narrowed the project’s focus—in comparison to BCLI’s law-reform projects—to documenting what the law is, without taking the next step (as in a law-reform project) and asking what the law should be.

## **This project’s funders**

The Public Hearings Project was made possible by funding from the Law Foundation of British Columbia and the Simon Fraser University Morris J. Wosk Centre for Dialogue Strengthening Canadian Democracy Initiative.

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14. See Alberta: *Municipal Government Act*, RSA 2000, c M-26, s 230; Saskatchewan: *The Planning and Development Act*, 2007, SS 2007, c P-13.2, ss 206–212; Manitoba: *The Planning Act*, SM 2005, c 30, CCSM c P80, ss 16 (3), 46, 74, 96, 105, 144, 168 (2), 170 (1); Ontario: *Planning Act*, RSO 1990, c P.13, ss 17 (15)–(23.2), 34 (12)–(14.6); Québec: *An Act respecting land use planning and development*, CQLR c A-19.1, ss 123–127; New Brunswick: *Community Planning Act*, SNB 2017, c 19, ss 25–26, 54, 111; Prince Edward Island: *Planning Act*, RSPEI 1988, c P-8, ss 11 (2), 18; Nova Scotia: *Municipal Government Act*, SNS 1998, c 18, ss 205 (3)–(7), 206, 210 (2); Newfoundland and Labrador: *Urban and Rural Planning Act, 2000*, SNL 2000, c U-8, ss 17–23; Yukon: *Municipal Act*, RSY 2002, c 154, ss 280–281, 294–296; Northwest Territories: *Charter Communities Act*, SNWT 2003, c 22, Schedule A, s 133; *Cities, Towns and Villages Act*, SNWT 2003, c 22, Schedule B, s 129; *Hamlets Act*, SNWT 2003, c 22, Schedule C, s 31; Nunavut: *Planning Act*, RSNWT 1988, c P-7, ss 24–25, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28.
15. See e.g. Washington: Wash Rev Code §§ 35A.63.070, 35A.63.150, 35A.63.170, 35A.63.220 (2022); Oregon: Or Rev Stat §§ 227.160–227.188 (2021); California: Cal Gov Code §§ 65351, 65353–65356 (2022).
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## BCLI and the Strengthening Canadian Democracy Initiative

### BCLI support for the Strengthening Canadian Democracy Initiative

While the goals of BCLI's Public Hearings Project don't include legislative reform, the BCLI project is intended to support a broader initiative that does have law-reform aims. This is the Strengthening Canadian Democracy Initiative, which is being carried on by the Simon Fraser University Morris J. Wosk Centre for Dialogue. The Democracy Initiative explores "the intersections of policy, procedures and citizen experiences to identify how we can create a more resilient democratic culture across all communities in Canada."<sup>16</sup>

### Renovate the Public Hearings Project

One of the projects making up the Strengthening Canadian Democracy Initiative is the Renovate the Public Hearings Project. The goal of the project is to "improve municipal procedures and increase trust in democracy" by "identifying evidence-based recommendations for revising the British Columbia's *Local Government Act* public hearing requirements to create stronger public engagement practices, supports for reconciliation, and more effective local government pre-development approval processes."<sup>17</sup>

To advance this law-reform goal, the project has five objectives:

- (1) analyze existing legal frameworks, including relevant case law, and explore options for legal reform;
- (2) increase understanding of how public hearings evolved and their effects;
- (3) improve democratic decision-making by building stronger trauma-informed and culturally respectful relationships among government and citizens;
- (4) pilot and evaluate alternative options for public input that meet the needs of local governments and communities;

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16. Simon Fraser University, Morris J. Wosk Centre for Dialogue, "About the Initiative: Initiative Purpose" (last visited 28 February 2022), online: *Morris J. Wosk Centre for Dialogue* <[www.democracydialogue.ca/about-us](http://www.democracydialogue.ca/about-us)>.

17. Simon Fraser University, Morris J. Wosk Centre for Dialogue, "Renovate the Public Hearing" (last visited 28 February 2022), online: *Morris J. Wosk Centre for Dialogue* <[www.democracydialogue.ca/publichearings](http://www.democracydialogue.ca/publichearings)>.

- (5) recommend evidence-based reforms to support more meaningful public input in local government land use decision making.<sup>18</sup>

With this study paper, BCLI intends to support objectives (1) and (2) of the project.

## **Commentary from the SFU Morris J. Wosk Centre for Dialogue Strengthening Canadian Democracy Initiative**

At four places in this study paper, the SFU Morris J. Wosk Centre for Dialogue Strengthening Canadian Democracy Initiative has provided commentary on issues raised in the text from its own project on public hearings. This commentary addresses some of the broader social issues that surround this study paper's discussion of the law on public hearings.

## **Implications of Public Hearings Taking Place on Unceded Indigenous Lands**

In carrying out the Public Hearings Project and preparing this study paper, BCLI's eyes have been trained on events that have occurred in the past. One event is conspicuous in its absence from the story of how British Columbia's law on public hearings has developed. This is any "recognition that organized societies pre-existed within the territorial limits of what is now Canada."<sup>19</sup> In other words, the development of this body of law has failed to acknowledge that its subject—a public hearing on a land use bylaw in British Columbia—takes place on and affects unceded Indigenous lands.

"The need to take this reality into account," a former Chief Justice of British Columbia has observed, "raises big questions for the practice of Canadian law."<sup>20</sup> This point should be understood broadly, with the "practice of law" encompassing the reform of existing law and the development of new laws.

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18. *Ibid.*

19. The Honourable Chief Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice," in M Louise Mandell et al, eds, *Indigenous Legal Orders and the Common Law: Materials Prepared for the Continuing Legal Education Seminar, Indigenous Legal Orders and the Common Law, Held in Vancouver, B.C., on November 15 & 16, 2012* (Vancouver: Continuing Legal Education Society of British Columbia, 2021) 2.1 at 2.1.1.

20. *Ibid.*

Turning briefly to the future development of the law on public hearings, many things aren't readily apparent but it's clear that the law won't continue to develop in the same vein. The turning point that has made this conclusion irresistible occurred when Canada reversed its initial opposition to the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>21</sup>

In British Columbia, this change of position from opposition to support has led to the enactment of the *Declaration on the Rights of Indigenous Peoples Act*.<sup>22</sup> This act commits the government of British Columbia, "[i]n consultation and cooperation with the Indigenous peoples in British Columbia," to "take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."<sup>23</sup> The UN Declaration calls on states to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."<sup>24</sup> Public hearings, which are part of a provincial legislative framework on land use and management, arguably come within this duty to consult and cooperate in good faith.<sup>25</sup>

It's also worth considering the position of local governments, which are responsible for implementing the legislative requirement by holding public hearings. The final report of the Truth and Reconciliation Commission of Canada has addressed this point, calling on local governments to adopt and implement the UN Declaration.<sup>26</sup> As

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21. GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/61/295 (2007) [UN Declaration].

22. SBC 2019, c 44.

23. *Ibid*, s 3.

24. *Supra* note 21, art 19.

25. See Felix Hoehn & Michael Stevens, "Local Governments and the Crown's Duty to Consult" (2018) 55:4 Alta L Rev 971 at 999 (arguing that "[t]he importance of powers of land use control to Aboriginal title claims was recognized by the Yukon Court of Appeal in *Ross River Dena [Council v Government of Yukon]*, 2012 YKCA 14 at para 38] when it stated that '[t]he honour of the Crown demands that it take into account Aboriginal claims before divesting itself of control over land' ").

26. Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (Montreal & Kingston: McGill-Queen's University Press, 2015), online: <ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Volume\_6\_Reconciliation\_English\_Web.pdf> at 28 (call to action no. 43: "We call upon federal, provincial, territorial, and *municipal governments* to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation. [emphasis added]). See also *ibid* at 43 (call to action no. 47: "We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery

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a recent scholarly article has noted, “[a]fter asserting sovereignty over Indigenous peoples, the Crown delegated a broad spectrum of the powers flowing from that sovereignty to local governments.”<sup>27</sup> In looking to how this act may affect the future of public hearings, “a particularly cogent point is that Indigenous peoples are not just neighbours of municipalities, they have rights and interests that overlap local boundaries. For local planners, this means that better outcomes can be expected when relationships with Indigenous peoples are based on collaboration, rather than consultation that treats Indigenous peoples as just ‘stakeholders.’ ”<sup>28</sup>

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and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.”).

27. Hoehn & Stevens, *supra* note 25 at 1008.

28. *Ibid* at 1007.

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## Chapter 2. Summary of Land use Law in British Columbia

### Introduction

This chapter is intended to be an introduction for general, non-specialist readers to the concepts and terms that shape land use law in BC and that are important for the chapters that follow. To do this, the chapter provides basic information on three topics.

First, the chapter briefly considers the role played by local governments within Canada's broader system of governance. This role is primarily illustrated by contrasting local governments with federal and provincial governments. Unlike those levels of government, local governments' role isn't defined in the constitution and is increasingly seen by courts and commentators to be in flux.

Second, the chapter considers the legislation that the Legislative Assembly of British Columbia has enacted to provide a legal framework for local governments. The focus is on three provincial statutes that make up the core of this legal framework.

Third, the chapter describes the key terms that are used in land use law, which appear over and over again in this study paper. The focus is on words such as *bylaw*, *official community plan*, and *zoning*, each of which has a specialized meaning that derives from the legislation applicable to local governments.

### The Place of Local Governments in Canada's System of Governance

The *Constitution Act, 1867*,<sup>29</sup> recognizes two levels of government: a federal level and a provincial level. Legislation is made at the federal level by the Parliament of Canada, in Ottawa. At the provincial level, legislation is made by the various provincial legislatures, such as the Legislative Assembly of British Columbia, in Victoria.

The *Constitution Act, 1867*, doesn't recognize local governments as a level of government similar to the federal or provincial levels. Local governments, to use a well-

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29. (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

worn phrase, “are entirely the creatures of provincial statutes.”<sup>30</sup> This means that provincial legislation constitutes local governments, delegates specific powers to them, and may at any time remove those powers.

Recent scholarship has pointed out that it’s possible to read too much into this lack of constitutional status. As one article has argued, “focusing solely on the lack of a direct constitutional mandate paints an incomplete picture of local governments in the twenty-first century,” which can lead to the extreme conclusion that they are “an inferior species of government.”<sup>31</sup> In fact, “[t]he importance of local governments in Canadian public life is often underestimated,” as “[t]he authority of Canadian municipalities has grown as provinces reformed municipal statutes to underline the governmental role of municipalities, granting more authority to local governments and doing so in broad terms.”<sup>32</sup>

So it’s worthwhile to bear in mind that the role of local governments in Canada’s system is in flux. It will continue to develop, often in unpredictable ways, as the future unfolds. But, that said, the current place occupied by local governments has significant implications for them, for land use planning, and for this study paper. A judgment of an Ontario court has clearly spelled these implications out by listing “four principles which apply to the constitutional status of municipal governments”:

- (i) municipal institutions lack constitutional status;
- (ii) municipal institutions are creatures of the legislature and exist only if provincial legislation so provides;
- (iii) municipal institutions have no independent autonomy and their powers are subject to abolition or repeal by provincial legislation;
- (iv) municipal institutions may exercise only those powers which are conferred upon them by statute.<sup>33</sup>

It’s for these reasons that this study paper spends much of its time discussing provisions in provincial statutes. Even though local governments are one of the main actors in public hearings on land use bylaws, they perform this role within a broadly defined framework. And that framework is set out in provincial legislation.

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30. *R v Greenbaum*, [1993] 1 SCR 674 at 687, 100 DLR (4th) 183, Iacobucci J.

31. Hoehn & Stevens, *supra* note 25 at 974.

32. *Ibid.*

33. *East York (Borough) v Ontario (Attorney General)* (1997), 34 OR (3d) 789 at 797–798, 41 MPLR (2d) 137 (Gen Div), Borins J, *aff’d* (1997), 36 OR (3d) 733, 153 DLR (4th) 299 (CA), leave to appeal to SCC refused, [1998] 1 SCR vii.

## Major Local-Government Statutes in British Columbia

### Introduction

While “British Columbia’s local governments are constituted under and governed by a complex group of statutes,”<sup>34</sup> there are three in particular that are relevant to this study paper and its focus on public hearings in land use planning.

### Local Government Act

With close to 800 sections, the *Local Government Act*<sup>35</sup> is British Columbia’s longest statute. Its first section lists the three purposes of the act:

- (a) to provide a legal framework and foundation for the establishment and continuation of local governments to represent the interests and respond to the needs of their communities,
- (b) to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and
- (c) to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities.<sup>36</sup>

In essence, this list of purposes is saying that the *Local Government Act* is the source of laws relating to the creation of local governments and the delegation of powers from the provincial government to local governments.

In carrying out these purposes, the *Local Government Act* covers a wide range of topics: everything from incorporating municipalities and regional districts, voting in local elections, and setting out governance and procedures for local governments to levying local taxes, managing legal proceedings against local governments, and delegating specific powers to local governments. Included in these specific powers is the power over local land use planning.

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34. William A Buholzer, *Local Government: A British Columbia Legal Handbook*, 8th ed (Vancouver: Continuing Legal Education Society of British Columbia, 2020) at § 1.1 [Buholzer, *Local Government*].

35. *Supra* note 1.

36. *Ibid*, s 1.

Among the three major statutes for local governments, the *Local Government Act* is the most important for this study paper, because it sets out the basic legal framework for land use planning that applies to most local governments in BC. This study paper will return again and again to the provisions of the *Local Government Act*.

## **Vancouver Charter**

The *Local Government Act* applies to every local government in British Columbia except one. For historical reasons, the city of Vancouver has its own local-government statute, called the *Vancouver Charter*.<sup>37</sup> The *Vancouver Charter's* approach to land use planning is broadly similar to that of the *Local Government Act*, especially in regard to public hearings,<sup>38</sup> but there are some small differences in detail. This study paper's focus will be on the *Local Government Act*, but it will note differences for the city of Vancouver (mainly in footnotes) whenever appropriate.

## **Community Charter**

The third major statute for BC's local governments has little to do with land use planning. So the *Community Charter*<sup>39</sup> will only appear a few times in the pages that follow.<sup>40</sup>

The existence of the *Community Charter* is mainly worth noting for this study paper because it is the concrete embodiment of the abstract point made earlier about the place of local governments in Canada's system of governance being in flux.<sup>41</sup>

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37. SBC 1953, c 55.

38. See William Buholzer, *British Columbia Planning Law and Practice* (Toronto: LexisNexis Canada, 2001) (loose-leaf release 57 updated May 2021) at § 16.83 [Buholzer, *BC Planning Law*].

39. SBC 2003, c 26.

40. There is some crossover between the *Community Charter* and the *Local Government Act*, *supra* note 1, on some of the topics covered in this study paper. For example, the *Community Charter* contains general requirements on public notices (see *supra* note 39, s 94), while the *Local Government Act* spells out specific requirements for public notices of public hearings (see *supra* note 1, ss 466–468). Since this study paper's subject is public hearings (and since this study paper isn't intended as a comprehensive discussion of local-government law generally), its focus in discussing such legislative requirements will be on the specific provisions applicable to public hearings found in the *Local Government Act*.

41. See, above, at 10 (further discussion of how the place of local governments within Canada's system of governance is in flux).

The *Community Charter* came into being as part of a major effort to reform BC's local-government law at the turn of the 21st century.<sup>42</sup> The main impetus behind this effort was a broad conceptual change in how the province structured its local-government legislation. In brief, the idea was to draw on changes already made in other provinces, which "had revamped their local government enabling legislation to substitute a 'broad powers' approach for the delegation of dozens of separate, narrowly-worded legislative powers."<sup>43</sup>

In the end, this reform effort was only partially realized. The provincial government ultimately decided not to proceed on plans to repeal the *Local Government Act* and leave only the *Community Charter* in force.<sup>44</sup> This decision has left "British Columbia with one foot in the modern world of broad powers, and the other in the arcane detail of the *Local Government Act*."<sup>45</sup> As the *Local Government Act* governs land use planning, so much of this study paper is taken up with analyzing detailed provisions—often setting out procedures for local governments to follow—from this statute.

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42. Note that the text greatly simplifies a complex reform process that unfolded over the course of more than a decade (from the early 1990s to the mid-2000s), spanning a change in provincial government from the BC New Democratic Party to the BC Liberal Party. The reform effort proceeded down two tracks, resulting in both significant changes to what was then called the *Municipal Act* (it was renamed in the reform process as the *Local Government Act*) and the development and enactment of the *Community Charter*). The story is recounted in detail in Buholzer, *Local Government*, *supra* note 34 at §§ 1.4–1.9.

43. *Ibid* at § 1.4.

44. See *ibid* at § 1.19 ("While government Ministry service plans had previously contemplated a second phase of the *Community Charter* process dealing comprehensively with what remained of the *Local Government Act*, the *Community Charter Council Act* was repealed in 2006 and the Council disbanded, and the comprehensive program of renovation for B.C.'s local government enabling legislation appeared to have come to an end."). This commentator has noted that "[t]he new Liberal government was sensitive to the fears of the business community that a new local government legislative regime would increase the ability of municipalities to impose regulations affecting its members" (*ibid* at § 1.8), which may have contributed to the government's decision not to follow through on making the broadly framed *Community Charter* the sole local-government statute.

45. *Ibid* at vii.

## Land Use Terminology

### Local government, municipality, regional district

While *local government* isn't, strictly speaking, a land use term, it is a good starting place for this discussion of terminology for a couple of reasons. First, local governments are one of the main actors in land use planning generally and public hearings specifically. Second, the term *local government* has a specific meaning in this context, which is somewhat narrower than what readers might expect.

The *Local Government Act* defines *local government* simply by reference to what may be called its deliberative body. Under the act, *local government* "means (a) the council of a municipality, and (b) the board of a regional district."<sup>46</sup>

The different terms used in paragraphs (a) and (b) reflect differences between municipalities and regional districts and how their local governments are constituted.

*Municipality* is a collective term for cities, towns, villages, and districts.<sup>47</sup> Classification of municipalities "depend[s] on the size of their population and geographic area."<sup>48</sup> According to recent provincial-government figures, "[t]here are currently 162 municipalities, ranging in population from just over 100 to over 630,000 people and ranging in size from 63 hectares to over 8,500,000 hectares."<sup>49</sup>

The local government of a municipality is called a *council*. "Municipal councils are democratically elected to make decisions on behalf of the community, and are accountable for those decisions to their electorate."<sup>50</sup> These municipal councils "are composed of a mayor and councillors, and vary in size from five to eleven members depending on population of the municipality. Mayors and councillors serve a four-year term."<sup>51</sup>

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46. *Supra* note 1, Schedule, s 1 "local government."

47. See British Columbia, "Local Government Systems in B.C." (last visited 28 January 2022), online: *Government of British Columbia* <[www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/systems](http://www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/systems)>.

48. *Ibid.*

49. *Ibid.*

50. British Columbia, "Municipalities in B.C.: Municipal Governance" (last visited 28 January 2022), online: *Government of British Columbia* <[www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/systems/municipalities](http://www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/systems/municipalities)>.

51. *Ibid.*

*Regional districts* “are federations of municipalities, electoral areas and in some cases, Treaty First Nations.”<sup>52</sup> British Columbia has “27 regional districts,” which “span nearly the entire geographic area of the province,” and which “range in population from under 4,000 to over two million and range in size from 2,000 to 119,337 km<sup>2</sup>.”<sup>53</sup>

In contrast to municipal councils, the local governments of regional districts are partially democratically elected and partially appointed. Regional districts “are governed by a board of directors composed of a director elected from each electoral area and one or more directors appointed from the elected council of each municipality and from a Treaty First Nation (if any), based on the population of the jurisdiction represented.”<sup>54</sup>

Historically, regional districts “arose out of a need for greater regional cooperation and equitable cost-sharing between municipal areas and rural areas.”<sup>55</sup> The scope of their activities is quite limited.<sup>56</sup> In comparison to municipalities, regional districts are far less active in land use planning and management.

## **Bylaw**

A *bylaw* is a “law passed by local government,” which is sometimes described as “a form of subordinate legislation.”<sup>57</sup> Bylaws are subordinate in the sense that a local

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52. “Local Government Systems in B.C.,” *supra* note 47.

53. British Columbia, “Regional Districts in B.C.” (last visited 28 January 2022), online: *Government of British Columbia* <[www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/systems/regional-districts](http://www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/systems/regional-districts)>.

54. *Ibid.*

55. *Ibid.*

56. See *ibid* (“Regional districts have three basic roles. They provide a political and administrative framework to: [p]rovide region-wide services such as regional parks, and emergency telephone services such as 911; [p]rovide inter-municipal or sub-regional services, such as recreation facilities where residents of a municipality and residents in areas outside the municipality benefit from the service; [a]ct as the general local government for electoral areas and provide local services such as waterworks and fire protection to unincorporated communities within the electoral areas.”).

57. Howard Epstein, *Land-use Planning* (Toronto: Irwin Law, 2017) at 565.

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government's authority to pass them isn't grounded in the constitution. Instead, it's dependent on provincial enabling legislation.<sup>58</sup>

Bylaws aren't specific to land use planning. They are the general instrument by which a local government makes laws to govern those areas over which the province has granted authority to the local government. That said, much of what local governments are doing by way of land use planning entails the adoption of a bylaw.

The general procedures for adopting bylaws are set out in the *Community Charter*.<sup>59</sup> In brief, bylaws are adopted by majority vote<sup>60</sup> of the municipal council or regional-district board, on three readings of the bylaw at a council or board meeting or meetings.<sup>61</sup>

## **Official community plan**

Land use planning has been described as “an attempt, based on studies and on public consultation, to achieve a rational agenda for a community.”<sup>62</sup> The central feature of this agenda is an official community plan.<sup>63</sup>

According to the *Local Government Act*, the purposes of an official community plan are to provide “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.”<sup>64</sup> Official community plans are best thought of in this way, as high-level statements of a vision or principles, which guide a local government in carrying out long-range planning. The official community plan “envisions

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58. See, above, at 9–10 (further discussion of the place of local governments within Canada's system of governance).

59. *Supra* note 39, ss 135–140. See also *Local Government Act*, *supra* note 1, s 227 (applying these provisions of the *Community Charter* to regional districts).

60. See *Community Charter*, *supra* note 39, s 123 (1).

61. See *ibid*, s 135 (1).

62. Epstein, *supra* note 57 at 37.

63. See *Local Government Act*, *supra* note 1, ss 471–478. In Vancouver, the equivalent of an official community plan is called an official development plan. See *Vancouver Charter*, *supra* note 37, ss 562–564.

64. *Supra* note 1, s 471 (1).



the objectives of the local community”<sup>65</sup> and “provide[s] the policy context for land use by-laws.”<sup>66</sup>

The *Local Government Act* sets out the requirements for the contents of an official community plan.<sup>67</sup> These required contents include “statements and map designations” regarding such things as residential and commercial developments, roads, and other public facilities.<sup>68</sup> The plan also “must include housing policies of the local government respecting affordable housing, rental housing and special needs housing.”<sup>69</sup>

The *Local Government Act* also imposes a special requirement for consultations during the development of an official community plan.<sup>70</sup> The requirement is broad in its scope, but it does call on the local government to “specifically consider” consultations with adjacent municipal councils and regional-district boards, First Nations, and provincial and federal governments<sup>71</sup> and to consider whether opportunities for consultations “should be early and ongoing.”<sup>72</sup> These consultations are “in addition to the public hearing.”<sup>73</sup> A court case on this requirement noted that the consultations it calls for are “an elastic concept,” which may include “informal communications, meetings, open houses, delegations, and correspondence.”<sup>74</sup>

Official community plans are adopted by bylaw. The *Local Government Act* sets out the process for adoption, which calls for the following steps after first reading of the bylaw, “in the indicated order”:<sup>75</sup>

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65. Epstein, *supra* note 57 at 19.

66. *Ibid* at 303.

67. *Supra* note 1, s 473.

68. *Ibid*, s 473 (1).

69. *Ibid*, s 473 (2).

70. See *ibid*, s 475 (1) (“During the development of an official community plan, or the repeal or amendment of an official community plan, the proposing local government must provide one or more opportunities it considers appropriate for consultation with persons, organizations and authorities it considers will be affected.”).

71. *Ibid*, s 475 (2) (b).

72. *Ibid*, s 475 (2) (a).

73. *Ibid*, s 475 (3).

74. *Gardner v Williams Lake (City)*, 2006 BCCA 307 at paras 28–29, Saunders JA.

75. *Supra* note 1, s 477 (3).

- consideration of the proposed official community plan “in conjunction with” (a) the local government’s financial plan and (b) any applicable waste management plan;<sup>76</sup>
- reference to the Provincial Agricultural Land Commission for comment, if the proposed plan “applies to agricultural land in the agricultural land reserve”;<sup>77</sup>
- “hold a public hearing.”<sup>78</sup>

According to a leading commentator on land use planning, official community plans “have been adopted for virtually all municipalities and most regional district electoral areas in the province.”<sup>79</sup> But many rural areas are not zoned.

## **Zoning**

The *Local Government Act* gives local governments the power to adopt zoning by-laws.<sup>80</sup> This “zoning power” has been described as “an authority to divide the area to which the zoning regulations are to apply into zones, and regulate within each zone the use and density of use of land and the use, density of use, siting, size, and dimensions of buildings and structures.”<sup>81</sup>

For example, a zoning bylaw may establish “residential zones[, which] can be defined to reflect different types of residential uses in a community such as single-family, duplex and multi-family.”<sup>82</sup> In addition to regulating “how land, buildings and other structures may be used”<sup>83</sup> within a zone, a zoning bylaw may also regulate

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76. *Ibid*, s 477 (3) (a).

77. *Ibid*, s 477 (3) (b).

78. *Ibid*, s 477 (3) (c).

79. Buholzer, *Local Government*, *supra* note 34 at § 9.1.

80. *Supra* note 1, s 479. See also *Vancouver Charter*, *supra* note 37, s 565. According to one commentator “[u]nder the *Vancouver Charter* the zoning power is significantly broader” than that conferred by the *Local Government Act* (Buholzer, *Local Government*, *supra* note 34 at § 9.16).

81. Buholzer, *Local Government*, *supra* note 34 at § 9.16.

82. British Columbia, “Zoning Bylaws” (last visited 22 February 2022), online: *Government of British Columbia* <[www2.gov.bc.ca/gov/content/governments/local-governments/planning-land-use/land-use-regulation/zoning-bylaws](http://www2.gov.bc.ca/gov/content/governments/local-governments/planning-land-use/land-use-regulation/zoning-bylaws)>.

83. *Ibid*.

“[w]here a building can be located on a site,<sup>84</sup> “the building’s maximum height and size,”<sup>85</sup> and “the maximum density typically measured by Floor Area Ratio.”<sup>86</sup>

If official community plans are broad statements of vision, then zoning bylaws fill in the details of land use planning by “implement[ing]”<sup>87</sup> the plan and “set[ting] specific rules”<sup>88</sup> for geographically bounded areas within a municipality or regional district. The Supreme Court of Canada has described the relationship between official community plans and zoning bylaws in the following terms: “[a] community plan does not alter zoning. A plan’s legal effect is that . . . by-laws enacted after the adoption of an official community plan ‘shall be consistent with the relevant plan.’ ”<sup>89</sup>

Zoning bylaws are prevalent throughout British Columbia. “With the exception of a few rural areas within the jurisdiction of regional districts,” a commentator notes, “the settled areas of the province are all subject to zoning bylaws.”<sup>90</sup>

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84. City of Vancouver, “Zoning and Development By-law 3575” (last visited 22 February 2022), online: *City of Vancouver* <[vancouver.ca/home-property-development/zoning-and-development-bylaw.aspx](http://vancouver.ca/home-property-development/zoning-and-development-bylaw.aspx)>.

85. *Ibid.*

86. City of Coquitlam, Planning and Development, “Land Use, Zoning & Density” (last visited 22 February 2022), online (pdf): *City of Coquitlam* <[www.coquitlam.ca/DocumentCenter/View/4150/Land-Use-Zoning-and-Density-PDF](http://www.coquitlam.ca/DocumentCenter/View/4150/Land-Use-Zoning-and-Density-PDF)> at 1. Floor area ratio is “is the maximum amount of floor area or building space on a lot—it is expressed as a ratio. For example, if you have a lot area of 500 m<sup>2</sup> and your maximum FAR is 0.45, then the maximum floor area you can construct is 225 m<sup>2</sup>” (*ibid* at 2).

87. Epstein, *supra* note 57 at 19.

88. *Ibid* at 303.

89. *Save Richmond Farmland Society v Richmond (Township)*, [1990] 3 SCR 1213 at 1216–1217, 75 DLR (4th) 425 [*Save Richmond Farmland Society*], Sopinka J (quoting s 949 (2) of the *Municipal Act*, RSBC 1979, c 290, which is now *Local Government Act*, *supra* note 1, s 478 (2)). See also *Vancouver Charter*, *supra* note 37, s 563 (2) (“The Council shall not authorize, permit, or undertake any development contrary to or at variance with the official development plan.”).

90. Buholzer, *Local Government*, *supra* note 34 at § 9.16.

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## Chapter 3. Development of the Requirement for Public Hearings in BC Land use Law

### Overview of Chapter and Social Problems Addressed by Land use Law

This chapter traces the development of the requirement to hold a public hearing in conjunction with a local government's land use regulation (such as zoning bylaws). First, it examines how the law has developed through legislation from the origins of land use planning in British Columbia to the present day. Then it discusses how court cases interpreting planning legislation have contributed to the makeup of the law.

This study paper will discuss the purposes of public hearings specifically in a later chapter, but it's worthwhile to begin this history of public-hearing requirements by noting the broader context within which they evolved. This is the context of land use planning and regulation. As can be said of virtually any area of the law, this body of law came into being in response to a specific set of social problems.

These social problems had to do with competing uses of land. As one professor has put it (using the language of economics), land use rules "are intended to prevent landowners from using their properties in ways that create negative externalities that harm neighbors or the general welfare."<sup>91</sup> Preventing these externalities plays into one of law's core concerns: managing disputes between people. "Planning is," the author of textbook on land use planning has noted, "one of the law's mechanisms for dealing with disputes, or, better, attempting to avoid disputes, whether the points of tension arise between private owners and some level of government or between or among private owners."<sup>92</sup>

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91. Michael Casey Gleba, "Toward Alienable Zoning" (2021) 6 JL Prop & Soc'y 51 at 60.

92. Epstein, *supra* note 57 at 15.

## Development of the Public-Hearing Requirement in Legislation

### Pre-history: developments before the province enacted land use legislation

Land-based “points of tension” are part of the founding of BC, with an Indigenous reserve system that preceded settlement and development.<sup>93</sup>

Further points of tension in connection with the development of land by settlers began to be felt around the turn of the 20th century.<sup>94</sup> And they were felt most keenly in cities and towns because this is where conflicting uses of land were likely to be in close proximity. Before dedicated planning legislation emerged at the provincial level in 1925, “at least one municipality had adopted a zoning bylaw under more rudimentary zoning enabling provisions.”<sup>95</sup>

While this specific approach to land use planning was quickly abandoned, it did establish one characteristic of this area of the law that continues to the present. Even though the provincial government is clearly involved in land use planning, that involvement is limited to the articulation of procedural rules that form a broad legal framework within which specific planning decisions are made. But the province itself doesn’t actually make those decisions. Instead, they’re made by local governments. A leading planning-law textbook explains why this is so: “[o]nly in theory could detailed regulation of land use be implemented at the level of a provincial government,” because “[t]he essential logic is that local government is in a position to be

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93. See R Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver : UBC Press, 2002). See also, above, at 6–8 (discussion of implications of public hearings taking place on unceded Indigenous lands).

94. See Buholzer, *BC Planning Law*, *supra* note 38 at § 1.6 (“The land use issues with which local governments were concerned at the time began to emerge in amendments to the province’s basic municipal legislation, the *Municipal Clauses Act*, at the beginning of the 20th century.”).

95. Buholzer, *Local Government*, *supra* note 34 at § 9.1. The “more rudimentary zoning enabling provisions” were actually highly detailed lists of delegated authority, allowing local governments to regulate things like laundries and sawmills—that is, to regulate various specific uses of land. So they were rudimentary in the sense of being limited in their reach to specific uses of land: these legislative provisions didn’t contemplate giving local governments a comprehensive set of tools to manage land use and planning within a locality. See Buholzer, *BC Planning Law*, *supra* note 38 at § 1.6 (tracing the development of this approach and listing the various regulated uses).

familiar with the physical characteristics of each neighbourhood, block, and lot and to understand how the community in some areas might best function together.”<sup>96</sup>

## **Town Planning Act (1925)**

So in the early 20th century British Columbia’s local governments had rudimentary land use-planning powers that were “tightly worded to equip local governments to deal only with particular land use issues,” which meant that the governing provincial “legislation thereby reflected a prevailing view that local governments should be empowered to interfere with private land use decisions only sparingly.”<sup>97</sup> But in 1925, BC changed course by enacting “[t]he first comprehensive delegation of legislative power to regulate land use in B.C.”<sup>98</sup>

This legislation, called the *Town Planning Act*,<sup>99</sup> has been described as “provid[ing] the essential elements of the planning and land use regulation toolkit that exists to this day.” The tools in that toolkit were: “the official comprehensive plan, the zoning bylaw with a mandatory public hearing, the planning commission and the board of variance, protection for existing uses from new regulations, the withholding of building permits during preparation of a zoning bylaw, and a ‘no compensation’ rule for property diminished in value by a zoning bylaw.”<sup>100</sup>

The preamble to the act cited “large municipal expenditures [that] have become necessary owing to the fortuitous development of urban centres” as a reason for the act’s goal of “mak[ing] provision whereby the natural growth of cities and towns may be planned in a systematic and orderly way.”<sup>101</sup> Planning for growth was then described as the means to secure a number of benefits, including reducing traffic congestion, encouraging economic development, preserving “the amenity of residential districts,” and providing “adequate areas . . . for protecting the health of and providing recreation for the public.”<sup>102</sup>

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96. Epstein, *supra* note 57 at 304.

97. Buholzer, *BC Planning Law*, *supra* note 38 at § 1.6.

98. *Ibid* at § 1.8.

99. SBC 1925, c 55.

100. Buholzer, *BC Planning Law*, *supra* note 38 at § 1.9.

101. *Supra* note 99, Preamble.

102. *Ibid*, Preamble.

While the *Town Planning Act* heralded a major shift in policy direction, it's possible

**ORIGINS OF THE BC TOWN PLANNING ACT**

British Columbia's Town Planning Act has direct ties to the Town Planning Institute and its British founder, Thomas Adams. In 1914 Adams came to Canada and drafted a template version of the Town Planning Act and promoted his work nationally. That year the Union of BC Municipalities also voted to support hiring him to draft a version for British Columbia, but it would take eleven years and two attempts before the BC legislature passed a Town Planning Act.

In 1922, the Vancouver Town Planning Branch was founded the same year a version of the Town Planning Act failed to pass in the legislature. They focused their efforts on revising and reintroducing a provincial Act. Members Frank E. Buck and J. A. Walker, coordinated and consulted with the national and municipal town planning groups. A. G. Smith was assigned the legal aspects of town planning and helped draft a second version of the Act.

The group worked with the Vancouver City Council and engaged in public commentary to increase the willingness of the provincial government to reconsider the Act. They gave key speeches like *Why We Plan* and *The A.B.C.s of Town-Planning* to emphasize town planning as a positive business proposition. They wrote editorials such as *The Billboard Problem* and *Architectural Control in Vancouver* to promote planning to achieve orderly urban growth. Underpinning all of these efforts was an argument that strong planning would reduce tax rates for individuals.

The coordinated efforts succeeded. In 1925, Mary Ellen Smith tabled the Town Planning Act and it was passed into law on December 18. Praise for the act was widely circulated in the *Journal of Town Planning*. Ironically, Smith was later denied membership to the Town Planning Institute because of her gender.

Although the Vancouver Town Planning Branch donated many personal papers and correspondence to archives in British Columbia, primary sources about what inspired language about public hearings has yet to be found. Such public hearing requirements did not exist in Thomas Adams's 1914 template, but were introduced into the BC act at some point prior to 1925. Exactly who wrote it and why may be lost to history.

—drafted by SFU Morris J. Wosk Centre for Dialogue Strengthening Canadian Democracy Initiative as part of their project on public hearings

to overstate the nature of this change. If the past is represented by a policy of deference to the property rights of landowners, then the *Town Planning Act* wasn't a clean break with this policy. Its provisions instead appear to be more concerned with trying to strike a balance between the new powers delegated to local governments and the desire to continue to protect those property rights.

This point can be seen from the list of tools in the "land use regulation toolkit" provided by the act, as described above. Some of these tools are clearly newly delegated powers for local governments (such as providing for the development of an "official comprehensive plan"). Others are more of check on the exercise of those powers (e.g., "protection for existing uses from new regulations").

What was described as "a mandatory public hearing" falls into this latter

camp. The section creating the requirement provided that a municipal "[c]ouncil shall not determine the boundaries of any district nor impose any regulations," by



“passing a zoning by-law,” “until after all persons who might be affected by the proposed by-law shall be afforded an opportunity to be heard on the matters covered therein before the Council.”<sup>103</sup> A parallel provision applying to amending or repealing a zoning bylaw is clearer on this point, describing the public hearing as a council meeting in which “all persons *whose property would be affected* by such amendment or repeal may appear in person or by attorney or by petition.”<sup>104</sup>

Even though the legislation at this point didn’t use the words *public hearing*, the hint of this idea was present. The notice requirement that went hand-in-hand with the hearing requirement called for broad notice to the public at large, through advertising “in not less than two consecutive issues of a newspaper published or circulating in the municipality.”<sup>105</sup> This approach meant that notice of the public hearing wouldn’t just be given to neighbouring landowners. Instead, word of the hearing would be spread widely throughout the community.

## **Municipal Act (1957)**

The *Town Planning Act* continued in force for just more than 30 years, being amended occasionally along the way. The next signpost on the development of the public-hearing requirement occurred in 1957, with the enactment of the *Municipal Act*.<sup>106</sup>

The language of the public-hearing requirement was largely unchanged. The act provided that “[t]he Council shall not adopt a zoning bylaw until it has held a hearing thereon.”<sup>107</sup> A subsequent section extended this requirement to amending or repealing a zoning bylaw.<sup>108</sup>

When it came to participation in the public hearing, the *Municipal Act* simply provided that “[a]t the hearing all persons who deem themselves affected by the proposed by-law shall be afforded an opportunity to be heard in matters contained in the by-law.”<sup>109</sup> This provision was similar to its predecessor in the *Town Planning Act*, though it lacked the reference to property interests in that earlier statute (“persons

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103. *Supra* note 99, s 10.

104. *Ibid*, s 11 (2) [emphasis added].

105. *Ibid*, s 10. See also *ibid*, s 11 (1) (incorporating by reference to section 10 this method of notice for amending or repealing a zoning bylaw).

106. SBC 1957, c 42.

107. *Ibid*, s 700 (1).

108. *Ibid*, s 701.

109. *Ibid*, s 700 (3).

whose property would be affected”).<sup>110</sup> But that language about property would re-appear in later versions of the legislation.

The *Municipal Act*'s public-hearing requirement also went hand-in-hand with timing and notice provisions that were similar to those found in the *Town Planning Act*. The hearing was required before the municipal council adopted a zoning bylaw and after notice “stating the time and place of the hearing has been published in not less than two consecutive issues of a newspaper published or circulating in the municipality, with the last of such publications appearing not less than three days nor more than ten days before the date of the hearing.”<sup>111</sup>

Overall, the *Municipal Act* was significant less for any substantive changes in the public-hearing requirement. Its importance consisted in absorbing the land use provisions in the *Town Planning Act* into a comprehensive *Municipal Act*.<sup>112</sup> This approach has continued on to the present day, as land use planning is still one part in a very large *Local Government Act*.

## **Municipal Amendment Act (1985)**

The next milestone in the development of the public-hearing requirement came with the enactment of amendments to the *Municipal Act* in 1985. The *Municipal Amendment Act, 1985*,<sup>113</sup> is the source of legislation on public hearings that remains in place to the present day.<sup>114</sup>

The noteworthy thing about the 1985 amendments is that they were much longer than the legislation that came before. Instead of two compact sections, the public-hearing requirement now took four sections, each with many subsections.

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110. See *supra* note 99, s 11 (2).

111. *Supra* note 106, s 700 (1).

112. See Buholzer, *Local Government*, *supra* note 34 at § 1.3 (noting that “[i]n 1957, the *Municipal Act* was expanded to 900 sections with the incorporation of material previously contained in eight other related statutes” [footnote omitted]).

113. SBC 1985, c 79.

114. See Buholzer, *BC Planning Law*, *supra* note 38 at § 1.17 (“In 1985, the planning and zoning powers were rewritten (but not fundamentally altered) as Part 29 of the *Municipal Act*, to which the present Part 14 bears a close resemblance.” [footnote omitted]).

Despite its added length, the specific provision establishing the public-hearing re-

**ERAS OF PLANNING AND PUBLIC ENGAGEMENT**

While the legal intention of public hearings has been relatively static since its inclusion in the BC Town Planning Act of 1925, the profession of planning has embraced different views towards public engagement.

**First Nations Laws and Governance (since time immemorial)**

For thousands of years, First Nations had their own systems of governance and decision-making about community planning. Every aspect of life, from the seasonal harvests to how homes and buildings were designed was a planning decision. Colonization replaced many of these Indigenous planning systems with European approaches to land management, which included the professionalization of planning.

**City Beautiful, Garden City, Regionalism (1890s–1920s)**

At the end of the 19th century, the profession of planning emerged to help rectify the lack of sanitation, poor living conditions, and disorder in industrial cities. Different priorities were debated but planners emerged as scientific experts with the power to solve the woes of urban growth. Both the Town Planning Institute and the growing number of Town Planning Acts emphasized visual aesthetics, inclusion of green space, and segregated land use.

**New Town Movement (1940s–1970s)**

Planning was still considered a technical exercise focused on pre-planned communities through the New Towns movement and post-war building efforts. Planners were seen as objective, rational, and value-neutral actors.

**Urban Renewal (1960s–1970s)**

The debates surrounding massive urban renewal projects of the 1960s created greater awareness that planning decisions are partly political and partly economic, and the planning profession faced a lot of criticism. As a result, new forms of advocacy and participatory planning processes emerged to address citizen concerns around transparency and democracy.

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quirement remained consistent with the legislation that had gone before. The 1985 amendments continued to require, before the adoption of certain specified land use bylaws, “a public hearing on the bylaw for the purpose of allowing the public to make representations to the local government respecting matters contained in the proposed bylaw.”<sup>115</sup> A later provision also revived the language tying participation in a public hearing to an affected property interest.<sup>116</sup>

So what accounted for the increased length of the 1985 amendments? First, there were some new substantive provisions in the 1985 amendments. For example, local governments were empowered to “waive the holding of a public hearing” in a specific case.<sup>117</sup> This waiver power could be used if (1) “an official community plan is in effect for the area that is subject to a proposed zoning bylaw” and (2) “the proposed

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115. *Supra* note 113, s 956 (1).

116. See *ibid*, s 956 (3) (“At a public hearing all persons who believe that their interest in property is affected by the proposed bylaw shall be afforded a reasonable opportunity to be heard or to present written submissions respecting matters contained in the bylaw that is the subject of the hearing.”).

117. *Ibid*, s 956 (4).

bylaw is consistent with the plan.”<sup>118</sup> A special notice provision also applied when a local government decided to waive a public hearing.<sup>119</sup>

**ERAS OF PLANNING AND PUBLIC ENGAGEMENT—  
continued**

**Sustainability Movement (1980s–present)**

The profession of planning continues to evolve with a focus on the longevity of communities and their sustainability. However, increasing complexity in the planning process has also resulted in critiques. Complaints about the pre-development approval process in British Columbia, for example, focus on how it adds delays or barriers for addressing current housing needs. While the profession of planning no longer views itself as all-knowing technocrats, it continues to use a technical process to balance trade-offs, guide land use decisions, and understand the public interest when making recommendations.

—drafted by SFU Morris J. Wosk Centre for Dialogue  
Strengthening Canadian Democracy Initiative as part of their  
project on public hearings

Second, the 1985 amendments also introduced new procedures. For example, the amendments spelled out in detail the procedure for adopting the proposed land use bylaw after the public hearing.<sup>120</sup>

Third, the 1985 amendments added considerable new detail to the established procedures for public hearings.

To take one example, the timing rule that requires a public hearing to be held before

adopting a land use bylaw was restated in the 1985 amendments in more limited and definite terms (“[t]he public hearing shall be held after first reading of the bylaw and before third reading”).<sup>121</sup> To take another example, the notice that a local government must give before a public hearing was expanded in scope (requiring direct notification of neighbouring landowners, if “the bylaw alters the permitted use or density of an area”)<sup>122</sup> and detail (spelling out what information must be provided in the published notice).<sup>123</sup>

## **Developments since 1985**

The legislation on public hearings continued to change and develop in the years after 1985, as the *Municipal Act* became the *Local Government Act*. These changes built on the basic structure provided by the 1985 amendments, altering the details of it rather than its overall framework.

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118. *Ibid*, s 956 (4).

119. See *ibid*, s 958.

120. See *ibid*, s 959.

121. *Ibid*, s 956 (2).

122. *Ibid*, s 957 (3).

123. See *ibid*, s 957 (2) (a).

At this point, it's necessary to pause the narrative of developing legislation, because it only tells part of the story of what makes up the current law. Since the early 1980s, court cases on public hearings have come to play an increasingly important role in the law on public hearings.<sup>124</sup> Before noting what judges have added to the law on public hearings, it's helpful to take a step back and consider why the common law would play such a significant role in this area of the law.

## **Development of the Public-Hearing Requirement in Case Law**

### **Overview: three factors contributing to the importance of case law in the development of the public-hearing requirement**

Case law has had an important impact on the development of certain aspects of public hearings because of three factors. These factors are: (1) the rise of procedural fairness within administrative law; (2) the connections between public hearings and other kinds of hearings, such as hearings before a court; and (3) the incentives that BC land use law has created to litigate on procedural issues.

### **Judicial review and the rise of procedural fairness in administrative law**

#### *About judicial review*

"It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law," the Supreme Court of Canada has observed in a leading case.<sup>125</sup> "The corollary of this constitutionally protected principle is that superior courts may be called upon to review whether particular exercises of state power fall outside the law. We call this function 'judicial review.'"<sup>126</sup>

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124. See e.g. Buholzer, *BC Planning Law*, *supra* note 38 at § 16.53 ("Each aspect of the hearing has been attacked in litigation and examined by the courts, often resulting in the erection of an additional common law requirement upon the simple statutory foundation for a hearing.").

125. *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 10 [*Catalyst Paper*], McLachlin CJ.

126. *Ibid.*

Judicial review applies to local-government decisions. As the court has explained, “[a] municipality’s decisions and bylaws, like all administrative acts, may be reviewed in two ways.”<sup>127</sup>

One way relates to the fact that local governments “possess only those powers that provincial legislatures delegate to them,”<sup>128</sup> which was discussed in the previous chapter.<sup>129</sup> The other way, which is more significant for the discussion that follows in this chapter, involves what the court called “the requirements of procedural fairness.”<sup>130</sup>

### *About procedural fairness*

“The duty of procedural fairness,” a court has recently noted, “extends to all administrative decision makers acting under statutory authority.”<sup>131</sup> “The values underlying the duty of procedural fairness,” a leading case has explained, “relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.”<sup>132</sup>

As can be readily appreciated this principle sets a rather open-ended standard for procedural fairness. As the court has put it in another leading case, “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.”<sup>133</sup> In other words, the extent to which the procedures that a given administrative decision-maker has used in coming to a decision can be seen to be fair will vary from case to case.

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127. *Ibid* at para 12.

128. *Ibid* (“[M]unicipal acts may be set aside because they fall outside the scope of what the empowering legislative scheme contemplated. This substantive review is premised on the fundamental assumption derived from the rule of law that a legislature does not intend the power it delegates to be exercised unreasonably, or in some cases, incorrectly.”).

129. See, above, at 9–10 (on “the place of local governments in Canada’s system of governance”).

130. *Catalyst Paper*, *supra* note 125 at para 12.

131. *Young v Central Health*, 2016 NLTD(G) 145 at para 19, Goodridge J.

132. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 28, 174 DLR (4th) 193 [Baker], L’Heureux-Dubé J.

133. *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 682, 69 DLR (4th) 489, L’Heureux-Dubé J.

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To try to guide courts toward achieving some consistency in applying this variable principle, the Supreme Court of Canada has articulated the following (non-exhaustive) list of factors to consider in determining the duty of procedural fairness in a specific case:

- “the nature of the decision being made and the process followed in making it”;<sup>134</sup>
- “the nature of the statutory scheme” (note: “[g]reater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted”);<sup>135</sup>
- “the importance of the decision to the individual or individuals affected”;<sup>136</sup>
- “the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances”;<sup>137</sup>
- “the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.”<sup>138</sup>

As more people challenged the decisions of local governments on land use bylaws made after a public hearing, courts more and more came to analyze local governments’ decisions in these ready-made terms from administrative law. And this analysis was also influenced by the nature of the public hearing itself.

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134. *Baker*, *supra* note 132 at para 23.

135. *Ibid* at para 24.

136. *Ibid* at para 25.

137. *Ibid* at para 26.

138. *Ibid* at para 27.

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## Hearings generally

The public hearings required by the *Local Government Act* share a family resemblance with other kinds of hearings required by law. In its most basic terms, a *hearing* is simply “an act of listening to evidence.”<sup>139</sup>

There is a wide range of occasions in which the law calls for the taking of evidence. Different types of hearings exist in a spectrum based on their formality and the number of procedural protections they have. At one end appears civil or criminal trials in a court (such as the Supreme Court of British Columbia). Court hearings have the widest array of procedural protections, and they are also the most formal in their procedures. Participants in court hearings can rely on the following procedural protections:

- 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.<sup>140</sup>

At the other end of the spectrum are parliamentary or legislative committees, which are informal, and which have few defined procedural protections. Such committees are concerned with “governmental decisions whose primary thrust is to affect the public in a general sense, even though specific sub-groups may be the subject of the decision.”<sup>141</sup> “This kind of public hearing,” a law professor has noted, “which we can call legislative or rulemaking, uses the public hearing ostensibly as a fact finding device, presumably to give the decision-maker information or ideas about public attitudes and reactions.”<sup>142</sup> In these types of hearings, the features listed above for trials likely don’t exist, as “the procedures followed . . . [are] largely if not entirely in the

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139. Judy Pearsall, ed, *Concise Oxford English Dictionary*, 10th ed (Oxford: Oxford University Press, 2002), *sub verbo* “hearing.”

140. Alyssa Bradley & Guy Patterson, *Public Hearings: A New Era* (27 November 2020), online (pdf): *Young Anderson—Barristers and Solicitors* <[www.younganderson.ca/assets/seminar\\_papers/2020/Public-Hearings-A-New-Era.pdf](http://www.younganderson.ca/assets/seminar_papers/2020/Public-Hearings-A-New-Era.pdf)> at 1. The qualifier “at least until recently” in the last bullet point is a reference to the increased use of videoconferencing in court proceedings due to the COVID-19 pandemic.

141. Sheldon J Plager, “Participatory Democracy and the Public Hearing: A Functional Approach” (1968) 21:2 Admin L Rev 153 at 153.

142. *Ibid.*



discretion of the decision-maker” and “[f]ew legal constraints exist” on this discretion.<sup>143</sup>

Since the end of the Second World War, there has been a proliferation of administrative decision-makers.<sup>144</sup> These decision-makers tend to occupy the broad middle of the spectrum. They aren’t courts, and there are widely recognized policy reasons not to treat them as courts.<sup>145</sup> But they do share some of the adjudicative functions of courts, so there are widespread concerns about giving them free rein to define their own procedures, as if they were the equivalent of legislative committees.<sup>146</sup>

As a general point, this middling position of administrative decision-makers has marked the case law. As courts have considered whether the procedures these decision-makers use are fair, they have repeatedly asked whether administrative deci-

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143. *Ibid.*

144. See Dan Moore, “Engagement with Human Rights by Administrative Decision-Makers: A Transformative Opportunity to Build a More Grassroots Human Rights Culture,” (2017) 49:1 Ottawa L Rev 131 at 136–137 (“Examples [of administrative decision-makers] include labour and employment tribunals, the Immigration and Refugee Board, municipal boards, securities commissions, and human rights tribunals. Although these decision-making contexts are certainly less formal than the courts from a legal perspective, many of the decision-makers have some level of legal training, as well as access to organizational resources to support them when novel legal issues arise. On the other hand, administrative decision-making also occurs in a wide range of less formal situations, where a discretionary decision-making power is exercised by a Minister or lower level officials in a government department or agency. Examples include decisions by officers of the Canada Border Services Agency on whether to defer the enforcement of a removal order; decisions about driver’s licenses for motor vehicles; and decisions about the issuance, refusal, and revocation of passports. Administrative officials working in contexts such as these often do not have formal legal training and are expected to quickly make and document their decisions.” [footnote omitted]).

145. See e.g. Alberta Law Reform Institute, *Powers and Procedures for Administrative Tribunals in Alberta*, Report 79 (1999), online: <[www.alri.ualberta.ca/wp-content/uploads/2020/05/fr079.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/05/fr079.pdf)> at para 58 (“Administrative tribunals can make adjudicative decisions, but they are not courts. Two important features distinguish them from courts. The first is that they deal with limited subject areas. For some of these, a court-like degree of formality is appropriate; for others, a very informal proceeding, or one designed for the specific purpose, is more apt to the particular business of the tribunal. Second, very often their mandate requires that in making decisions they are to take the public interest into account. Often to do this, they must take into account government policy or agency policy, and also other information that is not supplied to them by the applicant or other participants.”).

146. See Plager, *supra* note 141 at 153 (noting that legislative committees usually have the freedom to define their own procedures and rarely have specific procedures imposed on them by legislation).

sion-makers should be required to adopt procedures approaching those that apply to courts.<sup>147</sup> This has led to the development of a large body of case law.

And that case law applies to public hearings. After all, public hearings do resemble hearings before other administrative decision-makers. It was a relatively easy step for courts to take standards developed in cases involving administrative decision-makers and apply them in litigation involving a public hearing. As a result, litigation over the procedural fairness of a public hearing can often boil down to whether the local government that has called the public hearing should have to adopt procedures that approach those used in the courts.

## **Litigation involving public hearings: an incentive to challenge procedures**

Finally, it's worthwhile considering why litigation involving public hearings would so often focus on the procedural aspects of a local-government's decision-making. After all, when all things are equal, people tend to care more about the outcome of a decision than they do about the procedures that a decision-maker followed in reaching that decision.

The key point to bear in mind here is that all things aren't equal when it comes to challenging the outcome of a public hearing in court. This is because British Columbia hasn't established an adjudicative forum (either a court or a specialized tribunal) that has the job of reviewing the substance of a local government's decision on whether to adopt a land use bylaw.<sup>148</sup>

Whenever people have gone to court trying to challenge the substance of a land use bylaw, courts have consistently told them that the *Local Government Act* doesn't allow for judicial review of the merits of the local government's decision. This means judges can't rule on whether the bylaw is right or wrong. The courts only rule

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147. See, above, text accompanying note 140.

148. See Buholzer, *Local Government*, *supra* note 34 at § 9.1 ("An important feature of planning and land use management in British Columbia is the absence of an appeal tribunal, like the Ontario Municipal Board, hearing land use appeals on their merits. Apart from matters of jurisdiction and procedural fairness, elected municipal councils and regional boards have the final say on the merits of land use and development applications."). Note that, after this comment was written, Ontario replaced the Ontario Municipal Board with, first, the Local Planning Appeal Tribunal of Ontario (effective 3 April 2018) and, then, the Ontario Land Tribunal (effective 1 June 2021), reducing its powers and narrowing its scope of review. See *Local Planning Appeal Tribunal Act, 2017*, SO 2017, c 23, Schedule 1 (repealed); *Accelerating Access to Justice Act, 2021*, SO 2021, c 4, Schedule 6.

whether or not the procedures the local government used to make that decision were fair. So the only remedy people opposing the substance of the bylaw have is at the ballot box.<sup>149</sup>

Since it's much easier to win a court case than to influence the course of an election, anyone who is disappointed with the results of a public hearing has a strong incentive to reframe that disappointment in procedural terms. In this way, the person will be able to bring a case before the courts. That case will be focused on a relatively narrow issue (was the procedure used by the local government fair?). Managing litigation over that narrow procedural issue is a straightforward task in comparison to making an issue of a public hearing over the course of a local election, which invariably has myriad other competing issues.

Of course, a narrow procedural issue in a court case can only yield a relatively narrow remedy. If a court finds that a local government hasn't used fair procedures in calling or holding a public hearing, it will set aside that hearing. In effect, this means that the local government hasn't fulfilled the public-hearing requirement in the legislation. It sends the local government back to the drawing board, where it will have an opportunity to call or hold the public hearing with what the court has defined as fair procedures. In many cases, a local government may be able to do this, which means that the land use bylaw may ultimately be adopted. But experience has shown that the delays involved in holding a new public hearing may be enough to stop the local government from proceeding, effectively giving opponents of the bylaw the substantive remedy that they may have wanted all along (the defeat of the bylaw).

### **Aspects of public hearings particularly affected by the case law**

As these factors have come together, they've produced a body of case law that has had a marked impact on the law of public hearings. This impact hasn't been felt evenly. Instead, the case law has focused on a handful of specific areas, while leaving others untouched.

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149. See *Community Association of New Yaletown v Vancouver (City)*, 2015 BCCA 227 at para 153, leave to appeal to SCC refused, [2015] SCCA No 244 (QL) [*Community Association of New Yaletown*], Bauman CJ (“[J]udicial review has well defined limits. Citizens who disagree with the City’s view of the public interest must seek change through the political process rather than the courts.”).

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## Disclosure

The area where the case law has had the most pronounced impact concerns disclosure of documents.

### THE RISE OF TRANSPARENCY

In the middle of the 20th century, North American political culture entered a new era of transparency and embraced the right of citizens to know the details of how governments make decisions. Michael Schudson's 2015 book, *The Rise of the Right to Know: Politics and the Culture of Transparency, 1945–1975*, focuses on the United States, but similar changes followed in Canada. Schudson suggests that, media scrutiny, the environmental movement, and consumerism helped emphasize transparency as a democratic value.

California's Open Meeting Act (also known as the Brown Act) exemplifies how media scrutiny transformed local government practices during this era. In 1952, San Francisco Chronicle journalist Michael Harris, published a series about important city decisions made in secret meetings amongst legislative loopholes. As a response, legislator Ralph M. Brown penned landmark open meeting legislation that passed in 1953.

Similar transparency rules and procedures, often nicknamed sunshine reforms, followed, and spread across government sectors. Such laws include the US's Freedom of Information Act's passage in 1966 and Canada's Access to Information Act (ATIA) in 1983. Around 260 Canadian government institutions are currently subject to the ATIA, allowing citizens to view inputs and options considered in decision-making processes.

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Cases have identified that relevant documents in the possession of the local government must be made available to the public ahead of the hearing. The *Local Government Act's* provisions on public hearings for planning and land use bylaws<sup>150</sup> don't address this topic at all. But it has been the subject of a burgeoning stream of court cases, going back to the early 1980s.<sup>151</sup>

The facts of one of the leading cases<sup>152</sup> pro-

vide a good illustration of the concerns in this area. In this case, a landowner in Pitt Meadows (which, at the time, was "primarily an agricultural community")<sup>153</sup> "submitted an application for rezoning" to the local government, to allow for construction of residential housing and resort units.<sup>154</sup> The application faced "considerable public opposition."<sup>155</sup>

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150. See *supra* note 1, ss 464–470 (part 14, division 3).

151. See *Karamanian v Richmond (Township)* (1982), 138 DLR (3d) 760, 38 BCLR 106 (SC) [*Karamanian* cited to BCLR]; *Eddington v Surrey (District)*, [1985] BCJ No 1925 (CA) (QL) (early cases on disclosure).

152. *Pitt Polder Preservation Society v Pitt Meadows (District)*, 2000 BCCA 415 [*Pitt Polder*], rev'g (1999), 4 MPLR (3d) 117 (BCSC).

153. *Ibid* at para 6, Rowles JA.

154. *Ibid* at para 7.

155. *Ibid*.

**THE RISE OF TRANSPARENCY—continued**

The environmental movement of the era also strengthened transparency and public scrutiny over government decisions. During this time, both the US National Environmental Policy Act (1969) was passed and Canada's Environmental Assessment and Review Process Guidelines Order (1973) became operational, and required public access to reports. The requirements to study and publish risk factors and disclose potential sources of harm to the public before decision-making enshrines the public's right to know into legislation. These approaches have become standard procedures in a range of policy sectors.

The movement embracing transparency included people's rights as consumers, as well as citizens. For example, food labels became mandated during this era to ensure people could know the ingredients and nutrition of products before consumption, and drug manufacturer oversight expanded to protect consumers. Disclosures of bias and funding also became required for pharmaceutical companies.

As a culture of transparency expanded through different domains of public life, citizens came to expect similar access and scrutiny over their local land-use decisions. Public hearings became part of a civic culture that guarantees a citizen's right to scrutinize and be heard in the process of land-use decision-making processes and enacts their right to have access to all information relevant to the decision.

—drafted by SFU Morris J. Wosk Centre for Dialogue Strengthening Canadian Democracy Initiative as part of their project on public hearings

Ultimately, the local government scheduled a public hearing on changes sought to land use bylaws as a result of the rezoning application.<sup>156</sup> “About a week before the public hearing,” the local government “made available to the public a Public Hearing Information Package.”<sup>157</sup> This package didn't include a number of reports (an environmental assessment, an archeological assessment, and reports on the impacts of the proposed development on traffic, agricultural uses in the area, and municipal taxes) that the landowner had commissioned at

the behest of the local government. These reports were only “presented” to the public during the public hearing.<sup>158</sup>

After the public hearing, the local government adopted the proposed rezoning bylaws.<sup>159</sup> A citizens' group launched a court case, asking the court to set aside the bylaws.<sup>160</sup>

The court proceedings focused on the failure to disclose the reports in advance of the public hearing. The issue was formulated as follows: “whether a duty of proce-

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156. See *ibid* at paras 8–9.

157. *Ibid* at para 10.

158. *Ibid* at paras 10–13.

159. See *ibid* at para 21.

160. See *ibid* at para 22.

dural fairness rests on local government to make available to the public reports and other documents relevant to a proposed land use or zoning bylaw in advance of a public hearing when, by statute, a public hearing must be held before the local government makes a decision as to whether to adopt the proposed bylaw.”<sup>161</sup>

The court held that, in this case, the answer to its question was *yes*. In its view, “in order to provide the opportunity for informed, thoughtful, and rational presentations in relation to 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.”<sup>162</sup> In this case, the court decided that the local government didn’t meet this standard.<sup>163</sup>

A large number of cases have wrestled with disclosure issues because, in a sense, the standard can vary with the facts of a given case. But the broad outlines of the requirements are clear. On the one hand, “a municipality will generally meet its disclosure obligations if . . . it discloses everything that was or will be considered by council” in making its decision on the proposed bylaw.<sup>164</sup> This disclosure must be made far enough in advance of the public hearing to give members of the public “sufficient time to prepare reasoned presentations.”<sup>165</sup>

On the other hand, local governments aren’t required<sup>166</sup> to meet the expansive disclosure obligations and strict timelines placed on a Crown prosecutor in a criminal trial<sup>167</sup> or on a litigant in civil proceedings before a court.<sup>168</sup> For example, a party to

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161. *Ibid* at para 1.

162. *Ibid* at para 54.

163. See *ibid* at para 68. In coming to this conclusion, the court rejected the local government’s arguments that, strictly speaking, it didn’t have the reports in its possession, as they were commissioned by the landowner (see *ibid* at para 58), that the reports were ultimately presented at the public hearing (see *ibid* at para 62), and that evidence of prejudice to the public wasn’t provided (see *ibid* at para 67).

164. *Community Association of New Yaletown*, *supra* note 149 at para 91 [citations omitted].

165. *Pitt Polder*, *supra* note 152 at para 63.

166. See *Community Association of New Yaletown*, *supra* note 149 at para 92.

167. See e.g. *R v Stinchcombe*, [1991] 3 SCR 326, 130 NR 277 (leading case on prosecutor’s duty to disclose all relevant information to the defence).

168. See e.g. *Supreme Court Civil Rules*, BC Reg 168/2009, r 7-1 (discovery and inspection of documents for civil proceedings in the Supreme Court of British Columbia).

civil litigation in the BC Supreme Court is required to “prepare a list of documents” that contains “all documents that are or have been in the party’s possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact” in the court case.<sup>169</sup> This list must be “serve[d]” on “all parties of record” in the case.<sup>170</sup> The other parties may inspect and copy documents on the list.<sup>171</sup>

So there is something of a grey area between simply disclosing documents that will be considered by the local government and all relevant documents in the expansive criminal-proceeding or civil-litigation senses of the term *relevance*.<sup>172</sup> “While there can be no hard and fast rule for the degree of disclosure required,” as a recent case has put it, “in general, members of the public are entitled to receive in advance of the public hearing all documents put before council. Whether the public is entitled to more expansive or restricted access depends on several factors.”<sup>173</sup> These factors include the breadth of the rezoning decision (i.e., does it only affect a handful of people or much more), whether the rezoning decision contemplates a significant change in land use, and whether the public was already aware, by other means, of the content of the documents.<sup>174</sup>

### *Impartiality*

Another area that has attracted the attention of the courts is the impartiality of the decision-maker—which, in this case, is the local government itself (that is, a municipal council or a regional-district board). This is another issue on which the *Local Government Act* is essentially silent, so the courts have looked to principles developed under the administrative-law heading of procedural fairness.

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169. *Ibid*, r 7-1 (1) (a) (notice that, in addition to the strict formal procedure set out in this rule, it also adopts a standard—“could . . . be used . . . to prove or disprove a material fact”—that is much broader in scope than the baseline standard for public hearings—“was or will be considered by council”).

170. *Ibid*, r 7-1 (1) (b).

171. See *ibid*, r 7-1 (15), (16).

172. See *Vancouver Island Community Forest Action Network v Langford (City)*, 2010 BCSC 1357 at para 60 [*Vancouver Island Community Forest Action Network*], Fenlon J (“I have concluded from this review of the case law that neither party is correct in asserting that there is one rule for disclosure applicable to all cases.”).

173. *Ibid* at para 61.

174. See *ibid*.

As was the case with disclosure, the gold standard for impartiality is found in the courts. Litigants in a court case can expect judges not to be tainted by actual bias and, in addition, not to give a reasonable apprehension of bias (this is, in basic terms, a perception reasonably held by an outside member of the public, looking in at the court proceedings, that the judge's decision was influenced by something other than the evidence provided by the parties and the applicable law).<sup>175</sup> In other words, the standard for courts addresses both reality and appearances. A judge can't hear a case with an actual bias toward one of the parties (say, due to a financial interest in the outcome) or create the perception in reasonable members of the public that such a bias exists.

The courts have recognized that it's not appropriate to hold local governments strictly to this standard. This is because, while a judge has essentially only one role (to adjudicate court cases), a councillor's or a board member's responsibilities are "hybrid—political, legislative or otherwise."<sup>176</sup> So, while councillors and board members have "what some courts have characterized as a quasi-judicial function"<sup>177</sup> in making decisions after a public hearing, their role isn't purely judicial, and they can't be held to the exacting standards of impartiality expected from the courts.

This issue can arise in view of the political role councillors and board members must play. In a leading case, the court "concluded that a member of a municipal council was not disqualified by reason of bias unless he or she had prejudged the matter to

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175. See *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 20–22, Abella J ("The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows: 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.' This test—what would a reasonable, informed person think—has consistently been endorsed and clarified by this Court. The objective of the test is to ensure not only the reality, but the appearance of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality. . . . Le Dain J. connected the dots from an absence of bias to impartiality, concluding '[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case' and 'connotes absence of bias, actual or perceived.' Impartiality and the absence of the bias have developed as both legal and ethical requirements. Judges are required—and expected—to approach every case with impartiality and an open mind." [citations omitted; bracketed text in original] The quotation from Justice Le Dain is taken from *Valente v The Queen*, [1985] 2 SCR 673 at 684, 24 DLR (4th) 161).

176. *Jones v Delta (District of)* (1992), 92 DLR (4th) 714, 69 BCLR (2d) 239 at para 116 (CA) [Jones], Goldie JA (concurring). See also *Community Association of New Yaletown*, *supra* note 149 at paras 58–61.

177. *Community Association of New Yaletown*, *supra* note 149 at para 61.



be decided to the extent of being no longer capable of persuasion.”<sup>178</sup> (In simpler terms, this means the councillor would only be disqualified if the councillor were just going through the motions in a public hearing, because the councillor’s mind was already made up.)

The case concerned a rezoning of agricultural land to permit a large residential development. This proposed rezoning “was the main issue in the most recent municipal election.”<sup>179</sup> While seeking election, councillors took positions on it. After the election, attention was focused on one councillor, who was seen to be adamantly opposed. But despite statements and media reports implying that the councillor had attended the public hearings with a closed mind, the court concluded that, applying its test of impartiality to the evidence, the councillor “had not reached a final opinion on the matter which could not be dislodged. It follows that he was not disqualified by bias.”<sup>180</sup>

The courts are willing to give councillors and board members considerable leeway in determining whether a mind is closed. As one commentator has put it, “there is an important difference between a mind being open and a mind being empty; members of councils and boards are permitted to hold strong views on land use issues, which are acknowledged to be the bread and butter of local politics.”<sup>181</sup> So it’s no surprise that “the fact that a councilor may have campaigned for office on the basis of a strong position on a land use issue does not preclude that councilor from participating in a public hearing on that issue and voting on the bylaw”; but, that said, the councillor or board member must “if it becomes necessary, be able to swear an oath that at the hearing they were capable of being persuaded, by meritorious argument, to change their previously held views.”<sup>182</sup>

### *Post-hearing reports and advice from local-government staff*

As has been discussed, the common law has given extensive consideration to what must be disclosed in advance of a public hearing. The courts have also considered an extension of this issue, in which a local government asks members its staff to create reports *after* the public hearing, discussing and giving advice in relation to issues

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178. *Save Richmond Farmland Society*, *supra* note 89 at 1224.

179. *Ibid* at 1217.

180. *Ibid* at 1224.

181. Buholzer, *BC Planning Law*, *supra* note 38 at § 16.66.

182. *Ibid*.

raised at the public hearing.<sup>183</sup> While the *Local Government Act* does address what it calls “procedure after [a] public hearing,”<sup>184</sup> its provisions are focused more on local-government procedure in considering the proposed bylaw. They don’t address this situation.

In one case, after a contentious public hearing, a municipal council “indicated the next step would be for planning staff to review submissions presented at the public hearing and report back to council.”<sup>185</sup> “A week later,” the court noted, “the council received a report from the director of planning . . . and at a meeting of the District council held the following week, the bylaws were passed.”<sup>186</sup>

Several citizens asked the court to overturn the bylaw, on the basis that the report represented “new opinions of the director of planning about the proposed development,” which hadn’t been disclosed before the public hearing.<sup>187</sup> The court ultimately rejected this argument, noting that it was reasonably common for local governments to seek to have “further comment on certain subjects from its staff,” and “[i]f after receiving such information from staff, council was then required to call a new public hearing, the process would tend to be endless.”<sup>188</sup>

## **A Snapshot of the Current Law on Public Hearings**

### **Introduction**

Taking the provisions of the *Local Government Act* together with the contributions of court cases, it’s possible to create a picture of the law on public hearings as it stands at the beginning of 2022.

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183. See *Hubbard v West Vancouver (District of)*, 2005 BCCA 633 [*Hubbard*].

184. *Supra* note 1, s 470. See also *Vancouver Charter*, *supra* note 37, s 566 (5)–(5.1) (equivalent provisions for the city of Vancouver).

185. *Hubbard*, *supra* note 183 at para 4, Hall JA.

186. *Ibid*.

187. *Ibid* at para 2.

188. *Ibid* at para 23.

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## The basic requirement to hold a public hearing

A local government must hold “a public hearing on [specified kinds of land use by-laws] for the purpose of allowing the public to make representations to the local government respecting matters contained in the proposed bylaw.”<sup>189</sup>

## What triggers the requirement to hold a public hearing?

The *Local Government Act* makes 65 references to a *public hearing*. The bulk of these references are contained in the act’s dedicated division on “public hearings on planning and land use bylaws.”<sup>190</sup>

Under this division, a public hearing must be held whenever a local government seeks to adopt any one of three kinds of land use bylaws:

- an official community plan bylaw;<sup>191</sup>
- a zoning bylaw;<sup>192</sup>
- a bylaw providing for the early termination of a land use contract.<sup>193</sup>

The first two kinds of bylaws are much more common than the third, as virtually all of the populated land within British Columbia’s municipalities and regional districts is covered by official community plans and zoning bylaws.<sup>194</sup> The requirement to hold a public hearing is triggered whenever a local government seeks to adopt a new

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189. *Local Government Act*, *supra* note 1, s 464 (1). See also *Vancouver Charter*, *supra* note 37, s 566 (1) (“The Council shall not make, amend, or repeal a zoning by-law until it has held a public hearing thereon, and an application for rezoning shall be treated as an application to amend a zoning by-law.”).

190. *Supra* note 1, ss 464–470 (part 14, division 3). See also *ibid*, ss 434 (3) (consultation during development of regional growth strategy), 494 (5) (public notice and hearing requirements for temporary-use permits for designated areas and other areas), 518 (1) (process for phased development agreement bylaw), 610 (8) (heritage revitalization agreements), 612 (1) (heritage designation procedure). Discussion of public hearings in connection with these bylaws is outside the scope of this study paper.

191. See *ibid*, s 464 (1) (a). See also, above, at 16–18 (further discussion of official community plans).

192. See *supra* note 1, s 464 (1) (b). See also, above, at 18–19 (further discussion of zoning bylaws).

193. See *supra* note 1, s 464 (1) (c). See also *ibid*, s 548 (process for early termination of a land use contract).

194. See Buholzer, *Local Government*, *supra* note 34 at § 9.1.

official community plan or zoning bylaw or to modify an existing official community plan or zoning bylaw.<sup>195</sup>

The third item on the list refers to a type of land use regulation that was used in the 1970s.<sup>196</sup> Legislation in force at that time “provided for the substitution of land use contracts for zoning regulations, in an early attempt to enable local governments to require developers to shoulder infrastructure expansion costs.”<sup>197</sup> The resulting contracts were registered in the land title office on titles to the affected land.<sup>198</sup> While this method of land use regulation never approached the ubiquity of official community plans and zoning bylaws, one commentator has estimated that there are still “hundreds [of land use contracts] covering thousands of parcels of land around the province.”<sup>199</sup>

The enabling legislation for land use contracts was repealed in 1977.<sup>200</sup> So they are no longer an active feature of land use regulation in BC—no new land use contracts are being created. The *Local Government Act* has in fact placed a sunset date on their existence, providing for their termination by 30 June 2024.<sup>201</sup> It has also created a process for the earlier termination of any given land use contract,<sup>202</sup> which is the specific trigger for a public hearing. Many municipalities are adopting new zoning systems to change the zoning of the lands subject to the land use contracts.

## **When must the public hearing be held?**

The *Local Government Act* sets out a clear timetable for when a public hearing must be held. This is “after first reading of the bylaw [i.e., one of the three types of bylaws triggering the public-hearing requirement] and before third reading.”<sup>203</sup>

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195. See *ibid* at § 9.46.

196. See Buholzer, *BC Planning Law*, *supra* note 38 at §§ 1.12–1.14.

197. Buholzer, *Local Government*, *supra* note 34 at § 9.20.

198. See *ibid*.

199. *Ibid*.

200. See *Municipal Amendment Act, 1977*, SBC 1977, c 57, s 13.

201. See *supra* note 1, s 547 (1).

202. See *ibid*, ss 548–550.

203. *Ibid*, s 465 (1).

## What notice of the public hearing must be given?

The *Local Government Act* requires a local government to give the public advance notice of a public hearing.<sup>204</sup> The act directs that the contents of the notice state specific information about the hearing<sup>205</sup> and about the bylaw that is the subject of the hearing.<sup>206</sup> The act also directs that the notice “must be published in at least 2 consecutive issues of a newspaper, the last publication to appear not less than 3 days and not more than 10 days before the public hearing.”<sup>207</sup> Finally, in limited, specified circumstances, the local government also must mail the notice and additional information to neighbouring landowners and tenants in occupation.<sup>208</sup>

## What must be disclosed in advance of the public hearing?

While the *Local Government Act* has spelled out one thing local governments must do before a public hearing (give notice to the public), the courts have created another obligation to be carried out before the hearing. This is the advance disclosure of relevant documents for the public hearing to the public.

The courts’ touchstone in creating this obligation is fairness to public-hearing participants. This approach has resulted in a standard that can be fairly vague about what must be disclosed and when it must be disclosed, because the answers to these questions can vary from case to case. But the baseline requirement appears to entail (1) disclosing those documents that the local government will rely on in reaching its decisions about the proposed bylaw that has triggered the public hearing, and (2) making that disclosure sufficiently in advance of the hearing to allow members of the public to read the documents, reflect on their contents, and formulate their responses to them. Sometimes a local government might have to go above and beyond

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204. See *ibid*, s 466 (1). See also *Vancouver Charter*, *supra* note 37, s 566 (3).

205. See *supra* note 1, s 466 (2) (requiring notice to state the following: “(a) the time and date of the hearing; (b) the place of the hearing, if applicable; (b.1) if the hearing is conducted by means of electronic or other communication facilities, the way in which the hearing is to be conducted by those means”).

206. See *ibid*, s 466 (2) (requiring notice to state the following: “(c) in general terms, the purpose of the bylaw; (d) the land or lands that are the subject of the bylaw; (e) the place where and the times and dates when copies of the bylaw may be inspected”).

207. *Ibid*, s 466 (3).

208. See *ibid*, s 466 (4) (additional requirements if the proposed bylaw “alters the permitted use or density of any area or the residential rental tenure in any area, or limits the form of tenure to residential rental tenure in any area”), (5) (additional requirements if the proposed bylaw involves the early termination of a land use contract).

this baseline requirement, but the upper limit of what it might be called upon to do will still fall short of the exacting disclosure requirements placed on litigants in court cases.

## Who can appear at the public hearing?

The *Local Government Act* provides that “[a]t the public hearing, all persons who believe that their interest in property is affected by the proposed bylaw must be afforded a reasonable opportunity to be heard or to present written submissions respecting matters contained in the bylaw that is the subject of the hearing.”<sup>209</sup> This statement enabling public participation at the hearing is the guiding principle of the act’s provisions on public-hearing procedures.<sup>210</sup>

At first glance, the *Local Government Act* may appear to limit participation to neighbouring landowners and focus discussion on how the proposed bylaw would affect their property interests. But, as a commentator has noted, because this provision is framed in terms of a person’s belief, “courts have been reluctant to recognize any serious limits on who may reasonably assert such a belief and demand to be heard.”<sup>211</sup>

## What is the procedure at the public hearing?

So long as the guiding principle on public participation (affording all persons who believe that their interest in property is affected a reasonable opportunity to be heard or to provide written submissions) is respected, the *Local Government Act* allows “the chair of the public hearing” to “establish procedural rules for the conduct of the hearing.”<sup>212</sup> Examples of such procedural rules include things like “a speaker’s list and time limits on submissions.”<sup>213</sup> In establishing procedural rules, “the chair’s principal concern should be to ensure that members of the public are permitted to make their representations effectively.”<sup>214</sup>

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209. *Ibid*, s 465 (3). See also *Vancouver Charter*, *supra* note 37, s 566 (4) (“[a]t the hearing all persons who deem themselves affected by the proposed by-law shall be afforded an opportunity to be heard in matters contained in the proposed by-law”).

210. See *supra* note 1, s 465.

211. Buholzer, *BC Planning Law*, *supra* note 38 at § 16.53.

212. *Supra* note 1, s 465 (3).

213. Buholzer, *Local Government*, *supra* note 34 at § 9.46.

214. Buholzer, *BC Planning Law*, *supra* note 38 at § 16.63.

This approach gives the meeting chair a fair amount of leeway in setting procedural rules. The chair can't adopt rules that the case law has determined to be procedurally unfair or that don't comply with the legislation.<sup>215</sup> But there is a lot of room for individual judgment on issues that don't engage either case-law precedents or legislative provisions. This can result in some variety to the procedures used from one public hearing to the next.<sup>216</sup>

As a practical matter, "[p]ublic hearings are usually conducted as meetings of the municipal council or regional district board, or meetings of the 'committee of the whole' of these bodies."<sup>217</sup> But nothing in the *Local Government Act* or the common law requires this form of meeting for the public hearing. As a commentator has noted, "the chair may simply assemble the council or board members together and call the hearing to order."<sup>218</sup>

### **What is the nature of the duty of impartiality owed by councillors and board members at the public hearing?**

Court cases have made it clear that municipal councillors and regional-district board members must listen to the arguments presented at a public hearing with a mind capable of being persuaded by them. So councillors and board members are required to be impartial in this sense, but the law on this point contains a fair bit of nuance.

As was mentioned in the earlier discussion of impartiality,<sup>219</sup> courts have recognized that it would be inappropriate to impose the same high duty of impartiality that applies to judges on councillors and board members. While a councillor or board member in a public hearing is playing an adjudicative role, it is not a purely adjudicative role like the one played by a judge in a court. Instead, a councillor or board member has a hybrid role, which has adjudicative, political, and legislative functions.

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215. For example, the *Local Government Act* allows for public hearings to be "conducted by means of electronic or other communication facilities," so long as the "facilities . . . enable the public hearing's participants to hear, or watch and hear, each other": *supra* note 1, s 465 (1.1), (1.2). The chair of a public hearing couldn't make a procedural rule that the public hearing in this case could be held by specified electronic means (say, using an instant-messaging app), even though facility chosen didn't allow for participants to hear, or watch and hear, each other.

216. For example, a public hearing on one bylaw may set a 10-minute limit on speakers' time and a public hearing on a different bylaw may adopt a 5-minute limit.

217. Buholzer, *BC Planning Law*, *supra* note 38 at § 16.61.

218. *Ibid.*

219. See, above, at 38–39.

Because land use issues make up a major part of local politics, it's unrealistic to expect a councillor or board member to come to a public hearing with no track record of taking political stances on land use issues.

## **What can be discussed at the public hearing?**

Since "the purpose of the hearing is to provide an opportunity to be heard," a commentator has noted that attempting to place "[r]estrictions on the content of submissions [is] ill-advised."<sup>220</sup> This is a fairly expansive standard, which appears to be constrained only by the *Local Government Act*'s reference to being heard on "matters contained in the bylaw that is the subject of the hearing."<sup>221</sup>

There do appear to be some limits on what can be said. A recent case, for example, has said that the *Local Government Act* doesn't give participants in the hearing a right "to comment on or take a position on the business dealings of the City or the intricacies of its housing strategy."<sup>222</sup> But this approach appears to be the exception, rather than the rule. A commentator, after noting that "notions of relevance in land use matters are very subjective," concluded that "it is preferable, from the local government's point of view, for the chair to establish a time limit on submissions and thereby give members of the public an incentive to use their speaking time wisely, rather than attempting to rule questionable submissions out of order or irrelevant."<sup>223</sup>

## **What happens after the public hearing?**

The *Local Government Act* provides that, after a public hearing wraps up, "[a] written report . . . containing a summary of the nature of the representations respecting the bylaw that were made at the hearing, must be prepared and maintained as a public record."<sup>224</sup> Case law also gives local governments some scope to ask their staff to prepare further reports and advice on issues raised in the public hearing. But local governments have to exercise caution here. If councillors or board members rely on new documents to make their decisions on the proposed bylaw, they could flout the

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220. Buholzer, *BC Planning Law*, *supra* note 38 at § 16.63.

221. *Supra* note 1, s 465 (2). See also *Vancouver Charter*, *supra* note 37, s 566 (4).

222. *Community Association of New Yaletown*, *supra* note 149 at para 76.

223. Buholzer, *BC Planning Law*, *supra* note 38 at § 16.63.

224. *Supra* note 1, s 465 (5).



rule requiring public disclosure of relevant documents in advance of the public hearing.<sup>225</sup>

The *Local Government Act* also enables the municipal council or regional-district board, “without further notice or hearing,” to “adopt or defeat the bylaw, or alter and then adopt the bylaw.”<sup>226</sup>

## **When is a local government not required to hold a public hearing on a land use bylaw?**

The *Local Government Act* deals with a specific set of circumstances in which a local government isn’t required to hold a public hearing. This provision applies if the proposed land use bylaw is a “zoning bylaw” and if the following two conditions are both met: “(a) an official community plan is in effect for the area that is the subject of the zoning bylaw, and (b) the bylaw is consistent with the official community plan.”<sup>227</sup> If the local government decides not to hold a public hearing in these circumstances, then it must still give notice to the public, setting out such things as the purpose of the bylaw, the lands affected by it, and the date on which first reading of the bylaw at a council meeting will be held.<sup>228</sup>

This provision of the *Local Government Act* was amended in late 2021.<sup>229</sup> The main thrust of the amendment was to substitute the words *not required* for the previously used expression *may waive*. Experience with the provision using this *waiver* language showed that many local governments held public hearings even when they appeared to be entitled to waive them because the two conditions were met.<sup>230</sup>

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225. See, above, at 43-44 (summary of rules on disclosure).

226. *Supra* note 1, s 470 (1). The provision goes on to restrict the power to alter the bylaw, as such alterations may not “(i) do any of the following: (A) alter the use; (B) increase the density; (C) without the owner’s consent, decrease the density of any area from that originally specified in the bylaw, or (ii) alter the bylaw in relation to residential rental tenure in any area” (*ibid*, s 470 (1) (b)). See also *Vancouver Charter*, *supra* note 37, s 566 (5) (“After the conclusion of the public hearing, the Council may 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.”).

227. *Supra* note 1, s 464 (2).

228. See *ibid*, s 467.

229. See *Municipal Affairs Statutes Amendment Act (No 2), 2021*, *supra* note 10, ss 26, 30 [in force 25 November 2021].

230. See Buholzer, *Local Government*, *supra* note 34 at § 9.46 (“few local governments use the waiver option”).

One court case appears to indicate that courts may take into account that a public hearing *could* have been waived into account in deciding what is a fair procedure for the hearing.<sup>231</sup> In particular, the court noted that “the statutory right to opt out of such a hearing when a zoning bylaw is consistent with a previously passed OCP by-law underscores the extent to which the public’s interest in being heard has already been addressed, and supports a lower level of disclosure.”<sup>232</sup>

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231. See *Vancouver Island Community Forest Action Network*, *supra* note 172 at para 70.

232. *Ibid.*

## Chapter 4. Overview of the Purposes of Public Hearings

### Introduction

Having examined in the previous chapter how the law on public hearings developed into what it now is, this chapter will turn to the question of why the law on public hearings exists. To answer this question, this chapter primarily examines case law and commentary from the legal and planning professions.

While one commentator has noted that the requirement to hold a public hearing has its origins in narrowly affirming the property rights of neighbouring landowners,<sup>233</sup> more recent statements by courts and commentators have set out broader purposes for the legislation. These comments have emphasized loftier goals, such as enhancing democratic participation and improving the quality of local-government decision-making, as among the purposes underlying the legislation.

### Purposes of Public Hearings

#### To provide a forum at which all aspects of the bylaw might be reviewed

An early case on the duty to disclose documents in advance of a public hearing contained an influential statement of the legislation's purpose. "In my view," the court said, "the purpose of the Legislature in enacting s. 720 [now section 464 of the *Local Government Act*] was to provide a forum at which all aspects of the by-law might be reviewed so that members of the public, having become aware of the by-law's purpose and effect, would be in a position to make representations to council of the manner and extent it affected property owned by them."<sup>234</sup>

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233. See Buholzer, *BC Planning Law*, *supra* note 38 at § 16.54 ("The hearing requirement originates in a principle that those whose property is directly affected by a land use regulation ought to have the opportunity to make representations to the local government before the regulations are enacted.").

234. *Karamanian*, *supra* note 151 at 111, Wallace J.

This passage has been quoted approvingly in a stream of subsequent BC court cases.<sup>235</sup> The use of the word *forum* is telling, as it imports classical democratic ideas about the public hearing serving as “a meeting or medium for an exchange of ideas.”<sup>236</sup>

Broadening the scope of inquiry further, this idea of the public hearing as a forum for public participation in local-government decision-making has appeared in academic commentary on the law.

For example, a law professor has characterized public hearings as “[a] device to achieve citizen participation.”<sup>237</sup> Legislation requiring public hearings can be seen as supporting “the vitality of the democratic process” by advancing “the premise that decision-making should be kept responsive to the needs of widely representative groups and that arbitrary action of central planners in disregard of the legitimate needs and desires of the people they serve should be avoided.”<sup>238</sup> In a similar vein, an urban-planning textbook has noted that public hearings can be “viewed as revitalizing democratic practice in general by giving opportunities for local self-government to the ‘average’ citizen.”<sup>239</sup>

Commentators have also speculated on the downstream benefits of providing such a forum for democratic public participation. Public hearings can be viewed as fulfilling a function to “help to maintain the stability of society” and guard “the public inter-

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235. See *Kuciuk v Sechelt (District)*, 2013 BCSC 528 at para 47, Bracken J; *Fisher Road Holdings Ltd v Cowichan Valley (Regional District)*, 2012 BCCA 338 at para 32 [Fisher Road], Hinkson JA; *Eaton v Vancouver (City)*, 2008 BCSC 1080 at para 36, Loo J; *Gluska v Port Moody (City of)*, 2002 BCSC 1003 at para 22, Loo J; *Botterill v Cranbrook (City of)*, 2000 BCSC 1225 at para 25, Loo J; *Pitt Polder*, *supra* note 152 at para 49; *Norman v Port Moody (City of)*, 1995 CanLII 719 at para 18 (BCSC), Leggatt J; *548928 Alberta Ltd v Invermere (District of)*, 1995 CanLII 1616 at para 20 (BCSC), Melnick J; *Jones*, *supra* note 176 at para 87, Wood JA; *Jones v Delta (Corporation of)* (1991) 3 MPLR (2d) 30 at para 35 (BCSC), Donald J; *Rogers v Saanich (District of)*, 1983 CanLII 321 at para 76 (BCSC), Locke J.

236. *Concise Oxford English Dictionary*, *supra* note 139, *sub verbo* “forum.”

237. Jeffrey Jowell, “The Limits of the Public Hearing as a Tool of Urban Planning” (1968) 21:2 Admin L Rev 123 at 123.

238. *Ibid* at 125.

239. Frank S So et al, eds, *The Practice of Local Government Planning* (Washington: International City Management Association, 1979) at 555.

est”<sup>240</sup> by giving local residents a sense that they are involved in the decision-making process and “ensur[ing] that bureaucracies are responsive to the public.”<sup>241</sup>

### **To create a tool for information gathering about local conditions in the area affected by the bylaw**

“A second function,” of legislative public-hearing requirements that was noted by a commentator, “evolves out of the use of the hearing for fact finding.”<sup>242</sup> Another commentator has characterized this purpose in somewhat broader terms, calling the public hearing “[a] forum for information-gathering.”<sup>243</sup> This description reflects the fact that the public hearing “may provide the decision-maker with both factual information and some insights into public attitudes.”<sup>244</sup>

The idea here is that the local community may be in possession of facts and opinions about the proposed bylaw. The public hearing can be seen either as an effective way to transmit those facts and opinions to the local government or as a critical tool in uncovering these facts and opinions, which would otherwise be overlooked if the decision-making process were only informed by expert technical analysis. As a textbook on planning law puts it, “useful information emerges from public discussion” at a public hearing.<sup>245</sup>

### **To create public confidence in and enhance the quality of local-government decision-making on land use regulation**

Another purpose of the public-hearing requirement comes as a consequence of the first two. The notion here is that the creation of a forum for public comment on the proposed bylaw and the information gathered at the public hearing can combine to enhance the quality of decisions that local governments make on land use bylaws.

This function of the legislation was discussed in a leading BC case.<sup>246</sup> The court made the point that a public hearing “gives the decision-maker the benefit of public exam-

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240. *Ibid.*

241. *Ibid.*

242. Plager, *supra* note 141 at 155.

243. Jowell, *supra* note 237 at 123.

244. Plager, *supra* note 141 at 155.

245. Epstein, *supra* note 57 at 314.

246. See *Pitt Polder*, *supra* note 152 at paras 45–47.

ination and discussion of the issues surrounding the adoption or rejection of the proposed bylaw.”<sup>247</sup> By creating a space to hear opinions and document those opinions, public confidence in the decision is enhanced. Or, as the court put it, “participatory procedures such as public hearings on land use or zoning bylaws tend to dispel perceptions of arbitrariness, bias or other impropriety on the part of local government in the decision-making process and tend to enhance public acceptance of such decisions.”<sup>248</sup>

A commentator has connected this function to the procedural rules that have been erected around public hearings in the case law. By emphasizing these rules, the courts have helped local governments to reach better decisions on land use planning because “rational solutions are generated through the adversary dialectic made possible by ‘procedural due process.’”<sup>249</sup> Further, “[f]air notice and hearings, production of supporting evidence, cross-examination, reasoned decision, are all means employed to arrive at relative truth: a just decision.”<sup>250</sup>

## **To give notice to affected people about the bylaw**

The previous three sections discuss purposes of the public-hearing requirement that are primarily directed at local governments. Commentators have also discussed how the requirement can have purposes that are aimed more toward members of the public.

One commentator has emphasized the “protective” function of public hearings,<sup>251</sup> which is based on “the idea that the individual has the right to advance notice when his direct interests are in jeopardy by contemplated governmental action, and the idea that before action is taken he is entitled to be heard [o]n his own behalf.”<sup>252</sup>

In this view, tying the notice provisions in the legislation<sup>253</sup> to a public hearing makes it a more effective way of communicating the importance of the bylaw than simply giving notice that the local government is contemplating a land use bylaw.

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247. *Ibid* at para 45.

248. *Ibid* at para 47.

249. Jowell, *supra* note 237 at 147.

250. *Ibid* [footnote omitted] (quoting Paul Davidoff, “Advocacy and Pluralism in Planning” (1965) 31 J of the Amer Inst of Planners 331).

251. Plager, *supra* note 141 at 156.

252. *Ibid* at 155.

253. See *Local Government Act*, *supra* note 1, s 466; *Vancouver Charter*, *supra* note 37, s 566 (3).

This effectiveness resides in giving people a notice that can be acted upon, as “the hearing provides an opportunity to the land owner to appear and be heard in open forum before decision is rendered.”<sup>254</sup>

### **To perform an educative function for residents about the operations of local government**

In addition to giving notice to affected people, public hearings have also been seen to have an educative purpose for the broader public. As one commentator has put it, “[p]erhaps the most important function of citizen participation in planning [is] . . . the education of the citizen to a greater understanding of his city’s growth and change and his possible contribution.”<sup>255</sup>

Another commentator has gone somewhat further, finding in public hearings the means to create better citizens. “Participation in the resolution of a controversial issue is an excellent educational device,” this commentator has noted: “[i]n the process of resolving a specific issue, the interrelationships of all phases of community development can be made apparent.”<sup>256</sup>

Finally, there is another aspect to public hearings that may go hand-in-hand with this educational function. Some commentators have noted that another “rationale for citizen participation is its therapeutic value.”<sup>257</sup> This value is rooted in a public hearing’s “capacity to reduce the alienation of the individual.”<sup>258</sup> “Participation in the governmental decision-making process can have the psychological benefits of increasing the individual’s confidence in his ability to control his own life and environment,” a commentator has argued, which can make public hearings “a positive force for reducing or eliminating alienation.”<sup>259</sup>

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254. Plager, *supra* note 141 at 161.

255. James B Milner, “The Development Plan and Master Plans: A Comparison,” in Charles M Haar, ed, *Law and Land: Anglo-American Planning Practice* (Cambridge, MA: Harvard University Press & MIT Press, 1964) 47 at 75.

256. International City Managers’ Association, *Local Planning Administration*, 2nd ed (Chicago: International City Managers’ Association, 1948) at 58.

257. Jowell, *supra* note 237 at 127.

258. So, *supra* note 239 at 555.

259. *Ibid* at 556.

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## **Chapter 5. Arguments in Favour of and Against Current Public-Hearing Requirements**

### **Overview**

There is a large body of commentary on public hearings. While much of this commentary is descriptive and explanatory, a segment of it takes an evaluative approach to the law on public hearings, casting a critical eye over legislation requiring a public hearing before a local government adopts or amends a land use bylaw.

The bulk of this chapter is concerned with reviewing and summarizing this critical commentary, as it provides the leading arguments against the legislation in its current form. Understanding weaknesses and drawbacks identified by commentators from BC and across North America contributes to an overall understanding of the current law on public hearings.

But before reviewing critical commentary, this chapter begins by sketching out the arguments that could be raised in favour of the current state of the law on public hearings.

### **Arguments in Favour of the Current Public-Hearing Requirement**

#### **Introduction**

There are two points that colour this part of the chapter.

First, since the contemporary law on public hearings emerged in latter half of the 20th century, there's actually been little-to-no commentary making the case for the current legislative requirements for public hearings, in BC or elsewhere. Even though it's notoriously difficult to prove a negative—in this case, to give a definitive reason for why a body of commentary is missing pieces supporting the current law—it is possible to speculate on why there aren't arguments in favour of the current public-hearing requirement in the public record.

This could be evidence of widespread dissatisfaction with the law. Or it could be indicative of a sense that the status quo doesn't need active support. Changing the law, after all, would require rallying people to take some action. Ultimately, reforming public-hearing requirement would only happen if people coalesced around a popular and practical proposal for change. Sustaining the current law, on the other hand doesn't require this. It can be achieved simply by relying on political inertia.

Second, there's a considerable amount of overlap between this section and the purposes discussed in the previous chapter. This may be another reason for the lack of public commentary explicitly in support of the current law. It could be said that identifying the law's purposes implicitly makes the case for the status quo. In essence, the law is meeting its objectives. But it's probably still telling that (1) commentators aren't taking this final evaluative step and saying that the current law on public hearings is meeting its objectives and (2) much of the commentary identifying the law's purposes that was discussed in the previous chapter identifies these purposes as a prelude to criticizing the current law.

### **The current law is meeting its objectives**

The previous chapter set out a series of purposes that courts and commentators have noted for the current law on public hearings. The leading argument in favour of the current law is that it's meeting these objectives.

Meeting objectives would mean that the legislative requirement for public hearings is providing a democratic forum for the public to weigh in on potential land use by-laws. Further, this forum would serve a useful information-gathering function for decision-makers. Bringing these two elements together should also advance the purpose of enhancing local governments' decision-making on potential land use by-laws.

Other objectives are related more to how public hearings may benefit members of the public. In this sense, the key purposes of public-hearing requirements would be as an educative tool, deepening people's understanding of land use issues, and as a means to combat alienation and enhance the credibility of local-government decisions.

Ideally, the combination and fulfilment of these objectives would set off a virtuous circle of an informed public supplying local governments with information to enhance their land use decisions. Evaluating the current law would largely be a matter of determining the extent to which these benefits are being achieved through public hearings in British Columbia.

Now the challenge of this evaluation is setting the standard by which to measure the current law. It's possible, even tempting, to set this standard too high. But public hearings, in and of themselves, won't usher in a perfect end-state for democracy, in which highly informed and engaged public participants guide enlightened local governments to making ideal land use bylaws. Using a standard that's so elevated would be setting up the current law to take a test that it will fail.

Instead, evaluation of the current law on public hearings should measure that law against a more realistic standard. Such a standard would evaluate the current law against competing options that reasonably could be adopted within BC's system of land use planning and regulation. There are likely two such options. One option is clear and simple: to repeal the public-hearing requirement. The second option is diffuse and open-ended: to replace the current public-hearing requirement with a different approach to public participation in land use and planning decisions. So the issue for the sections that follow is whether the current law is advancing its goals on democratic engagement in comparison to these two options.

## **Heightened procedural protections support and clarify the current law**

As the law on public hearings has developed in British Columbia it has gathered—through both legislative amendments and court judgments—more and more rules directed at the procedures for calling and holding a public hearing. While this aspect of the law has come in for criticism,<sup>260</sup> it could also be considered, in a different light, as one of the strengths of the current law.

There is actually a fair bit of discussion of the need for procedural protections in BC's law on public hearings. That discussion comes from court decisions.

In these court cases, the issue has been framed in terms of how administrative law analyzes calls for procedural fairness. The leading case has said that, "[a]lthough the duty of fairness is flexible and variable," there are "criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances."<sup>261</sup> These "criteria" are set out in the case as a list of five "factors."<sup>262</sup>

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260. See, below, at 64–65.

261. *Baker*, *supra* note 132 at para 22.

262. *Ibid* at paras 23–27.

The complete list of factors was set out earlier in this study paper.<sup>263</sup> When these factors have been considered in court cases involving public hearings, courts have stressed two of them. These are the factors relating to (1) the importance of the decision and (2) the legitimate expectations of the person challenging the local government's decision on a proposed bylaw.<sup>264</sup> Considering these two factors has pointed the courts toward a relatively high level of procedural protections.

Under this approach, a strongly articulated set of procedures is helpful in supporting the public hearing as an important component in decision-making about land use bylaws. Those bylaws themselves can have a significant impact on a locality. As a leading case has put it, there is a “directly proportional” relationship between the importance of the decision (in terms of its impact on those affected by it) and the level of procedural protections needed to meet the standard of fairness (with more important decisions requiring stricter procedures).<sup>265</sup> Procedural rules can also support the legitimate expectations of the public in participating in a public hearing.

A high level of detail is needed to implement this approach. It could be argued that this detail has helped to clarify the law by explicitly stating the obligations placed on local governments to support public participation. Details in the case law, in this view, have filled out and made concrete what otherwise would have been just a vague and abstract standard of fairness.

## **Arguments Against the Current Public-Hearing Requirement**

### **Introduction**

There is considerably more commentary reviewing the arguments against legislative public-hearing requirements. It's important to understand at the outset that the bulk of these arguments against the requirement don't call for the simple abolition of it. As one commentator has put it, a direct “attack on the process—at least any sugges-

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263. See, above, at 30 (listing the following factors: (1) nature of the decision and process in making it; (2) nature of the statutory scheme; (3) importance of the decision to those affected; (4) legitimate expectations of the person challenging the decision; (5) choices of procedure made by the decision-maker).

264. See *Fisher Road*, *supra* note 235 at paras 27–34; *Pitt Polder*, *supra* note 152 at paras 42–54.

265. *Fisher Road*, *supra* note 235 at para 33 (quoting *Congrégation des témoins de Jéhovah de St Jérôme Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 9, McLachlin CJ).

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tions that it be abolished—would be considered an attack on ‘motherhood.’ ”<sup>266</sup> Or, in the words of another commentator, “[t]he idea of citizen participation is a little like eating spinach: no one is against it in principle because it is good for you.”<sup>267</sup>

So the arguments presented in the sections that follow shouldn’t be understood in black-and-white terms. Instead, these arguments are trying to evaluate public hearings in more nuanced way. In many ways, it’s the reverse image of how arguments in favour of public-hearing requirements operate. As was discussed in the preceding pages, arguments in favour of the current law advance the position that the law is, on balance, meeting its objectives. Arguments against public-hearing requirements similarly tend to start with the law’s objectives. They then proceed to argue that the law is failing to meet these objectives, or that there are alternative approaches that could do a better job of meeting these objectives.

### **The current law fails to enhance democratic decision-making**

Critics of the current law often argue that it gives a greater say to a relatively small class of people, who often may not have views that are aligned with the opinions and needs of the broader community. This argument was featured in a recent report on British Columbia’s housing crisis, which was critical of the current law on public hearings.

“We believe that democratic processes are important,” the authors of the report said, “but that overreliance on public hearings to make land use decisions tends to favour certain voices over others.”<sup>268</sup> Further, the authors noted that “those who support or stand to benefit from new housing supply often do not attend public hearings to voice their views and priorities,” while “the citizens most motivated and available to participate in the process generally oppose the development plans.”<sup>269</sup> This disparity leads to a system in which “[s]uch proceedings contribute to a land use planning system that prevents new housing supply in two ways: first, by restricting or impeding growth as a consequence of lengthy, uncertain and costly processes; and second, by allowing anti-development interests to apply disproportionate political pressure on decision makers.”<sup>270</sup>

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266. Samuel K Gove, “The Public Hearing Symposium: A Postscript” (1968) 21:2 Admin L Rev 187 at 189.

267. Arnstein, *supra* note 2 at 216.

268. *Opening Doors*, *supra* note 8 at 23.

269. *Ibid.*

270. *Ibid.*

This line of criticism also appears prominently in many academic discussions of public hearings. As one law professor has concluded, “[l]and use law is structured to provide the most voice—and therefore the most power—to a small group of stakeholders: those who live nearest to a proposed development and bear the biggest potential burdens. Land use law, by design, activates a project’s fiercest opponents.”<sup>271</sup> This commentator also cited “a study of public participation in the land use process,” which “showed, quantitatively, that those who speak at zoning hearings overwhelmingly live within a block or two of the proposed development and oppose it (speakers are also disproportionately white, male, and likely to own a home).”<sup>272</sup> As another commentator has put it, “[t]he holding of a public hearing by itself will not attract the unorganized and the uninvolved”—even if their views may be in the majority.<sup>273</sup>

## **The current law does a poor job of facilitating information gathering**

One of the purposes of a public hearing is to provide a means for local governments to tap into facts about the community and opinions of its residents. Commentators have questioned whether public hearings are an effective device to fulfill the purpose of information gathering in advance of a local government making a land use decision.

For example, a recent British Columbia report “noted that in general, public hearings tend to be an ineffective means of engaging and receiving input from the public.”<sup>274</sup> The report cited three reasons for public hearings can fail at information gathering.

First, “[t]he format of a public hearing does not allow for discussion.”<sup>275</sup> This may be, in part, due to the strict procedural protections that case law has established. Fearing that they run afoul of these rules, local governments can be reluctant to depart from a highly formalized structure to allow for a free-flowing discussion.<sup>276</sup> The result may often be “frustration on the part of the public.”<sup>277</sup>

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271. Kazis, *supra* note 4 at 2344–2345.

272. *Ibid* at 2346 [footnote omitted].

273. Jowell, *supra* note 237 at 151.

274. *Development Approvals Process Review*, *supra* note 5 at 14.

275. *Ibid*.

276. See Buholzer, *BC Planning Law*, *supra* note 38 at § 16.49.

277. *Development Approvals Process Review*, *supra* note 5 at 14.

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Second, “[p]ublic hearings occur late in the development approvals process, after considerable time (sometimes years) and significant cost has gone into a proposed project.”<sup>278</sup> Under the *Local Government Act*, public hearings must be held within a defined timeframe: “after first reading of the bylaw and before third reading.”<sup>279</sup> By this advanced point in the process, any “change [to the proposed bylaw] can be difficult to accommodate.”<sup>280</sup>

Third, “[p]ublic hearings tend to attract and empower well-organized interest groups.”<sup>281</sup> This point relates back to a concern discussed in the previous section, which noted that critics of public hearings question whether public hearings actually enhance democratic decision-making. In that earlier section, the concern was that a public hearing may be dominated by small groups, leading to a decision that reflects their views, which may not represent the views of the broader community. A similar concern arises in connection with the public hearing’s information-gathering function. This concern is that the views expressed by small, organized groups may crowd out the wider public, resulting in a public hearing that “may not represent the broad perspective of the community or even those who would be the most directly impacted by a decision.”<sup>282</sup>

Taking these three points into account, the report’s authors found that “[t]here was significant interest in and high importance placed on increasing the efficiency and effectiveness of the public input process.”<sup>283</sup> This led to a recommendation that there be a “[p]rovincial review of public hearings and consideration of alternative options for more meaningful, earlier public input and in different formats.”<sup>284</sup>

Other commentators have echoed some of the report’s concerns. For example, a leading BC commentator has tied concerns about the public hearing’s ability to gather information effectively to criticisms about the complex procedural nature of contemporary public hearings, arguing that “[t]he increasingly formalized conduct of

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278. *Ibid.*

279. *Supra* note 1, s 465 (1).

280. *Development Approvals Process Review*, *supra* note 5 at 14.

281. *Ibid.*

282. *Ibid.*

283. *Ibid* at 15.

284. *Ibid* at 24 (the recommendation was labelled in the report as “opportunity (2.b),” which was “ranked high importance” according to a priority structure set out in the report).

public hearings, necessitated by the close scrutiny of hearing procedures in legal challenges to bylaws makes the hearing itself a poor venue for two-way communication.”<sup>285</sup>

**ADDITIONAL SOCIAL SCIENCE COMMENTARY ON PUBLIC HEARINGS**

Commentary on the purpose and outcomes of public hearings is not limited to the law sector and legal scholarship. While most of this commentary comes from the United States, similar practices and outcomes can be observed in Canada.

**The existence of public hearings tends to support resident organizing.**

In the 2008 book *Citizen Lobbyists*, Adams argues that public hearings “serve an important democratic function by providing citizens with the opportunity to convey information to officials, influence public opinion, attract media attention, set future agendas, delay decisions, and communicate with other citizens.” He suggests citizens use public hearings to shame or cheer on decision-makers, meet each other, and become motivated to form like-minded coalitions over time.

**The structure of public hearings tends to empower particular demographics.**

Einstein, Glick and Palmer’s 2020 book, “Neighborhood Defenders,” uses a national survey of mayors, case studies and public records to measure and identify who tends to attend local meetings about housing developments and zoning. They argue the structure of institutions tends to empower socioeconomically advantaged groups.

Their findings align with a 2005 article, “Critical Factors for Enhancing Municipal Factors,” by Baker, Addams, and Davis. Drawing on a variety of literature, they note “attracting and involving younger citizens, and ethnic minorities” to public hearings is challenging because the timing and location of meetings add to other socioeconomic barriers.

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Looking outside British Columbia, academic articles on land use law have also raised this criticism of public-hearing requirements. For example, one American law professor has argued that “[m]odern social science research tools are possibly [a] better means of obtaining information about community preferences than the public hearing.”<sup>286</sup> Another academic has concluded that “[a]s a fact gathering device the public hearing is probably not too useful.”<sup>287</sup>

**The current law is overly complex, frustrating local governments and the public**

Another criticism of the current law is that its microscopic focus on

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285. Buholzer, *BC Planning Law*, *supra* note 38 at § 16.49.

286. Jowell, *supra* note 237 at 141.

287. Plager, *supra* note 141 at 158.



procedure has made it too complex. As a result, both local governments and members of the public can find themselves frustrated, as disputes over the substance of land use planning are displaced into fights over whether complicated procedural rules regarding things like notice and disclosure have been met.

**ADDITIONAL SOCIAL SCIENCE COMMENTARY ON PUBLIC HEARINGS—continued**

Both commentaries rely on a body of research that suggests public hearings tend to attract those with stable housing, higher incomes, more time, and greater capacity to engage local governments.

**The format of public hearings tends to inspire certain kinds of behaviour and comments.**

Farkas's (2013) article, "Power and Access in the Public Hearings of City Council Meetings," uses a case study in Ohio to demonstrate how citizen access is controlled and restricted throughout the decision-making process. Farkas argues institutional norms and rules enforced by meeting chairs constantly reminds citizens that they hold less power the process.

These institutional norms also influence the dynamics of the meeting. For example, in her article, "Using Mediation to Supplement Zoning Hearings," Netter (1992) proposes "Participants are encouraged, if not required, to be adversarial. Certainly, this adversarial process does not lend itself to dialogue between proponents, opponents, and the board." The yes-or-no, binary structure of comments sets up an adversarial environment.

—drafted by SFU Morris J. Wosk Centre for Dialogue Strengthening Canadian Democracy Initiative as part of their project on public hearings

As one of the leading commentators on BC local-government law has put it, "[t]he bare statutory requirement for a hearing has evolved, through the application of common law principles of procedural fairness and natural justice, into what many planning practitioners have come to see as a procedural minefield, to be approached with suspicion and a fatalist attitude as to their ability to traverse it without injury."<sup>288</sup> As a result, this commentator has concluded that "[t]he hearing lost much of its use-

fulness, many procedural challenges ago, as a meaningful forum for public participation in a land use decision."<sup>289</sup>

These comments criticize the current law's heavy emphasis on procedural rules from the local government's standpoint. But it's possible for members of the public to feel a similar sense of frustration with the law. As one American academic has explained, local governments are often in a better position to master the complexities of the law in ways that may devalue public participation because "[l]ocal governments are experienced at providing opportunities for sham participation: outlets for aggrieved parties to vent and feel heard, or box-checking exercises to maintain tech-

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288. Buholzer, *BC Planning Law*, *supra* note 38 at § 16.53.

289. *Ibid.*

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nical compliance with state and federal participation mandates.”<sup>290</sup> “The classic typology of forms of public participation,” the commentator noted, “classify such hearings as ‘manipulation,’ ‘therapy,’ and ‘tokenism.’ ”<sup>291</sup>

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290. Kazis, *supra* note 4 at 2357.

291. *Ibid* [footnote omitted] (the text refers to an influential analysis of public hearings in Arnstein, *supra* note 2).

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## Chapter 6. Conclusion

This study paper has examined the development of British Columbia's law on public hearings. It has traced this development to its origins, which go back nearly 100 years to British Columbia's first comprehensive provincial legal framework for local-government land use regulation.

This early land use law gave local governments the powers to adopt bylaws establishing community plans and zoning. The public hearing was integrated into the by-law-adoption process. It gave people a forum in which to express their views on the proposed bylaw.

As BC's freestanding statute on land use planning and regulation was eliminated in the mid-twentieth century, the basic requirement to hold a public hearing was ultimately integrated into British Columbia's legislative framework for local government. It now finds a home—largely unchanged in expression from its first appearance—in the *Local Government Act*.

What has changed over the years in the legislation is the development of more detailed procedures for holding public hearings. This legislative development has formed a symbiotic relationship with developments in the case law.

Blocked from reviewing the substance of land use decisions, and influenced by broader trends in administrative law, the courts made procedural fairness their watchword in deciding cases involving public hearings. Since the early 1980s, new legislation focused on articulating detailed procedures for the public hearing has been matched by court decisions setting new standards for those procedures in the name of fairness.

As a result, the current law on public hearings embraces detailed requirements for things like notices to the public and disclosure of relevant documents. Mastering these requirements requires an understanding of extensive legislation and case law.

This study paper has also delved into arguments made by supporters and opponents of the current law on public hearings.

Arguments in favour of the current law stress its contribution to democratic decision-making. The public hearing provides a forum that can benefit the public and local governments alike. It improves decisions on land use bylaws and enhances the public's understanding of land use issues and local government. Given the im-

portance of land use decisions, a high level of procedural detail is beneficial, as a framework that supports public hearings.

Arguments against the current law stress its perceived failures in these areas. Commentators have noted that the law tends to activate a segment of public opinion, which often may not be representative of needs and views of the community as a whole. In addition, public hearings can be of limited use for information gathering by local governments. Finally, the current law can often frustrate both local governments and the public with its detailed approach to complex procedural rules.

In examining these topics, this study paper has aimed to achieve its main objectives, which were to give a detailed picture of the current law, to describe the law's purposes, and to survey arguments for and against the current law in the commentary. The goal of this exercise was to promote understanding of the current law.

Even though this study paper wasn't intended to evaluate the current law and recommend reforms, it may play a helpful role for groups that are interested in law reform. In particular, this study paper is intended to support the law-reform project being carried out by the Strengthening Canadian Democracy Initiative of the Simon Fraser University Morris J. Wosk Centre for Dialogue.

The Strengthening Canadian Democracy Initiative's Renovate the Public Hearings Project plans to use this study paper in consultations held in Spring 2022. The project's plan is to "convene a generative dialogue to identify what is valued about current public hearing procedures and criteria that should be used to evaluate any alternatives."<sup>292</sup>

These consultations will inform the project's work streams unfolding over the next two years. The study paper aligns with a stream of work dedicated to legal review and law reform exploration. Other streams will focus on piloting alternatives ("SCDI will co-create and pilot scalable alternative options for quasi-judicial public hearings in four local governments in B.C.") and evaluations ("SCDI will evaluate pilots and compare results to current public hearing procedures to identify best practices for building capacity, relationships and respectful engagement requirements for land use decision-making").<sup>293</sup>

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292. *Supra* note 17.

293. *Ibid.*

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