BRITISH COLUMBIA

LAW INSTITUTE

1822 East Mall
University of British Columbia
Vancouver, British Columbia
Canada V6T 1Z1
Voice: (604) 822 0142
Fax: (604) 822 0144
E-mail: bcli@bcli.org
Website: https://www.bcli.org

supported by:

CMHC SCHL

Consultation Paper on Renovating the Public Hearing

Prepared by the Renovate the Public Hearing Project Committee

December 2023

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British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, BC, Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: bcli@bcli.org
WWW: https://www.bcli.org

The British Columbia Law Institute was created in 1997 by incorporation under the provincial *Society Act*. Its purposes are to:

- promote the clarification and simplification of the law and its adaptation to modern social needs,
- promote improvement of the administration of justice and respect for the rule of law, and
- promote and carry out scholarly legal research.

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Renovate the Public Hearing Project Committee

The Renovate the Public Hearing Project Committee contains experts in local-government law, planning, and academia. The committee's mandate is to assist BCLI in developing recommendations to reform public engagement on local-land-use bylaws. These recommendations will be set out in the project's final report, which is planned to be published in 2024.

The members of the committee are:

Bruce D. Woolley, KC—chair
(Lawyer)

Merle C. Alexander, KC
(Principal, Miller Titerle + Company)

Nathalie J. Baker
(Partner, Eyford Partners LLP)

Tyler Baker
(Director Regional Development, Interior Region, BC Housing)

Alyssa D. Bradley
(Barrister & Solicitor, Young, Anderson)

Deborah Carlson
(Staff Lawyer, West Coast Environmental Law)

Michael Drummond
(Vice President, Corporate & Public Affairs, Urban Development Institute)

Janae Enns
(Lawyer, Lidstone & Company)

Arielle Guetta
(Senior Planning Analyst, Governance and Structure, Ministry of Municipal Affairs for BC)

Ashley Murphey
(Planning Services Manager, Peace River Regional District)

Eric Nicholls
(Director, Planning and Land Use Management, Ministry of Municipal Affairs for BC)

Edward L. Wilson
(Senior Counsel, Lawson Lundell LLP)

Dr. Jennifer Wolowic
(Principal Lead, Aberystwyth University Dialogue Centre)

Tomasz M. Zworski
(City Solicitor, Legal Services, City of Victoria)

Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

For more information, visit us on the World Wide Web at:

https://www.bcli.org/project/renovate-the-public-hearing-project-pre-development-public-engagement-legal-reforms-to-support-housing-supply/

Call for Responses

We are interested in your response to this consultation paper. It would be helpful if your response directly addressed the options for reform set out in this consultation paper, but it is not necessary. General comments on public engagement on local-land-use bylaws are also welcome.

A helpful way to submit a response is to use a response booklet. You may obtain a response booklet by contacting the British Columbia Law Institute or by downloading one at **https://www.bcli.org/project/renovate-the-public-hearing-project-pre-development-public-engagement-legal-reforms-to-support-housing-supply/**. You do not have to use a response booklet to provide us with your response.

Responses may be sent to us in any one of three ways—

by fax:	(604) 822-0144
by email:	consultations@bcli.org
by online survey:	link from https://www.bcli.org/project/renovate-the-public-hearing-project-pre-development-public-engagement-legal-reforms-to-support-housing-supply/

If you want your response to be considered by us as we prepare our report on public hearings, then we must receive it by **15 March 2024**.

Privacy

Your response will be used in connection with the Renovate the Public Hearing Project. It may also be used as part of future law-reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name, title, and organization in the final report for the project, unless they expressly advise us to keep this information confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: https://www.bcli.org/sites/default/files/2008-11-12_BCLI_Personal_Information_Protection_Policy.pdf.

Note re: Housing Statutes (Residential Development) Amendment Act, 2023

A significant change to BC's legislation on public hearings occurred after the committee had completed its work examining the current law and options for reform.

On 1 November 2023, British Columbia's government introduced Bill 44 (*Housing Statutes (Residential Development) Amendment Act, 2023*) into the Legislative Assembly of British Columbia. This bill received royal assent and became law as the committee was completing its final review of this consultation paper for publication.

The new legislation contains extensive changes to land-use regulation at the local level. In particular, it forbids a local government from holding a public hearing on a land-use bylaw if these conditions are met:

- an official community plan is in effect for the area covered by the proposed bylaw;
- the bylaw is consistent with the plan;
- the sole purpose of the bylaw is to permit a development that is, in whole or in part, a residential development; and
- the residential component of the development accounts for at least half of the gross floor area of all buildings and other structures proposed as part of the development.

This change in the law occurred too late in the committee's process to allow it to take it into account in this consultation paper.

The committee plans to monitor the government's progress in implementing the *Housing Statutes (Residential Development) Amendment Act, 2023*, with a view to addressing it in this project's final report.

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EXECUTIVE SUMMARY

The subject of the consultation paper

This consultation paper seeks public comment on options for reforming British Columbia's legislation on public hearings.

Whenever a local government in BC is proposing to adopt or change a bylaw regulating land use, it must first hold a public hearing (unless a specified exemption from this rule applies). These public hearings give the public a forum to express its views on the proposed bylaw.

The requirement to hold a public hearing has been a feature of BC legislation for about 100 years. For most of this time, public hearings have been seen to enhance local democracy and improve local governments' decision making.

But lately, public hearings have attracted some pointed criticism. Critics have questioned whether BC's legislation on public hearings is really advancing public engagement and democratic participation. They've pointed to studies and surveys that indicate widespread dissatisfaction with the process. Public-hearing requirements, critics say, result in costs, wasted time, low satisfaction, and sometimes trauma for those involved.

This consultation paper presents a wide range of options to reform legislation on public hearings—covering everything from root-and-branch reform to fine tuning the current provisions—for public comment. To ensure that your comments are considered when the final recommendations for this project are being formulated, BCLI must receive them by **15 March 2024**.

About the Renovate the Public Hearing Project

BCLI began its Renovate the Public Hearing Project in late 2022, seeking a better way to engage the public and reduce pre-development risk and barriers to housing.

The project's goal is to recommend specific reforms to the public-hearing provisions in the *Local Government Act* and the *Vancouver Charter*. These reforms will be informed by comparative research and public consultation. The project's recommendations will be set out in its final report, which is projected to be published in early summer 2024.

A major component of this project involves considering reforms to the law that may be aligned with Indigenous governance, as called for under BC's *Declaration on the Rights of Indigenous Peoples Act*. The project identifies ways to integrate Indigenous considerations into law-reform approaches for public hearings so that any recommended legislative changes can function in a legally plural context. The project has been designed to support a Reconciliation and Community Listening Exploration Series, which will allow BCLI to engage with these issues directly and to provide input from that engagement to the project committee.

The project committee and the project's supporters

As part of the project, BCLI has formed the Renovate the Public Hearing Project Committee. The committee's primary task is to assist BCLI in developing recommendations for reform of the law. It is made up of experts in local-government law, land use and planning, and public engagement.

BCLI is carrying out this project in conjunction with the Simon Fraser University Wosk Centre for Dialogue. Over the course of the project, the SFU Wosk Centre plans to engage with impacted groups in a variety of ways, including through interviews, workshops, and events.

This project has been made possible by funding from the Canada Mortgage and Housing Corporation's Housing Supply Challenge.

Content of the consultation paper

The organization of the consultation paper

The majority of the consultation paper's chapters have a consistent design. They begin by discussing the current law, move on to reviewing criticisms of the law and legal issues related to it, and conclude by setting out a range of options for reform to address these issues.

The consultation paper opens with two chapters setting out introductory and foundational information for the chapters that follow.

Introduction and consultation paper overview

The introductory chapter explains why BCLI is tackling this subject, sets out a distinction between the broad and diverse category of public engagement and the particular instance within it that is the public hearing, and describes the Renovate the Public Hearing Project. It also discusses the structure of the consultation paper.

The UN Declaration on the Rights of Indigenous Peoples and the framework for recommendations for reform

This chapter provides some background information on the coexisting rights and interests in relation to land and governance in BC to help contextualize some of the options for reform that follow. It situates the land and self-determination rights articulated in the UN Declaration on the Rights of Indigenous Peoples within the context of BC. It also considers the legal foundation on which individual rights relating to public hearings are based. In particular, it focuses on the source of these rights as they derive from English property-law principles as imported into BC. It then discusses the distinction between Aboriginal title and land rights deriving from Canadian constitutional law and inherent Indigenous rights and title as affirmed in the UN Declaration on the Rights of Indigenous Peoples.

Purposes of public hearings, principles of public engagement, and whether the public hearing should be held

This chapter begins the review of options for reform for public comment. It focuses on two big-picture issues. First, it considers whether BC's legislation should include a list of principles of public engagement that apply to land-use bylaws. Second, it discusses if the legislation should allow a local government to forgo the public hearing.

Forms of public engagement other than public hearings

The consultation paper's fourth chapter discusses the wide range of types of public engagement that may be used on a land-use bylaw. It then asks readers to consider whether specific forms of public engagement should be mandated through BC's legislation on land use or whether local governments should simply have the power to decide which forms of public engagement to use. It also asks readers to consider the role that principles of public engagement may play in shaping this aspect of BC's legislation.

Timing of public engagement and public hearings

This chapter considers the narrow issue of when public engagement on a land-use bylaw should take place. BC's current legislation strictly regulates when a public hearing may be held, which has led to concerns that it occurs too late in the process, after all the substantive decisions have been made. This chapter presents a range of options for when the broader category of public engagement on a land-use bylaw should take place.

Procedural issues for public hearings and public engagement

This chapter discusses the current context within which the procedures for public hearings and public engagement are determined. It explains some of the criticisms of the procedures for public hearings and areas for flexibility within the current framework. It then goes on to explore options for making public hearings more inclusive and asks readers to consider options for the inclusion of First Nations in developing approaches to public hearings and engagement.

Conclusion

The consultation paper ends with a brief concluding chapter, which sums up the discussion of issues and options for reform.

Conclusion

BCLI encourages readers to respond to this consultation paper. Readers' responses assist the committee in crafting the final recommendations for reform for the Renovate the Public Hearing Project.

Chapter 1. Introduction and Consultation Paper Overview

An Overview of this Consultation Paper's Subject

Local governments' regulation of land use: narrowing the focus to the public hearing

This consultation paper asks the public to comment on an aspect of the regulation of land use. "Typically," a legal textbook has said, "land use decisions are about the type, amount and location of uses of land. That is, 'What?', 'How much?' and 'Where?' "[1]

These are sweeping questions. They may be easier to grasp as concrete examples. May a landowner convert a single-family home into an office? How many units may a proposed apartment building contain? May a mine be opened on the boundaries of a national park? It wouldn't be hard to keep asking questions in this vein. These are just a few examples of the limitless store of questions concerning land use.

While it's possible to consider these kinds of questions in the fullest possible breadth, that isn't the approach this consultation paper takes. Instead, this consultation paper tackles its subject in a tightly focused way.

This focused approach is achieved by progressively narrowing the field of inquiry. First, start by considering that a lot of professions and areas of academic study could be brought to bear on land-use questions. There's the profession of urban and regional planning, which is directly concerned with regulating land use. Academic subjects—such as economics, geography, sociology, and political science—all have insights on land use.

These are all valid and important areas of study. But they're all outside the scope of this consultation paper because they're outside the area of expertise for the British Columbia Law Institute. This consultation paper's focus is on the law and land use. That's the first step in narrowing the focus of inquiry.

1. Howard Epstein, *Land-use Planning* (Toronto: Irwin Law, 2017) at 37 (quoting Hok-Lin Leung, *Land Use Planning Made Plain*, 2d ed (Toronto: University of Toronto Press, 2003) at 2).

But even within the field of law alone, regulation of land use is a broad topic. Responsibility for it is parcelled out among all the major Canadian legal institutions: the federal parliament, provincial and territorial legislatures, councils and boards for cities, towns, villages, and regional districts, First Nations and other Indigenous governing organizations, and the courts.

And here is the second way in which this consultation paper has narrowed the field of inquiry. The consultation paper has very little to say about the federal role in regulating land use. While this consultation paper does discuss court decisions, they are considered in a supporting role.

The primary aim of this consultation paper is to consider the relationship between the province (British Columbia) and municipal councils and regional-district boards (local governments). Why the focus is on a relationship requires some explaining.

Canadian law favours allowing local governments to make decisions on land use. This is because they are seen as being best informed about the issues at play and best placed to resolve them.[2]

But, as a matter of constitutional law, local governments aren't seen as a separate and distinct level of government. Instead, they operate within the legislative framework set out for them by the provinces in which they are located.[3]

For most of British Columbia, the legal framework for local regulation of land use is found in a statute called the *Local Government Act*.[4] The City of Vancouver operates under its own special act, called the *Vancouver Charter*,[5] which is broadly similar to the *Local Government Act*.

This legislation has remained remarkably stable over the years. As a leading textbook has explained, right from the outset, "B.C.'s first planning legislation" created "the essential elements of the planning and land use regulation toolkit that exists to

2. See Epstein, *ibid* ("Only in theory could detailed regulation of land use be implemented at the level of a provincial government. The essential logic is that local government is in a position to be familiar with the physical characteristics of each neighbourhood, block, and lot and to understand how the community in some areas might best function together" at 304).

3. See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92 (8), reprinted in RSC 1985, Appendix II, No 5 (giving provincial legislatures exclusive power to make laws in relation to "Municipal Institutions in the Province").

4. RSBC 2015, c 1.

5. SBC 1953, c 55.

this day: [1] the official comprehensive plan, [2] the zoning bylaw with [3] a mandatory public hearing, [4] the planning commission and [5] the board of variance, [6] protection for existing uses from new regulations, [7] the withholding of building permits during preparation of a zoning bylaw, and [8] a 'no compensation' rule for property diminished in value by a zoning bylaw."[6]

This list of eight items makes up the legal framework within which local governments' decision making on land use operates. It also sets the stage for the final narrowing of focus, by which this consultation paper arrives at its subject.

While this legal framework collectively and each of the items within make for valid and important areas of study, BCLI has limited the scope of this consultation paper just to item (3), the "mandatory public hearing," for reasons that will be explained over the next few pages. With a little more detail, this consultation paper's subject is reforming provincial legislation that calls for a public hearing whenever a local government is adopting or amending a land-use bylaw.

Public hearings and public engagement

But before tackling why BCLI chose this subject, this consultation paper will take some time to describe what the subject is.

All levels of government frequently engage with the public. There are all sorts of examples of such engagement: everything from consultations about upcoming budgets or proposed legislation to surveys on government services and focus groups on emerging public issues. This consultation paper refers to this general category of government–public communication as public engagement.

Public hearings are a specific type of public engagement. Public hearings' features are mainly defined in legislation on regulating land use.[7] These are the salient features of public hearings in BC.[8]

6. William Buholzer, *British Columbia Planning Law and Practice*, vol 1 (Toronto: LexisNexis Canada, 2001) (loose-leaf release 63 updated July 2023) at § 1.9 [Buholzer, *BC Planning Law*].

7. See *Local Government Act*, *supra* note 4, ss 464–470.

8. For a detailed discussion of the development and current state of the law in British Columbia on public hearings, see British Columbia Law Institute, *Study Paper on Public Hearings: An Examination of Public Participation in the Adoption of Local Bylaws on Land Use and Planning*, Study Paper No 13 (April 2022) at 21–50, online: <bcli.org/publication/13-study-paper-on-public-hearings/> [*BCLI Study Paper*].

- **They are the baseline form of public engagement for local land-use bylaws.** The *Local Government Act* requires a public hearing for official community plans (these are the large-scale, long-term strategic development plans for a city, town, village, or regional district) and (with an exception)[9] zoning bylaws (these are the small-scale bylaws that fill in the details for land use in smaller-scale zones—in simple terms, at a neighbourhood level). Public hearings are also the only form of public engagement mentioned in the act in any sustained and detailed way.[10] These two qualities make public hearings, both in law and in practice, into something of a baseline standard for what public engagement on a land-use bylaw should be.
- **Legislation on public hearings is highly detailed and formalistic.** In addition to the requirement to hold a public hearing, the *Local Government Act* sets out a detailed list of procedural and notice requirements.[11] These provisions create precise and directive requirements on things like when a public hearing must be held,[12] what a notice must contain,[13] and what happens after a public hearing is held.[14]
- **Courts have also had a major hand in shaping the procedural fairness of public hearings.** But this detailed legislation only gives a partial impression of the law on public hearings. This is because court cases have established many important aspects of public hearings. Courts review public hearings under the administrative-law concept of procedural fairness. Court decisions have, in particular, shaped local governments' disclosure obligations in advance of a public hearing.
- **Public hearings afford the public two important rights: a right to information and a right to be heard.** The legislation and case law effectively give the public two rights.[15] The first is to receive disclosure of the infor-

9. See, below, at 48–49 (discussion of exception for zoning bylaws that are consistent with official community plans).

10. But see *Local Government Act*, *supra* note 4, ss 475–476 (references to holding "public consultations" in connection with official community plans). See also, below, at 57–58 (further discussion of public consultations as a form of public engagement on an official community plan).

11. See *ibid*, ss 465–468, 470.

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

13. See *ibid*, s 466 (2).

14. See *ibid*, s 470.

15. See *Community Association of New Yaletown v Vancouver (City),* 2015 BCCA 227 at para 153 [*New Yaletown*], leave to appeal to SCC refused, 2015 CanLII 69439 (SCC), Bauman CJ.

mation that the local government will rely on in reaching a decision about the land-use bylaw at issue. The second is the right to make representations to the local government in advance of that decision. These representations may be made at an in-person meeting of the local government. They may be made at a videoconference meeting. Or they may be made in writing and sent to the local government. But this is as far as it goes. The public hearing doesn't determine the fate of the bylaw. The local government remains free to come to a decision that's at odds with the majority view at the public hearing.

What have commentators been saying about public hearings?

For much of their existence, public hearings attracted positive commentary. They developed a sort of idealized halo. As the author of an influential article on public engagement from the late 1960s put it, public hearings were "a revered idea that is vigorously applauded by virtually everyone," which could be called a "cornerstone of democracy."[16]

But more recently the public hearing has begun to attract criticism. Critics have questioned whether BC's legislation on public hearings is really advancing public engagement and democratic participation. They've pointed to studies and surveys that indicate widespread dissatisfaction with the process. Current public-hearing requirements, critics say, result in costs, wasted time, low satisfaction, and sometimes trauma for those involved.

This criticism has intensified in recent years following two major reports on BC's crisis in affordable housing.[17] These reports identified public hearings as a contrib-

16. Sherry R Arnstein, "A Ladder of Citizenship Participation" (1969) 35:4 J Am Plan Assoc 216 at 216. See, also, below at 28–35 (for a more detailed discussion of the goals and purposes of public hearings).

17. See British Columbia, Ministry of Municipal Affairs, *Development Approvals Process Review: Final Report from a Province-Wide Consultation* (September 2019) at 14–15, online: <gov.bc.ca/assets/gov/british-columbians-our-governments/local-governments/planning-land-use/dapr_2019_report.pdf> [*DAPR Report*]; 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) at 60, online: <engage.gov.bc.ca/app/uploads/sites/121/2021/06/Opening-Doors_BC-Expert-Panel_Final-Report_Jun16.pdf> [*Opening Doors Report*].

uting factor to the crisis. They both recommended legislative reform to address problems with public hearings.[18]

What role have Indigenous governments played in shaping public hearings?

Earlier, this introduction noted that all the major Canadian legal institutions have a hand in regulating land use.[19] This list of institutions included First Nations and other Indigenous governing institutions. But their role has differed from the federal, provincial, and local governments, and the courts.

It's a historical fact that BC's legislation on public hearings was developed without input from Indigenous Peoples. From its inception about a hundred years ago to the present, the public hearing in BC has been shaped with little-to-no consideration of Indigenous legal orders. Nor has it been shaped in consultation and cooperation with Indigenous governments.

But, looking forward into the future, this approach will have to change. Recent developments have committed Canada and British Columbia to an approach that avoids this omission for future legislative development. British Columbia, in particular, has reached a turning point in how it develops legislation.

This change is due to the United Nations Declaration on the Rights of Indigenous Peoples.[20] After initial opposition, Canada reversed its position and in 2010 announced that it formally endorsed the UN Declaration.[21]

In 2019, BC implemented the UN Declaration by passing the *Declaration on the Rights of Indigenous Peoples Act*.[22] The *Declaration Act* commits the government of

18. See *DAPR Report*, *supra* note 17 at 24; *Opening Doors Report*, *supra* note 17 at 26. See also, below, at 35–39 (for a more detailed discussion of criticisms of public hearings).

19. See, above, at 1–2.

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

21. See Indian and Northern Affairs Canada, News Release, 2-3429, "Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: <canada.ca/en/news/archive/2010/11/canada-endorses-united-nations-declaration-rights-indigenous-peoples.html>; Canada, "Archived—Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: <rcaanc-cirnac.gc.ca/eng/1309374239861/1621701138904>.

22. SBC 2019, c 44 [*Declaration Act*].

British Columbia, "[i]n consultation and cooperation with the Indigenous peoples in British Columbia," to "take all measures necessary to ensure that the laws of British Columbia are consistent with the Declaration."[23]

This commitment means any project to reform legislation in BC must ensure consistency with Indigenous rights, including self-determination and land-based rights, as affirmed in the UN Declaration. It also means that, ultimately, the BC government must consult and cooperate with Indigenous Peoples to ensure consistency with the UN Declaration.

Why has BCLI launched this consultation on public hearings?

BCLI has launched this consultation as part of a project to seek a better way to engage the public in decisions about land-use bylaws. The impetus for this better way comes from two sources, which are found in the two immediately preceding sections of this consultation paper.

First, this consultation paper aims to address and propose remedies to criticisms of the public hearing. BC legislation on regulating land use uses the public hearing as a baseline standard for public engagement. This isn't the only way to structure a legal framework for public engagement on land-use bylaws. There are other approaches that are in use in other jurisdictions. Improving the legislation on this subject might also contribute to better outcomes in land-use regulation generally and the real-estate sector specifically.

Second, this consultation paper intends to consider and develop how legislative reform should take place within the new approach required by the *Declaration Act*.

A significant part of what the *Declaration Act* calls for will involve government-to-government consultation and cooperation, which BCLI (which isn't a part of the provincial government) can't carry out. But some government action is always necessary for law reform to take effect. BCLI can't implement its own recommendations for legislative reform; only the Legislative Assembly of British Columbia can do that.

Yet there remains the intellectual and policy-development work that precedes government action. BCLI intends to use this project to begin to explore how that work will change in response to the *Declaration Act*.

23. *Ibid*, s 3.

Finally, the nature of this project supports these goals. As this introduction has shown, the public hearing is a small part of the broader system of regulating land use. This project is highly focused on a tightly defined area of the law.

And that may be its strength. Tackling very large issues—such as reforming land-use regulation in a way that significantly relieves a housing crisis or aligning all British Columbia legislation with the UN Declaration—can be daunting if approached all at once. But progress may be made by examining an aspect of the issue in depth and finding concrete reforms.

But one disadvantage to the narrow focus of this project is that the work of legal pluralism and building government-to-government relationships involves broader issues and needs to start before local-land-use decisions reach the public hearing stage. Some of these broader issues are raised throughout this paper to help contextualize the options for reform discussed here and point to some of the broader reforms needed to support those changes.

About the Renovate the Public Hearing Project

What are the goals of the project?

The Renovate the Public Hearing Project's overriding goal is to examine part 14, division 3 of the *Local Government Act*[24] and publish a report recommending changes to reform the law of public hearings. These proposed legislative reforms are intended to align with the project's broader goals of reducing barriers and improving housing supply by providing solutions to the challenges created by legislated local-government public hearings in British Columbia.

Renovate the Public Hearing Project Committee

As part of this project, BCLI has formed the Renovate the Public Hearing Project Committee. The committee is made up of experts in local-government law, land use and planning, and public engagement. It has members from the legal and planning professions, as well as members in government and academia.[25]

The committee's primary role is to assist BCLI in developing recommendations for reform of the law. It does this through monthly committee meetings.

24. See *supra* note 4, ss 464–470 (entitled "Public Hearings on Planning and Land Use Bylaws").

25. For list of committee members and their biographies see, below, appendix B at 95–99.

Reconciliation and Indigenous Community Listening Series

An important component of the project will be to consider how reforms to the law on public hearings can be aligned with Indigenous governance. As noted earlier, BC has passed the *Declaration Act*,[26] which requires that all Crown legislation be aligned to be consistent with the UN Declaration. BCLI's project will identify ways to integrate Indigenous considerations into law-reform approaches for public hearings so that any recommended legislative changes can function in a legally plural context. The project has been designed to support a Reconciliation and Community Listening Exploration Series (Reconciliation Listening Series) to allow BCLI to engage with these issues directly and to provide input from that engagement to the project committee.

BCLI's project partner: SFU Wosk Centre

BCLI is carrying out this project in conjunction with the Simon Fraser University Wosk Centre for Dialogue. Over the course of the project, the SFU Wosk Centre plans to engage with impacted groups in a variety of ways, including through interviews, workshops, and events. (It has already published a report based on a pre-project workshop.)[27] This engagement will have a particular focus on populations that are in greatest need of housing or that face barriers to achieving affordable housing supply due to public hearings pre-development approval processes. The SFU Wosk Centre will share findings and results from its engagement with the BCLI project committee, to help inform its deliberations.[28]

The project's funder: CMHC

Both the SFU Wosk Centre's and BCLI's projects have been made possible by funding from the Canada Mortgage and Housing Corporation's Housing Supply Challenge.[29]

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26. See *supra* note 22.

27. See Simon Fraser University, Morris J Wosk Centre for Dialogue, *Renovate the Public Hearing Workshop Report: The Future of Public Hearings in British Columbia* (May 2022), online: <renovatethepublichearing.ca/_files/ugd/f79cdf_9f44e1ad2d214539b4fe0f1f77caaa86.pdf>.

28. For more information see, online: <renovatethepublichearing.ca>.

29. See Canada Mortgage and Housing Corporation, "Housing Supply Challenge" (August 2021), online: <cmhc-schl.gc.ca/professionals/project-funding-and-mortgage-financing/funding-programs/all-funding-programs/housing-supply-challenge>.

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

Before beginning the Renovate the Public Hearing Project, BCLI carried out a legal-research project on public hearings. That project drew to a close in March 2022, when BCLI published a study paper setting out its research and findings.[30]

The study paper was intended to give a detailed picture on the law of public hearings in BC. It traced the origins of the legislative requirement to hold a public hearing in early land-use legislation. It also described the ways in which that legislation has developed, in tandem with case law, over the course of a century. Finally, the study paper examined statements in the case law and commentary explaining the purposes of public hearings and set out arguments evaluating the pros and cons of the current law.

What is the project's timeline?

BCLI began work on developing the Renovate the Public Hearing Project after publishing the study paper. The project was launched in October 2022. Fall and winter 2022 were dedicated to research, project planning and organization, and forming the project committee. Project committee meetings and policy development began in January 2023.

Publication of this consultation paper kicks off a period of public consultation.

The project committee plans to reconvene at the end of the consultation period. In 2024, it plans to review consultation results and develop recommendations for reform of the law. The project is scheduled to wrap up at the end of March 2024.

How Do Other Canadian Jurisdictions Deal with Public Engagement on Land-Use Bylaws?

British Columbia isn't the only jurisdiction in Canada to have legislation on public hearings. In fact, every other Canadian province and territory has as a part of its legislative framework on local-land-use bylaws a provision for a public hearing.[31]

30. See *BCLI Study Paper*, *supra* note 8.

31. See Alberta: *Municipal Government Act*, RSA 2000, c M-26, s 216.4; Saskatchewan: *The Planning*

All this Canadian legislation is broadly similar.[32] But the legislation does differ in its details. For example, some provinces are more open than BC to legislation that recognizes the general category of public engagement.[33] This legislation will be discussed in more detail later in this consultation paper, because it is a source of options for reforming the law in BC.

About the Public Consultation

What is the consultation paper's general approach?

Immediately following this introductory chapter is another chapter that gives readers foundational information that's important for understanding this consultation paper. After that chapter, the consultation paper settles into a consistent pattern.

The general approach of the middle chapters consists of raising issues for the legislative reform of the law that currently requires the public hearing. In British Columbia, this means focusing on the dedicated division on public hearings in the *Local*

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), 44 (1) (a), 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, 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.

32. Providing for public engagement is a common feature of the legislative frameworks other countries have for land-use planning. See Organization for Economic Cooperation and Development, *Land-use Planning in the OECD: Country Fact Sheets* (Paris: OECD Publishing, 2017) at 33, DOI: <10.1787/9789264268579-en> (reporting that 31 of the OECD's 32 member countries had public-engagement processes as part of their systems of regulating land use).

33. See e.g. Alberta: *Municipal Government Act*, *supra* note 31, s 216.1; *Public Participation Policy Regulation*, Alta Reg 193/2017; Québec: *An Act respecting land use planning and development*, *supra* note 31, ss 80.1–80.5; *Regulation respecting public participation in matters of land use planning and development*, CQLR c A-19.1, r 0.1.

Government Act.[34] Along with this act, there is a parallel section in the *Vancouver Charter* that applies just to the City of Vancouver.[35]

After each issue, there is a discussion of a range of options for reform, which may address the issue. This discussion largely consists of evaluating the pros and cons of each option.

Finally, a list of options is presented for consideration and public comment.

This series of chapters begins with a chapter considering the fundamental issues of the purposes of public engagement and when a local government may be allowed not to hold a public hearing. From there, proceeding chapters consider the various forms of public engagement that could be used in place of a public hearing, the timing of public engagement, and procedural issues for public engagement.

Why should readers respond to this consultation paper's questions?

Responding to this consultation paper will give readers the opportunity to influence the development of the final recommendations for this project.

The project committee plans to review responses to this consultation paper before making its final recommendations. Responses will be an important element—along with research and committee judgment—in determining what those recommendations will be.

All members of the public are encouraged to respond to this consultation paper. Responses should be in writing and may be delivered to BCLI in a number of ways.[36]

Readers who want their responses to be considered by the project committee as it makes its final recommendations must ensure BCLI receives the response by **15 March 2024**.

34. See *supra* note 4, ss 464–470.

35. See *supra* note 5, s 566.

36. See, above, at unnumbered page headed "Call for Responses" for more information on how to make a response.

Chapter 2. The UN Declaration on the Rights of Indigenous Peoples and the Framework for Recommendations for Reform

Overview of the UN Declaration and BC's Declaration Act

As noted in the previous chapter, the laws and procedures relating to the public hearing in BC were largely shaped with little-to-no consideration of applicable Indigenous rights and title, and were implemented prior to the final report and calls to action of the Truth and Reconciliation Commission of Canada,[37] the enactment of the BC *Declaration Act*,[38] and the enactment of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*.[39] The issues and options for legislative reform set out in the following chapters are discussed within the context that legislative reform will require the BC government to take all measures necessary to ensure the law is consistent with the UN Declaration, in consultation and cooperation with the Indigenous Peoples of BC.

Part of this involves understanding the various rights engaged when land-use bylaws are enacted by local governments.[40] The purpose of this chapter is to provide an overview of some of the applicable rights and interests to provide that context for consideration of the options for reform that follow.

Within BC, there are eight First Nations that have negotiated modern treaty agreements with the provincial and federal governments.[41] Jurisdiction over land use de-

37. Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012), online: <ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>.

38. See *supra* note 22.

39. SC 2021, c 14.

40. The term *local government* is used throughout this paper, consistent with the *Local Government Act*, to refer to municipal councils and regional district boards. See, above, at 2.

41. Various other First Nations in BC are in the process of negotiating agreements. See BC Treaty Commission, "Negotiations Update" (last visited 23 November 2023), online:

cisions, including management, planning, zoning, and development of treaty lands forms part of the negotiations in the treaty process.[42] The result of the modern treaty agreements implemented in BC is that municipalities do not have general powers to regulate zoning and land use planning on modern treaty lands.[43] Nor do municipalities have general powers to regulate zoning and land use planning on Indian reserve lands.[44] As the focus of this paper is the legislative framework for local government regulation of land use, the discussion of coexisting rights and interests is addressed within this context of lands subject to the *Local Government Act* and the *Vancouver Charter*. Across the vast majority of BC, these same lands are subject to inherent Indigenous rights and title as affirmed by the UN Declaration.

The legislation and case law on public hearings recognize an individual right to receive information and an individual right to make representations. These rights are held by members of the public. As explained in more detail in the following chapter, these rights are generally extended to persons with a property interest that may be affected by the proposed bylaw. The property interests and rights afforded under the law on public hearings derive from the English common law.

Canada's constitution recognizes and affirms existing Aboriginal and treaty rights, including Aboriginal title.[45] Aboriginal title depends upon it being established in accordance with Canadian law. Once it is established, it comes with a bundle of associated rights, including jurisdictional rights inherent in collective title.[46]

The rights affirmed in the UN Declaration do not derive from Canadian constitutional law and Canadian principles of Aboriginal title. The UN Declaration affirms the inherent individual and collective rights of Indigenous Peoples, including of Indigenous Peoples in Canada, which continue and must be recognized and respected by

bctreaty.ca/negotiations/negotiations-update/>.

42. BC Treaty Commission, "Why Treaties?" (last visited 23 November 2023), online: <bctreaty.ca/negotiations/why-treaties/>.

43. Of note, final agreements may in some cases require a modern treaty Nation's land use plan to conform to certain requirements of the *Local Government Act*. See e.g. *Tsawwassen First Nation Final Agreement* (effective 3 April 2009) at c 17, paras 19 & 20, online: <bctreaty.ca/wp-content/uploads/2016/09/Tsawwassen_final_initial_0.pdf>.

44. *Kits Point Residents Association v Vancouver (City)*, 2023 BCSC 1706 at para 247. First Nations and local governments may reach agreements with regards to co-planning as will be discussed later in this paper. See, below, at 82–83.

45. *Constitution Act*, *1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

46. See *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC) at paras 154–158, Lamer CJ [*Delgamuukw*].

state governments. It is an articulation of the "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[47]

Ensuring consistency with the UN Declaration, as mandated by the BC *Declaration Act*, requires considerating the inherent rights of Indigenous Peoples (which are impacted by local-land-use bylaws), and ensuring they are balanced with the individual rights afforded by the law on public hearings.

The individual and collective rights affirmed within the UN Declaration can be broken down into three broad categories: title, specific rights flowing from title, and rights that exist independent of a connection to the land.[48] In BC, title and rights flowing from title are held by First Nations. As this consultation paper deals with the way local governments make land-use decisions, there is a focus on those rights within the UN Declaration that relate to First Nations title and rights flowing from title.

As part of the Reconciliation Listening Series, BCLI heard a number of perspectives related to the displacement of Indigenous peoples from their lands within Canada and the importance, in the spirit of reconciliation, of local government consideration of Indigenous rights and interests that do not flow from land. Some of these perspectives are woven throughout this consultation paper, particularly in chapter 6.[49]

Indigenous self-determination and land-based rights

The BCLI heard through the Reconciliation Listening Series that acknowledging First Nations are governments with inherent land rights within their traditional territories is important in the context of public hearings. Public hearings are a form of engagement between local governments and the general public. Throughout the Reconciliation Listening Series, BCLI heard about the importance of distinguishing between engagement between local governments and Indigenous people as members of the general public and engagement between First Nations and local governments. In this paper, we refer to both types of engagements and relationships. BCLI heard through the Reconciliation Listening Series that relationships and engagements with First Nations governments need to be considered differently from public engagements. Reconciliation Listening Series participants shared that consultation and co-

47. UN Declaration, *supra* note 20, art 43.

48. See e.g. the rights affirmed in art 7 of the UN Declaration to "life, physical and mental integrity, liberty and security of the person," which do not depend upon a historic connection to the land for their recognition.

49. See, below, at 79–88.

operation with First Nations should precede public engagement and be of an ongoing nature such that it continues beyond the life of any specific project to which a local government land-use decision relates.

This consultation paper attempts to address some issues around how relationships between First Nations governments and local governments can impact and be impacted by public hearings. Separately, BCLI has attempted to address how local government public-hearing and public-engagement procedures can be modified to be more inclusive, including of Indigenous voices.[50]

First Nations hold unique title and rights as the original stewards and governments of lands in BC. They are the title and rights holders in relation to their unceded territories. Most local governments in BC exercise jurisdiction on land that has not been ceded by First Nations to the Crown or Canada. In BC, 95% of the land is unceded territory.[51] That unceded territory is impacted by the jurisdiction and decisions of local governments. Additionally, zoning bylaws can have impacts on neighbouring lands, which may include reserve or treaty lands.

The right to self-determination affirmed in article 3 of the UN Declaration is connected to Indigenous title and the authority of Indigenous Peoples to self-govern. Aligning BC laws with the UN Declaration means shifting from a legal framework based on decision-making authority held exclusively by state governments to shared decision making with First Nations who hold rights and title to the land over which local governments currently make land-use decisions. This is the work of ensuring that laws function in a legally plural context. This work can foster positive long-term relationships when well supported by a framework for shared and separate jurisdiction.

The BC *Declaration Act* action plan speaks to the rights and title of Indigenous Peoples. The goal under that heading in the *2022–2027 Action Plan* is: "Indigenous Peoples exercise and have full enjoyment of their inherent rights, including the rights of First Nations to own, use, develop and control lands and resources within their territories in B.C."[52] The *2022–2027 Action Plan* also affirms that Canada is legally plural,

50. See, below, at 79–88 for a fuller discussion of this issue.

51. See Okanagan College Library, "WET 219—Applied Water Law—Indigenous Rights—Unceded Lands" (last modified 7 September 2023), online: <libguides.okanagan.bc.ca/c.php?g=721994&p=5175676>.

52. See British Columbia, Ministry of Indigenous Relations and Reconciliation, *Declaration on the Rights of Indigenous Peoples Act Action Plan 2022–2027* (last visited 6 November 2023) at 10, online: <gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-

which includes "Indigenous laws and legal orders with distinct roles, responsibilities and authorities."[53]

Some of the land-based rights held by Indigenous Peoples, which are affirmed in the UN Declaration, include:

- The right to the lands, territories, and resources Indigenous Peoples have traditionally owned, occupied, or otherwise used or acquired.[54]
- The right to own, use, develop, and control lands, territories, and resources possessed by reason of traditional ownership, occupation, or use.[55]
- The right to maintain and strengthen their distinctive spiritual relationship with the land they have traditionally owned or otherwise occupied and used.[56]
- The right to redress or compensation for traditionally owned or occupied lands, territories, and resources which are taken, occupied, used, or damaged without free, prior, and informed consent.[57]

Some of the rights affirmed in the UN Declaration which speak to decision-making jurisdiction over land and territories, including lands from which Indigenous Peoples have been dispossessed, include:

- The right to determine and develop priorities and strategies for the use and development of their lands or territories.[58]
- The right to improvement of economic and social conditions in the areas of education, employment, housing, sanitation, health, and social security.[59]

relations-reconciliation/declaration_act_action_plan.pdf> [*2022–2027 Action Plan*].

53. *Ibid* at 6.
54. UN Declaration, *supra* note 20, art 25 (1).
55. See *ibid*, art 26 (2).
56. See *ibid*, art 25.
57. See *ibid*, art 28 (1).
58. See *ibid*, art 32 (1).
59. See *ibid*, art 21 (1).

- The right to conserve and protect the environment and productive capacity of their lands or territories and resources.[60]

Land Ownership Under BC Crown Law

Modern Canadian property law, which underpins the current laws on public hearings, derives from English common law and the feudal system. In most of Canada, English common law was imported through settlement by the British.[61] This imposition of English property law overlooks the fact that Indigenous Peoples had existing rights in the land.[62] Under Crown law, Crown sovereignty only works to trump prior land claims to the extent that land is taken away by or ceded to the Crown by legitimate state action. In some provinces, land was surrendered to the Crown through treaties. For the most part, this is not the case in BC, where colonial acquisition of land and the import of English property law has not extinguished Indigenous land rights that precede colonization.[63]

Even though 95% of land in BC has not been ceded and Indigenous land rights have not been extinguished, modern BC property laws and legislation have evolved from doctrines imported from English property law, subject to reforms that have been introduced over time.[64]

While Crown laws pertaining to real property have evolved over time, the basic doctrine of tenures and estates and interests remain at the foundation of Canadian real-property law. Under this system, land is considered to ultimately be held from the Crown, not owned outright by individuals.[65] Most private landowners in Canada hold land in the form of a fee-simple estate. Fee-simple title is, for most practical

60. See *ibid*, art 29 (1).

61. See Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada, 2018) at 83.

62. See *ibid* at 80.

63. See *ibid* at 87 & 222.

64. See *ibid* at 83.

65. See *ibid* at 71–72. In BC, the *English Law Act*, SBC 1867, No 266 (now s 2 of the *Law and Equity Act*, RSBC 1996, c 253) decreed that English law applied to the whole of the colony of BC as of 19 November 1858. In this way, socage tenure and leasehold tenure were introduced into law in BC. The effect of the timing of the reception of English law is that land is not owned outright; it is held from the Crown. See Anne Warner La Forest, *Anger and Honsberger Law of Real Property*, 3rd ed, vol 1 (Toronto: Thomson Reuters, 2019) (loose-leaf updated October 2020, release 24) at § 3:30.10 (f) & § 3:30.20 (a).

purposes, considered absolute ownership as it represents the most extensive and complete form of property ownership. It grants the owner the highest level of control and rights over a piece of land with the fewest restrictions.[66]

Fee-simple ownership gives the landowner the right to possess, use, enjoy, transfer, and inherit land with minimal limitations. Some of the restrictions on fee-simple ownership include government regulations,[67] property taxes,[68]and expropriation and seizure frameworks.[69] Additionally, if fee-simple ownership lapses such that no person is entitled to the land, it reverts to the Crown.[70] This process, known as escheat, is considered one of the longest surviving incidents of feudal tenure to survive until modern times.[71] In summary, fee-simple land ownership represents the most comprehensive form of property ownership and is based on a tenure system of ownership. However, ultimately, under BC property law, the Crown is considered to be the ultimate heir of the land.

At common law, how one uses their land has generally been governed by the law of nuisances and any restrictions that may apply to the parcel of land. Zoning bylaws, which now govern to a certain extent how one uses their land and establish density of use (whether residential, commercial, or industrial), can be characterized as an extension of the law of nuisance in statutory form.[72]

66. See *supra* note 61 at 75.

67. Fee-simple ownership is subject to government regulation, which can include zoning laws, municipal bylaws, environmental regulations, building codes, and other laws restricting the use of land.

68. Failure to pay property taxes can result in the loss of property to the government.

69. Governments, including the BC government, have the power to expropriate property for a public use provided they compensate the owner. Property can also be seized by the government under civil-forfeiture regimes if the government proves that it is more likely than not that the property was used to commit or is the result of unlawful activity.

70. This occurs under the doctrine of escheat. In BC, land can escheat back to the Crown for failure to abide by certain Crown laws or when a landowner dies intestate and with no next of kin to inherit the land. See Ziff, *supra* note 61 at 79 & 198.

71. Escheat is based on principles of feudal law that all land is ultimately held by a superior lord. Therefore, when a tenancy in land ends, that lord comes into possession of the land. As land in Canada is held from the Crown by the tenure of free and common socage, it escheats to the Crown. The Crown in this context is the province except as to lands retained under the jurisdiction of the Dominion, such as reserve lands under the *Indian Act*. See La Forest, *supra* note 65 at § 2:40.30 (d) & § 3:30.20 (b).

72. See *ibid*, vol 3 at § 36:30.10.

As a practical matter, the province empowers local governments to enact many of the bylaws and zoning laws relating to land use and the segregation of uses and density of use within their local jurisdiction as recognized under BC law. The public hearing is a procedural requirement when local governments pass such land-use bylaws. This legal structure recognizes the rights and interests of members of the public to receive information and make representations. It does not currently include recognition of Indigenous laws pertaining to title and jurisdiction over land.

Aboriginal Title in Comparison with Inherent Indigenous Land Rights

Aboriginal title

As noted above, inherent Indigenous land rights do not depend upon state recognition for their existence. However, within Canadian law, Aboriginal title refers to the recognition of certain rights and interests in land held by Aboriginal people under Canadian law.[73] As a legal concept, it is distinct from Indigenous title as framed by Indigenous laws. Although Aboriginal title is often informed by evidence of Indigenous laws pertaining to property rights, it is a common-law concept, which depends upon proof that:

1. the lands at issue were occupied prior to Crown sovereignty;
2. if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and
3. at the time of Crown sovereignty, occupation of the land was exclusive.[74]

73. Section 35 of the *Constitution Act, 1982*, *supra* note 45, defines the Aboriginal people of Canada as including the "Indian, Inuit and Métis peoples of Canada."

74. See *Delgamuukw*, *supra* note 46 at para 143. In *Tsilhqo'tin Nation v British Columbia*, 2014 SCC 44 at para 49, the Supreme Court of Canada expanded on the concept of exclusivity as an element of Aboriginal title and clarified that "the exclusivity requirement must be approached from both the common law and the Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society."

Indigenous legal principles and common-law principles of land tenure: An example

Within BC, there are over 200 First Nations with distinct laws and legal orders. It is important, therefore, to not conceive of Indigenous land-tenure laws as uniform across the province. What follows is a discussion of just one example of some ways an Indigenous land-tenure system can differ from common-law principles of land tenure.

Sarah Morales and Brian Thom explain the significance of sharing as a legal principle within the Island Hul'qumi'num system of land tenure. Within the Hul'qumi'num legal system, access to territories or locales is controlled by residence groups or individual families. This system of controlled and reciprocated access to territories serves to guard against misuse or unwelcome exploitation. It is also distinct from Crown land-tenure systems, which bestow on owners the benefit of excluding access.[75]

The legal principle of sharing as incorporated into land-tenure systems means two or more residence groups "may jointly own certain productive resources, locales or portions of a territory."[76] The principle of sharing within some Indigenous property laws does not mean that there is not also a principle of exclusion. Kinship is also a principle giving rise to certain rights and obligations. In the absence of relationships or explicit understandings about shared access, principles of exclusion and trespass may operate in relation to territorial boundaries.[77]

With colonization, large expanses of Indigenous territories were granted to settlers as fee-simple lands and First Nations were allocated reserve lands. These reserve lands represent nominal areas in comparison with First Nations' traditionally held territories. The division of First Nations into Indian bands under the *Indian Act* and the allocation of reserve lands did not account for the legal principle of sharing of lands and resources by neighbouring residence groups.[78] Nor did it account for Indigenous systems of governance.

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75. Sarah Morales & Brian Thom, "The Principle of Sharing and the Shadow of Canadian Property Law," in Angela Cameron, Sari Graben, & Val Napoleon, eds, *Creating Indigenous Property: Power, Rights, and Relationships* (Toronto: University of Toronto Press, 2020) 120 at 134.

76. *Ibid*.

77. See *ibid* at 137.

78. See *ibid* at 135.

As noted above, the concept of Aboriginal title, which requires proof of exclusive occupation of land, also does not account for the legal principle of sharing as between neighbouring residence groups.

Indigenous title

Indigenous title, which persists despite the assertion of Crown title (as explained above), refers to a form of land tenure consistent with Indigenous legal orders. Indigenous title, therefore, may have a collective nature and may at times be overlapping or exclusive.[79] Recognition of Indigenous title as informed by Indigenous legal orders and laws goes beyond recognition of Indian bands and title to reserve land or treaty land. It may need to include "property-owning residence groups in configurations that do not precisely match modern-day Indian bands" or collective title as held to a diversity of lands across various territories in alignment with Indigenous legal orders.[80]

As noted in the example above, relationships and explicit agreements regarding shared access can be important aspects of Indigenous jurisdiction. As will be explored later in this consultation paper, frameworks such as government-to-governments agreements, protocol agreements, and memorandums of understanding can support relationships between Crown and Indigenous governments and shared land-use decision making.

Of note, however, both the common-law test for Aboriginal title and the approach to Aboriginal title in the negotiation of modern treaties fall short of fully reflecting traditional Indigenous land-tenure systems.[81]

If the inherent right of Indigenous Peoples to self-determination and the correlated authority to self-govern is to be honoured,[82] Indigenous land-tenure systems and property laws must be accounted for. The existing framework reinforces colonially created jurisdictional boundaries to decision making on reserve, on treaty land, and on fee-simple land within the jurisdictional boundaries of municipalities and regional districts. As consideration is given to a new framework for land-use decision making within BC laws, the requirement within the *Declaration Act* for BC laws to be

79. See *ibid* at 140–141.

80. *Ibid* at 152.

81. See *ibid* at 152–153 & 157.

82. See UN Declaration, *supra* note 20, arts 3 & 5.

consistent with the UN Declaration means that Indigenous laws and systems of governance must also inform the new framework.

What We Heard about Relationships between First Nations and Local Governments

Throughout the Reconciliation Listening Series, multiple participants shared personal experiences of observing a lack of engagement with First Nations governments by local governments. The need for early and ongoing engagement and cooperation with First Nations governments by local governments was highlighted as a priority by many participants. One participant pointed to an example of a local government refusing to do an Indigenous land acknowledgement as highlighting the need for a stronger framework recognizing Indigenous title.[83] BCLI also heard stories of attempts to build relationships and suggestions for strengthening future relationships.

The *Local Government Act* requires local governments to provide opportunities for consultation with affected people and organizations in addition to the public hearing when they are developing an official community plan (OCP).[84] Within this context of land-use decision making, local governments must consider consultation with First Nations.[85] Ultimately, consultation with First Nations at this stage is at the discretion of council. BCLI heard a number of personal accounts from Reconciliation Listening Series participants of not having observed any signs of consultation with local First Nations governments when local governments developed or amended the OCP.

BCLI also heard of some experiences where Nations were consulted during the OCP process. However, Reconciliation Listening Series participants who shared those experiences noted that those consultations were not supported in an ongoing way through the public hearing stage. Two separate stories were shared with BCLI of consultation during an OCP being followed by what were perceived to be highly contentious public hearings. The experience of one First Nations government with the public hearing was that their prior input was removed following the public hearing and not protected by the local government. Another story shared with BCLI involved a municipal government, when faced with public opposition to the OCP, essentially

83. See CBC News, "Surrey's rejection of Indigenous land acknowledgement enforces systemic racism, BCAFN says" (14 January 2021), online: <cbc.ca/news/canada/british-columbia/surrey-council-indigenous-land-acknowledgement-1.5874240>.

84. See *supra* note 4, s 475 (1), (3). See also, below, at 57–58 (further discussion of public consultations on the development of official community plans).

85. See *supra* note 4, s 475 (2).

blaming the local First Nation for the content of the OCP and asserting that their hands as council were tied. Both of these stories were shared with BCLI as individual perspectives of examples of consultations lacking a broader understanding and framework for intergovernmental relationships and as not being in the spirit of reconciliation. It was also shared by Reconciliation Listening Series participants that these types of experiences can result in heightened animosity between the general public and First Nations.

BCLI also heard of experiences where some First Nations, through treaties or agreements, were able to reach a point of having mutually agreed upon frameworks for engagement. Intergovernmental agreements and memorandums of understanding also offer the potential to include capacity funding or at least a framework for assessing capacity expectations. BCLI heard about the necessity for capacity funding for First Nations to be involved in co-planning of land use.

A framework supporting shared decision making

In this paper, some examples of agreements and working relationships between local governments and First Nations for supporting shared decision making are shared. Reconciliation Listening Series participants shared with BCLI that the development of these agreements has not come out of the framework of the *Local Government Act*. Rather, their existence is often dependent upon the individuals who occupy certain leadership roles.

Similarly, the common law in BC as developed through the courts does not provide a framework for shared decision making with First Nations. The current state of the law is that local governments have no legal or constitutional obligation to consult with First Nations. While the province can delegate certain aspects of the duty to consult to third parties, it has not done so either explicitly or implicitly in the *Local Government Act*. For a legal obligation to consult to apply to local governments as creatures of statute, legislation must confer that power to them.[86] While the legislation does provide that local governments "consider whether consultation is required" with First Nations when adopting or varying an official community plan, the nature of any such consultation is up to City Council and is not a delegation of a constitutional duty to consult with rights and title holders.[87]

86. *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379 at paras 70–72.

87. *Gardner v Williams Lake (City)*, 2006 BCCA 307 at paras 24 & 27.

BCLI heard through the Reconciliation Listening Series that setting out an explicit legislative framework for consultation and cooperation with First Nations by local governments would go a long way towards supporting government-to-government discussions about land-use decision making more broadly. Notably, courts have expressed a concern with day-to-day operational decisions such as permits and zoning decisions being bogged down by a duty to consult with First Nations.[88] BCLI heard a similar concern that when consultation is interpreted as applying at a public hearing stage, First Nations governments get bogged down in minute details.

Free, prior, and informed consent

When looking at land-use decision making by state governments, BCLI heard from Reconciliation Listening Series participants of the need to consult and cooperate with First Nations governments to achieve their free, prior, and informed consent (FPIC). FPIC is a principle within the UN Declaration that applies to a number of land rights affirmed therein. It also informs the obligation of states to consult and cooperate with Indigenous Peoples. The UN Declaration requires 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."[89]

It was shared with BCLI by Reconciliation Listening Series participants that FPIC is essential to ensuring that First Nations are treated as governments as opposed to the public or an interested stakeholder. Defining how to achieve FPIC with precision can be challenging because the principle inherently relies upon a recognition that Indigenous Peoples are self-determining. Therefore, when engaging with First Nations as self-determining governments, the approach to achieving FPIC may vary somewhat Nation to Nation.

However, engagement approaches can be guided by best practices. Some of those shared with BCLI as important considerations when engaging with First Nations on land-use decision making include:

- Identify all First Nations whose traditional territories overlap with any plans or projects and who must be consulted and cooperated with to achieve FPIC.

88. See *supra* note 86 at paras 70 & 72.

89. UN Declaration, *supra* note 20, art 19.

- Establish a relationship for determining how to work with a given First Nation to achieve FPIC.
- When FPIC is achieved, ensure it is protected and not treated similarly to stakeholder inputs on plans and projects.
- Ensure that essential information is conveyed so that a Nation understands how their decision making may be implicated by the state government's decision.
- As it relates to public hearings, it was suggested that the sharing of information could include opportunities for First Nations to shape any subsequent public engagement.

Some First Nations are developing memorandums of understanding and shared-decision-making policies or agreements with local governments to help shape these relationships in a sustainable way. It was noted by Reconciliation Listening Series participants that building these relationships, agreements, and understandings can foster opportunities for collaborative decision making in other contexts as well.

Reconciliation Listening Series participants shared with BCLI that a framework for government-to-government shared decision making should be embedded in legislation at a broad level and not limited to sections speaking to public hearings and public engagements. BCLI heard through the Reconciliation Listening Series that one area where the legislation could incorporate a framework for shared decision making is in the sections which speak to consultation during the development or varying of an official community plan. It was shared with BCLI as part of the Reconciliation Listening Series that this part of the legislation should be amended to explicitly address obligations of local governments to co-plan with First Nations within a framework that recognizes Indigenous Peoples inherent rights and title as affirmed in the UN Declaration.

Chapter 3. Purposes of Public Hearings, Principles of Public Engagement, and Whether the Public Hearing Should Be Held

An Overview of this Chapter

This chapter tackles three big-picture topics.

First, it examines the purposes of legislation requiring a public hearing. This examination is the last piece of preliminary discussion in this consultation paper. It sets out what legislation, courts, and commentary have described as the goals of legislation on public hearings. And it also reviews critical commentary on these goals. This discussion is intended to equip readers with a firm sense of the intended purposes of public hearings and the ways in which those purposes arguably aren't being fulfilled in practice.

The preceding chapter and the discussion of the purposes of public hearings in this chapter set the foundations for considering reforms to the law. The second and third topics of this chapter begin the consideration of issues for reform.

With its second topic, this chapter considers principles that may be used to shape legislation on the broader class of public engagement. This topic ushers in one of the major themes of this consultation paper. This theme may be summarized as considering the extent to which legislation on public hearings should be principles based or rules based.

Finally, the third topic of this chapter explores whether the public hearing may not be held. In many ways, this is the overarching issue for reform in this consultation paper, because it effectively asks readers whether they favour incremental reforms to the current legislative framework or a whole new approach to that framework. The chapter closes with an examination of options for eliminating the public hearing in favour of other forms of public engagement.

Part One: The Purposes of Public Hearings

Legislative statements of purpose

Local Government Act: Representations on proposed bylaw

Let's start with BC's current legislation governing public hearings on local-land-use bylaws.

Part 14, division 3 of the *Local Government Act* establishes the requirement to hold a public hearing before a local government "adopt[s] (a) an official community plan bylaw, (b) a zoning bylaw, or (c) a bylaw under section 548 *[early termination of land use contracts]*."[90] The purpose of a public hearing is described as "allowing the public to make representations to the local government respecting matters contained in the proposed bylaw."[91]

There is not too much detail in this statement. It does answer some basic questions about the legislation. Who is covered by the legislation? ("The public.") What may the public do under it? ("Make representations to the local government."). Why is the provision in the act? (To give the general public a platform from which to share its views on the proposed bylaw with the local government.)

Vancouver Charter: No statement of purpose

The equivalent provision in the *Vancouver Charter*[92] doesn't contain a similar statement of the public hearing's purpose.

Judicial comments on the purposes of public hearings

Overview: The importance of judicial commentary

Judges can be a valuable source of information about the purposes of legislation because judges are often called on to interpret the meaning of legislation. The ap-

90. *Supra* note 4, s 464 (1) [bracketed text in original]. Land-use contracts are an older form of local-land-use regulation. Their enabling legislation was repealed in 1977, so no new land-use contracts are being created in BC. And existing land-use contracts are being phased out, with the government setting 30 June 2024 as the termination date for all land-use contracts in BC. See *Local Government Act*, *supra* note 4, s 547 (1). Given their largely defunct status, land-use contracts don't figure into the discussion of land-use bylaws in this consultation paper.

91. *Ibid*, s 464 (1).

92. See *supra* note 35, s 566.

proach that Canadian courts take to interpreting legislation emphasizes the importance of the legislation's purpose.[93]

Court cases interpreting public-hearings legislation have fleshed out the legislation's bare-bones statement of purpose. Two leading cases have said that public hearings (1) give the public the opportunity to evaluate a proposed bylaw's effect on property rights and (2) help to improve the quality of land-use decision making.

To provide a forum for evaluating the effect on property rights

One leading case has concluded that "the purpose of the Legislature in enacting [legislation on public hearings] 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."[94]

Two things are apparent from these comments.

First, the hearing affords the public the opportunity to evaluate or judge the proposed bylaw. This is particularly evident in the court's subsequent comments on public hearings: "[t]o make *an intelligent assessment* of the effect of a by-law on one's property and to be able *to question proponents of the by-law* one should be informed of the matters considered by the planning committee, the rationale for their recommendation, and such other relevant material considered by council when it adopted the committee's recommendations and decided a public hearing be held."[95]

The court continued, underscoring the analytical nature of the public's engagement with a proposed bylaw in a public hearing: "[a]nything *less than full disclosure of the relevant information restricts the scope of the analysis* and the consequent representation a homeowner might otherwise make to council at the public meeting."[96]

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93. See *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 at para 21 (SCC), Iacobucci J (quoting Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87).

94. *Karamanian v Richmond (Township)*, 1982 CanLII 287 at para 9 (BCSC), Wallace J [*Karamanian*]. This passage was cited with approval in the subsequent cases *Fisher Road Holdings Ltd v Cowichan Valley (Regional District)*, 2012 BCCA 338 at para 32, Hinkson JA, and *Eddington v Surrey (District of)*, [1985] BCJ No 1925 at paras 27–28 (CA) (QL), Esson JA [*Eddington*].

95. *Karamanian*, *supra* note 94 at 111 [emphasis added].

96. *Ibid* [emphasis added].

In a sense, this interpretation of the purposes of the public hearing takes the second word in that name (*hearing*) literally as "[t]he action or process of listening to evidence etc. in a court of law or before an official"[97]—only in this case with the public stepping into the judicial role.

Second, this evaluative task is directed at a specific target. There are potentially many reasons why a member of the public would want to analyze, evaluate, or comment on a bylaw. But the court in this case placed special emphasis on carrying out these tasks in connection with the effect of the bylaw on property rights. This point comes through in the court's characterization of the public's role as trying to "make an intelligent assessment of the effect of a by-law *on one's property*."[98]

To raise the quality of decision making about land use

A different characterization of the purpose of public-hearings legislation appears in another leading case. In this case, the court made the point that public hearings can help to raise the quality of local governments' decisions on land use.

As the court noted, a public hearing "gives the decision-maker the benefit of public examination and discussion of the issues surrounding the adoption or rejection of the proposed bylaw."[99] In short, "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."[100]

In the court's view, there are two ways in which public hearings may improve local decision making. First, they may bring to light information that would otherwise be missed. Second, they may bolster the legitimacy of the decision. These themes get developed in academic commentary on public hearings.

97. Angus Stevenson, ed, *Shorter Oxford English Dictionary*, 6th ed, vol 1 (Oxford: Oxford University Press, 2007), *sub verbo* "hearing (4)."

98. *Karamanian*, *supra* note 94 at 111 [emphasis added].

99. *Pitt Polder Preservation Society v Pitt Meadows (District)*, 2000 BCCA 415 at para 45, Rowles JA [*Pitt Polder*].

100. *Ibid* at para 47.

Academic commentary on public hearings

Overview: The role of academic commentary on the law and its similarities to and differences from judicial commentary

Unlike judicial commentary, academic commentary isn't tied directly to interpreting specific legislation establishing a public-hearing requirement. In addition, much of this commentary originates from outside BC. So academic commentary tends to be broader in scope, providing more detail than court cases and a more panoramic view of the implications of public hearings.

That said, recent academic commentary has identified a similar set of core purposes for public hearings as judicial commentary has. "Within political theory and the field of public administration," a recent law-review article noted, "public participation is touted for increasing knowledge about problems and solutions, improving the outcome of decisions, and bringing social values into technical and scientific decision-making. In addition, it can imbue participants with greater civic skills, redistribute power, and enhance the legitimacy of decision-making."[101]

This section of the consultation paper will discuss the theme of accountability and redistributing power in a moment, but first it's worth reviewing academic commentary on how public hearings may improve government decision making.

Improving government decision making

As it was in court cases, improving decision making is a major theme in academic commentary on public hearings. This commentary points to several ways in which public hearings can be said to improve government decision making.

"At a societal level," a recent article pointed out, "public participation is said to enhance the quality of decision-making by including the perspectives of people most impacted by any given policy."[102] These perspectives "can provide needed information and novel problem-solving ideas," which may, "[i]n turn, . . . [lead] to improved outcomes."[103]

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101. Michele Estrin Gilman, "Beyond Windows Dressing: Public Participation for Marginalized Communities in the Datafied Society" (2022) 91:2 Fordham L Rev 503 at 506–507 [footnotes omitted].

102. *Ibid* at 523.

103. *Ibid*.

Another way in which public hearings can be seen to improve decision making is by expanding the information governments may use in coming to a decision. In this way, public hearings may be a safeguard against narrow, technical decision making. As a recent article put it, public hearings "[ensure] the inclusion of a range of social and cultural values, which can expand decision-making outside of narrow technical and scientific parameters."[104] Public hearings may also draw on local concerns and knowledge that might otherwise be undiscovered in the decision-making process.

Finally, and as noted by the courts, "public participation adds democratic legitimacy to governmental decisions because people gain trust from processes they understand and impact."[105] As the article went on to argue, public hearings "[improve] accountability by adding layers of scrutiny and discussion between the public and their elected officials."[106]

The idea of accountability is another major strand in academic commentary on public hearings.

Accountability and redistributing power

A recent critical law-review article[107] noted that the goals of public hearings emphasize "accountability to existing residents: the idea that new real estate development should meet the needs and desires of people who already live in the neighborhood or town where the proposed development is located."[108]

This theme of accountability has two dimensions: government accountability and market accountability. These two dimensions are intertwined.

"Unaccountable markets," so the argument goes, create the "threat of gentrification."[109] The idea is that "existing residents lack capital, [so] they cannot exert power by participating in the marketplace by purchasing and redeveloping land."[110] Since

104. *Ibid*.

105. *Ibid*.

106. *Ibid*.

107. Anika Singh Lemar, "Overparticipation: Designing Effective Land Use Public Processes" (2021) 90:3 Fordham L Rev 1083 (arguing that "local control, community empowerment, and public participation are among the building blocks of residential segregation" at 1086).

108. *Ibid* at 1093–1094.

109. *Ibid* at 1097.

110. *Ibid* at 1107.

they aren't able to compete with outside developers in the financial sphere, local residences look to the political sphere to protect their interests.

But here they argue that "local governments are not fully able to serve the interests of current residents," because local governments lack the political and financial power to stand up to wealthy corporations and higher levels of government.[111] This results in harmful initiatives, such as the failed postwar schemes of urban renewal.[112]

So public-hearing requirements are needed to redress this power imbalance. "Absent robust public participation," the article noted, "the benefits of new development will accrue to outsiders, typically for-profit developers, and the costs will be incurred by the existing community."[113]

Public hearings, in this view, "serve an instrumental function by redistributing the benefits of redevelopment from wealthy outsiders to low- or moderate-income residents."[114] This theme of redistributing power draws on an influential characterization of various forms of public engagement as rungs on a ladder.[115]

111. *Ibid* at 1103.

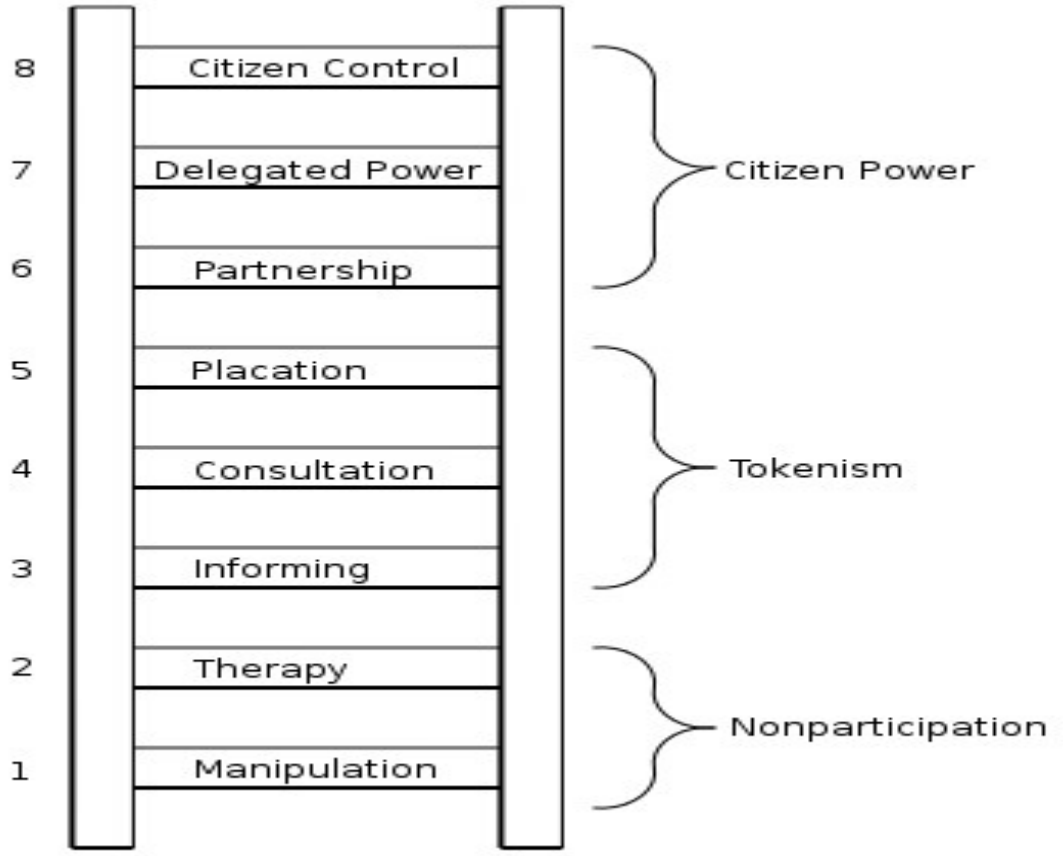
112. See *ibid* at 1094–1097. See also Audrey G McFarlane, "When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development" (2000) 66:3 Brook L Rev 861 at 868–871.

113. Lemar, *supra* note 107 at 1103.

114. *Ibid* at 1106 [footnote omitted].

115. See Arnstein, *supra* note 16 at 217. See also Barbara L Bezdek, "Citizen Engagement in the Shrinking City: Toward Development Justice in an Era of Growing Inequality" (2013) 33:1 St Louis U Pub L Rev 3 ("Arnstein's Ladder has remained the touchstone in assessing the meaning, or lack thereof, in public participation in local government decision-making that allocates scarce development dollars, because it succinctly juxtaposes powerless citizens with power-holders" at 3).

Figure: Eight rungs on a ladder of citizen participation.



As is obvious from the image, the higher rungs represent the greatest redistribution of power to the public.[116] "Many public participation tools [including public hearings]," on the other hand, "exist at [the] middle levels," where "citizens may be heard, but they lack the power to shape outcomes."[117]

116. Although the image of a ladder and the names attached to the rungs strongly suggest a hierarchy of value from bad (lowest rungs) to good (highest rungs), commentators have argued that public engagement shouldn't be viewed in this way. See Bezdek, *supra* note 115 ("Increased control may not always be desired by the community, and increased control without necessary supports . . . may produce what the community would regard as failure" at 43). In this view, the task is more a matter of attaching the right level of engagement with the public in the circumstances.

117. Gilman, *supra* note 101 at 532.

Summary of the major purposes of public hearings

BC's *Local Government Act* requires a public hearing before a land-use bylaw is adopted or amended "for the purpose of allowing the public to make representations to the local government respecting matters contained in the proposed bylaw."[118] Judicial and academic commentary has explained that this amounts to two broad purposes:

- improving government decision making; and
- enhancing government accountability by empowering the public.

Criticisms of public hearings based on legislation failing to achieve these purposes

Overview: Recent criticism has faulted public hearings for thwarting rather than advancing the legislation's stated purposes

Public hearings have recently attracted a range of criticisms.[119] The most effective of these criticisms directly rebut the perceived strength of public hearings to fortify local democracy by promoting the legislative goals of improving local-government decision making and enhancing government accountability by empowering the public.

Critics have said that public hearings essentially fail to fulfil their purposes. They trace this failure to perceptions that public hearings make a poor deliberative forum and empower only a small range of people.

Public hearings fail to improve decision making because they do a poor job of facilitating information gathering and group deliberation

Public hearings are the default mode of public engagement. "Participatory opportunities in land use decision-making," argued a recent law-review article, "often fail to meet the deliberative ideal because the standard model of public participation in land use is the public hearing."[120]

118. *Supra* note 4, s 464 (1).

119. See *BCLI Study Paper*, *supra* note 8 at 60–66 (for a sampling of the range of criticisms).

120. Gilman, *supra* note 101 at 551 [footnote omitted]. See also *DAPR Report*, *supra* note 17 at 14.

And "[p]ublic hearings," an American lawyer has argued, "do not resemble the rational, problem-solving dialogues described by participation proponents."[121] Instead, "they consist largely of one person after another using the allotted time to recite the assumptions with which they entered the room, refusing to question those assumptions, cheering others who hold the same assumptions and jeering at people who do not. . . . They certainly are not dialogues that result in an informed consensus."[122]

Public hearings don't foster reasoned deliberation. As a leading textbook on BC planning law has explained, the public hearing's failure to be a deliberative forum is due in large part to its legal framework. This legal framework features a telling combination of detailed, specific legislative rules and exacting procedural requirements developed through a body of court decisions.

"The increasingly formalized conduct of public hearings," the textbook pointed out, "necessitated by the close scrutiny of hearing procedures in legal challenges to bylaws makes the hearing itself a poor venue for two-way communication."[123] The rigid nature of public hearings' legal framework, critics say, can make public hearings a frustrating experience for all people involved with them.

Public hearings can be frustrating for members of the public. For the public, a recent critical article has detailed, "[h]earings are often structured in ways that limit opportunities for input, such as when hearings are held in inconvenient locations and/or during work hours, require advance sign-ups, and limit time to speak."[124] The experience "provides for one-way communications from local government officials to the public or from the public to government officials, without dialogue."[125] The result, from the public's standpoint, "mak[es] the process one of 'decide, announce, and defend' in lieu of a 'true discussion or engagement of the public in a deliberative decision making process.' "[126]

Public hearings can be frustrating for local governments. On the other side of the coin, critics of the public hearing have argued that the process can frustrate local

121. Lemar, *supra* note 107 at 1118.

122. *Ibid*.

123. Buholzer, *BC Planning Law*, *supra* note 6 at vol 2, § 16.49.

124. Gilman, *supra* note 101 at 551–552 [footnote omitted].

125. *Ibid* at 551.

126. *Ibid* at 552 [footnote omitted].

governments and their planning staff. The latter, according to a textbook on planning law, "have come to see [the public hearing] as a procedural minefield, to be approached with suspicion and a fatalist attitude as to their ability to traverse it without injury."[127]

Public hearings often don't work well for gathering useful information. What about the prospect of using the public hearing to gather useful but otherwise unavailable information, which may support and improve local government's land-use planning? Critics have also questioned the capacity of public hearings to serve as practical information-gathering devices.

A recent BC report has concluded, "in general, public hearings tend to be an ineffective means of engaging and receiving input from the public."[128] In a similar vein, an academic article has reached the following conclusion: "[a]s a fact gathering device the public hearing is probably not too useful."[129] A number of reasons support these conclusions.

Public hearings can be rigid and formal. First, as discussed earlier, the rigid and formal nature of public hearings can deter communication between the public and local governments. This quality can impair the ability of public hearings to function as deliberative forums and information-gathering bodies.

Other information-gathering tools may work better than public hearings. Second, critics have argued that public hearings aren't as effective at gathering information as other means of determining public opinion. As an American law professor has argued, "[m]odern social science research tools are possibly [a] better means of obtaining information about community preferences than the public hearing."[130]

Public hearings often capture just a narrow range of opinion. To a certain degree, the effectiveness of the public hearing is compromised because it tends to capture only a narrow range of public opinion.[131] This leads into the third reason why public hearings can fail to support local governments with useful information.

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127. Buholzer, *BC Planning Law*, *supra* note 6 at vol 2, § 16.53.

128. *DAPR Report*, *supra* note 17 at 14.

129. Sheldon J Plager, "Participatory Democracy and the Public Hearing: A Functional Approach" (1968) 21:2 Admin L Rev 153 at 158.

130. Jeffrey Jowell, "The Limits of the Public Hearing as a Tool of Urban Planning" (1968) 21:2 Admin L Rev 123 at 141.

131. See *DAPR Report*, *supra* note 17 at 14.

Public hearings can empower small, select groups. This reason is that public hearings tend to empower only a small segment of the public. This can make them a poor device for determining information about the broader public interest.

This last point leads into a broader critique of public hearings that has developed in recent years, which is the subject of the next section of this chapter.

Public hearings fail to enhance accountability because they empower select groups and the status quo

A recent article focused on BC has declared that "[h]ousing policy has a democracy problem."[132] The problem, in the authors' view, is "highly unrepresentative public hearing processes," which "contribute to land-use decisions that fail to reflect the perspectives and interests of all affected residents."[133]

As a recent BC report has put it, "[p]ublic hearings tend to attract and empower well-organized interest groups."[134] The reason for this can be found in the legal framework for public hearings.

"Land use law, by design," explained a law professor, "activates a project's fiercest opponents."[135] The legal framework that constitutes the public hearing "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."[136]

This point has an echo in BC's legislation on public hearings. In a provision dealing with public-hearing procedures, the *Local Government Act* says "all persons who believe that *their interest in property* is affected by the proposed bylaw" must be given

132. Alex Hemingway & Simon Pek, "To Break Housing Gridlock, We Need to Democratize Unrepresentative Public Hearings" (22 February 2023) at para [1], online: <policynote.ca/democratize-public-hearings/>.

133. *Ibid*.

134. *DAPR Report*, *supra* note 17 at 14.

135. Noah M Kazis, "Transportation, Land Use, and the Sources of Hyper-Localism" (2021) 106:5 Iowa L Rev 2339 at 2345 [footnote omitted].

136. *Ibid* at 2344–2345.

the right to be heard at the public hearing or to make written submissions to the local government.[137]

Public hearings, in other words, often end up narrowing the scope of public consideration of a proposed land-use bylaw to what might be lost through the bylaw's proposed changes. They can stoke fears that new developments will harm the financial interests of neighbouring landowners.[138] This can drive opposition to the bylaw.

Conversely, public hearings appear to have a poor track record of engaging the broader community. Recent studies have found that public hearings "systematically underrepresent the interests of renters and those who have been priced out or otherwise excluded from communities."[139] Empirical research out of the United States has found that the "public" that tends to show up for public hearings is older, less diverse, and more financially well-off than the actual general public.[140]

The result, critics have argued, is a structure that doesn't enhance accountability in the public interest. Instead, public hearings "preference some voices over others, put a thumb on the scale in favor of the status quo, and fail to ensure that irrelevant, often false, information does not drive the decision-making process."[141]

What we heard about experiences with public hearings through the Reconciliation Listening Series

As part of the Reconciliation Listening Series, BCLI invited people to share stories of their experiences participating in public hearings. These stories were shared from the perspective of Indigenous people participating in these public engagements and individuals involved in rezoning applications related to the development of housing for urban Indigenous populations.

The stories shared with BCLI were largely of highly adversarial public hearings in which Indigenous people felt uncomfortable and attacked. Local government public hearings were described to BCLI by many Reconciliation Listening Series partici-

137. *Supra* note 4, s 465 (2) [emphasis added].

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

139. Hemingway & Pek, *supra* note 132 at para [3].

140. See Katherine Levine Einstein, David M Glick, & Maxwell Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis* (New York: Cambridge University Press, 2019).

141. Lemar, *supra* note 107 at 1137.

pants as a colonial process, as a bureaucratic step and institution supporting the individual right to express oneself, and as serving no purpose in advancing dialogue or resolving issues. Participants spoke of being shamed for sharing their views. We also heard about the trauma from having to undergo a public hearing in order to build housing for Indigenous people on unceded lands. One participant questioned why anyone would want to lead an Indigenous housing non-profit society and expose themselves to the toxicity of the public hearing process.

BCLI also spoke with non-Indigenous people working within not-for-profits involved in Indigenous housing and services within urban settings. These participants shared stories of also feeling uncomfortable and unwelcome at public hearings. Many of them noted that while their experiences were not positive, as non-Indigenous people they at least didn't have to deal with the harm of being the direct object of other peoples' animosity.

It was noted as significant to the power imbalance that local governments would require Indigenous housing providers to sign agreements regarding their housing costs. However, there was a lack of reciprocity from certain local governments to waive procedural steps such as public hearings or the payment of development cost charges where they have the discretion to do so.

In terms of First Nations participating in public hearings, BCLI heard that this is not only at odds with the need to recognize them as governments, but that it raises important capacity concerns. Some Nations have territories that span multiple municipalities and regional districts, so there are potentially a very high number of public hearings impacting their traditional territory. Meaningful participation in those public hearings requires a review of the proposals, which can be quite lengthy. Sending someone from within the First Nations government to participate at the level of the general public takes their time away from governmental level duties. Additionally, individuals who attend in their own capacity not related to a government role cannot speak to the impact of the decision at the governmental level.

Part Two: Principles of Public Engagement

Overview: A foundational issue for reform

In taking up this topic, the consultation paper is making a shift from discussing background information to considering issues for reform. These issues are intended to respond to the calls for reforming BC's legislation on public hearings.

A major question is the degree of reform. It could range from fine-tuning the current legislation to more transformative reforms. One of the goals of this consultation paper is to gauge the public's views on this question.

A good starting place for either approach is to consider the principles that should apply to public engagement on a land-use bylaw. These principles may be used to form the foundation of any reformed legislative framework for public engagement on a land-use bylaw.

Project committee's list of six principles of public engagement

The project committee examined this issue carefully. Through consideration of legal research and discussion at committee meetings, it formulated a list of the following six principles of public engagement on a land-use bylaw:

- transparency;
- accountability;
- inclusivity;
- equity;
- reconciliation; and
- proportionality.

Other lists of principles that may serve as benchmarks

Overview: Legislative and other lists of principles

As part of its research into principles of public engagement, the committee considered lists that have been put into use in other jurisdictions. These lists of principles can serve as benchmarks for the committee's list.

Two of these lists come from legislation in force outside BC. The third is a list developed by a major international organization.

Québec: The only Canadian province with legislation setting out principles of public engagement

Like British Columbia, Québec has legislation on public engagement on local-land-use bylaws.[142] Unlike British Columbia, Québec went beyond legislation just in connection with one form of public engagement (i.e., the public hearing). Instead, its legislation tackles what it calls "public participation," which is broader in scope than just public hearings and is similar to what this consultation paper calls public engagement.

The legislation begins by enabling local governments in Québec to adopt their own "public participation policies," which contain "measures complementary to those provided for in this Act and [which promote] dissemination of information, and consultation and active participation of citizens in land use planning and development decision-making."[143]

The legislation doesn't just grant local governments a discretion to develop policies that, in their view, comply with the act. Instead, it requires local governments' public participation policies to "compl[y] with the requirements of [a] regulation,"[144] which the act authorizes the responsible minister to develop in accordance with the following criteria:

> (1) the decision-making process is transparent;
>
> (2) citizens are consulted before decisions are made;
>
> (3) the information disseminated is complete, coherent and adapted to the circumstances;
>
> (4) citizens are given a real opportunity to influence the process;
>
> (5) elected municipal officers are actively present in the consultation process;
>
> (6) deadlines are adapted to the circumstances and allow citizens sufficient time to assimilate the information;
>
> (7) procedures are put in place to allow all points of view to be expressed and foster reconciliation of the various interests;
>
> (8) rules are adapted according to, in particular, the purpose of the amendment, the participation of citizens or the nature of the comments made; and

142. See *An Act respecting land use planning and development*, *supra* note 31, ss 80.1–80.5.

143. *Ibid*, s 80.1.

144. *Ibid*, s 80.2. See also *Regulation respecting public participation in matters of land use planning and development*, *supra* note 33.

(9) a reporting mechanism is put in place at the end of the process.[145]

These criteria are essentially stated as principles, so they may be used as a benchmark of what a legislative list of principles for public engagement on a land-use by-law would look like.

Victoria: An example of principles-based legislation

The Australian state of Victoria has taken principles-based legislation a step beyond Québec. Victoria recently adopted a new statute[146] that was intended to embody the principles-based approach to local-government legislation.[147]

The act as a whole "removes unnecessary regulatory and legislative prescriptions and enables councils to govern based on five principles."[148] Within this framework, Victoria's act requires local governments to have a community-engagement policy[149] based on the following principles:

(a) a community engagement process must have a clearly defined objective and scope;

(b) participants in community engagement must have access to objective, relevant and timely information to inform their participation;

(c) participants in community engagement must be representative of the persons and groups affected by the matter that is the subject of the community engagement;

(d) participants in community engagement are entitled to reasonable support to enable meaningful and informed engagement;

(e) participants in community engagement are informed of the ways in which the community engagement process will influence Council decision making.[150]

145. *An Act respecting land use planning and development*, *supra* note 31, s 80.3.

146. See *Local Government Act 2020* (Vic), 2020/9.

147. See Victoria State Government, Department of Government Services, Local Government, "A principles-based Act: Removing unnecessary regulatory and legislative prescription" (last visited 1 August 2023), online: <localgovernment.vic.gov.au/council-governance/local-government-act-2020/principles-of-the-local-government-act-2020>.

148. *Ibid* at para [2]. The principles are (1) community engagement, (2) strategic planning, (3) financial management, (4) public transparency, and (5) service performance (see *ibid* at para [3]).

149. See *ibid*, s 55 (1).

150. *Ibid*, s 56.

A community-engagement policy applies generally to local-government decision making, so its underlying principles are broader in their reach than those focused just on public engagement on a land-use bylaw.

International Association for Public Participation's core values

Finally, the International Association for Public Participation is not a legislative body, but its published set of core values are often cited as a benchmark for public engagement on a land-use bylaw. These core values are:

(1) Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.

(2) Public participation includes the promise that the public's contribution will influence the decision.

(3) Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.

(4) Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.

(5) Public participation seeks input from participants in designing how they participate.

(6) Public participation provides participants with the information they need to participate in a meaningful way.

(7) Public participation communicates to participants how their input affected the decision.[151]

151. International Association for Public Participation, *Core Values for the Practice of Public Participation* (last visited 31 July 2023), online: <iap2.org/page/corevalues> [*IAP2 Core Values*].

Summary: The project committee's list of principles is comparable to these benchmarks

While there is some variation among the details of these four lists, overall they have more substantive qualities in common than qualities that differ. Making allowances for differences in expression, readers may notice that the three benchmark lists capture each of the committee's proposed principles of transparency,[152] accountability,[153] inclusivity,[154] equity,[155] reconciliation,[156] and proportionality.[157]

Issue for reform: Should BC legislation on public engagement on local-land-use bylaws contain a list of principles?

Brief statement of the issue

British Columbia has legislation on public engagement on local-land-use bylaws. But that legislation is focused on only one type of public engagement: the public hearing. And public hearings have recently been criticized for failing to provide a useful, deliberative forum for public engagement, which has hampered their ability to support land-use decisions. This criticism has led to calls for legislative reform. One way to begin the process of reform is to set out the principles that should serve as the foundation for reformed legislation. Should BC's legislation on public engagement on local-land-use bylaws set out such a list of principles?

Discussion of options for reform

One option to address this issue would be to include a list of principles in BC's legislation on public engagement. The principles could be those in the list developed by the committee. Such a list would have several advantages.

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152. See Québec: *An Act respecting land use planning and development*, *supra* note 31, s 80.3 (1), (3); Victoria, *Local Government Act 2020*, *supra* note 146, s 56 (a), (b), (e); *IAP2 Core Values*, *supra* note 151 at paras (3), (6), (7).

153. See Québec: *An Act respecting land use planning and development*, *supra* note 31, s 80.3 (4), (5), (9); Victoria, *Local Government Act 2020*, *supra* note 146, s 56 (e); *IAP2 Core Values*, *supra* note 151 at paras (2), (7).

154. See Québec: *An Act respecting land use planning and development*, *supra* note 31, s 80.3 (2), (4); Victoria, *Local Government Act 2020*, *supra* note 146, s 56 (c); *IAP2 Core Values*, *supra* note 151 at paras (1), (4), (5).

155. See Victoria, *Local Government Act 2020*, *supra* note 146, s 56 (d).

156. See Québec: *An Act respecting land use planning and development*, *supra* note 31, s 80.3 (7).

157. See Québec: *An Act respecting land use planning and development*, *ibid*, s 80.3 (6), (8).

First, it could serve to clarify the goals and purposes of the law. A common theme of criticisms of the public hearing is that it has drifted from being a device to support deliberation and democracy into a formal exercise that generates conflict and frustration. One way to begin to address this concern would be to refocus the legislation on the principles of the general category of public engagement.

Second, a legislative list of principles could serve as a foundation for comprehensive reforms to BC's legislation on public engagement on local-land-use bylaws. Such a list could open the door to new approaches, such as a principles-based regulation of public engagement.[158]

Finally, the list developed by the project committee is comparable to lists used in other jurisdictions' legislation and statements by a leading organization. Adopting it should place BC within the mainstream of principles on public engagement.

The opposing position is also an option to consider: BC's legislation could continue to go without a statement of principles. There are a number of reasons that support this option.

First, lists of principles, purposes, or goals aren't common in Canadian legislation. There's a common drafting convention that considers such lists to be superfluous, "since the object of a well-drafted Act should become clear to the person who reads it as a whole."[159]

Second, and related to the first point, some critics have said that lists of purposes can distract courts from their task of interpreting legislation to resolve disputes. The concern is that the list directs a court's attention to abstract principles and goals and away from the wording of statutory provisions. As a leading textbook on statutory interpretation has argued, "when more than one purpose is mentioned, they are al-

158. See, below, at 51–52 (discussion of options for reform regarding principles-based regulation of public engagement).

159. Uniform Law Conference of Canada, *Canadian Drafting Conventions* (last visited 26 January 2023), principle 19, online: <ulcc-chlc.ca/Civil-Section/Drafting/Drafting-Conventions>. But it's also worth noting that two of BC's leading statutes on local government do contain lists of principles and purposes. See *Local Government Act*, *supra* note 4, s 1 (purposes of act); *Community Charter*, SBC 2003, c 26, ss 1 (principles of municipal governance), 2 (principles of municipal–provincial relations), 3 (purposes of act).

most never ranked. It is left to the courts to work out the relationship among the listed purposes and their connection to specific provisions and words."[160]

Third, some readers might simply prefer the current approach of BC's legislation on public hearings. This rule-bound legislation might be preferable to a more principles-based approach because it could be seen as more certain and familiar. Most Canadian provinces appear to follow this approach. And (though this point is a matter for debate) fine-tuning reforms could be made to the current legislation to address criticisms of public hearings.

These two options for reform represent the ends of a spectrum of options. Between them exists a wide range of choices that broadly favour the use of a list of principles but would adopt different principles than those developed by the project committee.

There are many reasons to support, as a general idea, adopting a list of principles. A list may help to clarify the legislation. It may also make the legislation more open and accessible to people who don't have legal training.

There is also a wide range of ideas that could be used to develop a list of principles. This quality makes this option rather open-ended and difficult to evaluate.

Summary of options for reform

- *BC's legislation on public engagement on land-use bylaws should be based on the following principles: (a) transparency; (b) accountability; (c) inclusivity; (d) equity; (e) reconciliation; and (f) proportionality.*
- *BC's legislation on public engagement on land-use bylaws should be based on the following principles: . . .* [readers may fill in their own list of principles in the comments section].
- *BC's legislation on public engagement on land-use bylaws should continue not to include a list of principles.*

160. Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 191.

Part Three: When Should the Public Hearing Not Be Held?

Overview: Another foundational issue for reform

The previous topic (principles of public engagement) was introduced as a foundational issue for this consultation paper. It earned this label because it implicitly deals with fundamental questions, such as why should British Columbia have legislation on public engagement on land-use bylaws and what should that legislation aim to accomplish.

This topic takes up another foundational issue for this consultation paper. It asks readers to consider whether the public hearing should retain its pride of place as the central form of public engagement on land-use bylaws. Should public hearings be the standard and default for public engagement? Or should BC's legislation de-emphasize their role in favour of a new approach to public engagement on land-use bylaws?

Background information on when a public hearing doesn't need to be held

The current law in BC: a public hearing isn't required on a zoning bylaw that's consistent with an official community plan

BC's *Local Government Act* spells out when a local government won't be required to hold a public hearing on a land-use bylaw.[161] Its provisions only apply when the following conditions are met:

- the bylaw at issue is "a proposed zoning bylaw";
- the local government has an official community plan, which "is in effect for the area that is the subject of the zoning bylaw"; and
- the proposed zoning bylaw "is consistent with the official community plan."[162]

161. See *supra* note 4, s 464 (2).

162. *Ibid*.

If all these conditions are met, then the local government "is not required to hold a public hearing."[163]

This exception was introduced in 2021, following amendments to the *Local Government Act*.[164] Previously, the *Local Government Act* had a similar provision that said a local government "may waive" the public hearing in these circumstances.

Local governments rarely used this power under the former provision to waive a public hearing.[165] It's not clear why this was the case. There has been speculation that local governments were reluctant to take what was seen to be an active step in shutting down public engagement on a zoning bylaw.

It's too soon to know to what extent local governments will use their discretion under the updated provision, which removed this active language of waiving a public hearing. There have been some examples of local governments not holding public hearings in reliance on this provision.[166] But there also are concerns about the legislation's notice requirements. And it still places the public hearing at the centre of public engagement on land-use bylaws.

There is no equivalent provision on when a public hearing isn't required in the *Vancouver Charter*.[167]

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163. *Ibid*.

164. See *Municipal Affairs Statutes Amendment Act (No 2), 2021*, SBC 2021, c 30, ss 26, 30 (in force 25 November 2021).

165. See William A Buholzer, *Local Government: A British Columbia Legal Handbook*, 8th ed (Vancouver: Continuing Legal Education Society of British Columbia, 2020) at § 9.46 [Buholzer, *Local Government*].

166. See e.g. City of New Westminster, "Public Notice: Public Hearing Not Being Held" (last visited 12 October 2023), online: <newwestcity.ca/publicnotices/sb_expander_articles/2367.php> (concerning "[a] rezoning application . . . to allow construction of a duplex at 902 First Street"). See also Theresa McManus, "Platform for Stigma: New West Council Rejects Public Hearing for Supportive Housing Plan," *New Westminster Record* (31 May 2023), online: <newwestrecord.ca/local-news/platform-for-stigma-new-west-council-rejects-public-hearing-for-supportive-housing-plan-7077524> (news article on local government's decision "to host dialogue-based engagement session for proposed supportive housing but no public hearing").

167. After the committee had considered this issue, BC's government announced further changes to the law on when a public hearing may not be held. See British Columbia, Office of the Premier, News Release, 2023PREM0062-001706, "More small-scale, multi-unit homes coming to B.C., zoning barriers removed" (updated 2 November 2023), online: <news.gov.bc.ca/releases/2023PREM0062-001706> ("[n]ew proposed changes will also phase out one-off public hearings for rezonings for housing projects that are consistent and aligned

Some other provinces offer more flexibility for local governments in deciding when the public hearing may not be held

Most of Canada's provinces and territories simply require public hearings on land-use bylaws and don't provide a mechanism to avoid that requirement.[168] But a couple of provinces do build in some legislative flexibility that exceeds what BC has done on this issue.

Ontario's legislation allows a local government not to hold a public hearing if it has used some other form of public engagement. Specifically, if the local government has an "official plan" (the Ontario equivalent to BC's official community plan) and that plan "sets out alternative measures for informing and obtaining the views of the public," then the legislative provisions requiring the public hearing "do not apply" to the proposed land-use bylaw.[169]

Québec has legislation that enables local governments to "adopt a public participation policy that contains measures complementary to those provided for in this Act."[170] These policies are guided by a list of principles in Québec's legislation.[171] The public-participation policy, in effect, replaces legislatively mandated forms of public engagement.

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with the official community plans" at para [9]). The proposed legislation contains imperative language ("must not") that removes local governments' discretion and prevents them from holding public hearings in the circumstances described in the news release. See Bill 44, *Housing Statutes (Residential Development) Amendment Act, 2023*, 4th Sess, 42nd Parl, British Columbia, 2023, cls 5 (c), 6 (amending s 464 of the *Local Government Act*, *supra* note 4, to prohibit public hearings on specified zoning bylaws), 36 (b) (amending s 566 of the *Vancouver Charter*, *supra* note 5, to create a parallel prohibition applicable to the City of Vancouver) (first reading 1 November 2023). Bill 44 has subsequently received royal assent and is now *Housing Statutes (Residential Development) Amendment Act, 2023*, SBC 2023, c 45.

168. See e.g. Saskatchewan: *The Planning and Development Act*, *supra* note 31, s 207 (2); Nova Scotia: *Municipal Government Act*, *supra* note 31, s 205 (3).

169. *Planning Act*, *supra* note 31, s 17 (19.3) (applicable to proposed amendments to the official plan; for a parallel provision applicable to proposed amendments to a zoning bylaw, see *ibid*, s 34 (14.3)). In an echo of BC's *Local Government Act*, *supra* note 4, s 467 (which requires notice to the public when a local government isn't holding a public hearing because one is not required under the act), Ontario's legislation requires information disclosure to the public in these circumstances. See *Planning Act*, *supra* note 31, ss 17 (19.6), 34 (14.6).

170. *An Act respecting land use planning and development*, *supra* note 31, s 80.1.

171. See *ibid*, s 80.3. See, also, above at 42–43 (setting out Québec's list of principles).

Issue for reform: When should the public hearing not be held?

Brief statement of the issue

The *Local Government Act* places the public hearing at the centre of public engagement on land-use bylaws. It grants local governments only a tightly limited scope in which they may decide not to hold a public hearing. In this respect, public hearings are the legislated default and standard for engaging the public on local-land-use bylaws in BC.

But the public hearing has recently come under criticism.[172] Critics have argued that public hearings don't provide a deliberative forum for productive commentary on a land-use bylaw. Other forms of public engagement may in fact do a better job of meeting the goal of using the public's input to improve land-use decision making.

Other jurisdictions have given their local governments more freedom not to hold a public hearing and more flexibility to use other forms of public engagement. To what extent should BC consider following the same path by allowing its local governments more scope not to hold a public hearing?

Discussion of options for reform

This is an issue that's capable of generating a wide range of options. This range includes everything from retaining the current legislation to incremental reforms that keep the same basic structure in place to new directions that de-emphasize the public hearing in favour of different approaches to public engagement.

A majority of committee members favoured an option that took this last approach, which would significantly change BC's legislation on public hearings. In their view, this option unites several of the major themes that run through this consultation paper by embodying the following features:

- it responds to criticisms of the overly formal and adversarial nature of public hearings—which have inhibited deliberation and the flow of information useful for informed land-use decision making—by opening up options to use other forms of public engagement;
- it gives local governments more flexibility in deciding how to conduct public engagement in respect of a specific land-use bylaw;

172. See, above, at 35–39.

- it engages the principles of public engagement discussed previously[173] by enshrining them within a new, principles-based approach to legislation.

In this majority's view, allowing local governments to eliminate the public hearing if they allow for other forms of public engagement that advance the principles discussed earlier would have several advantages.

First, it gives local governments more tools to tailor public engagement on land-use bylaws to local circumstances. A major criticism of public hearings is that they've failed to contribute to better land-use decision making. This failure may be due to the adversarial nature of a public hearing. Or it may be due to the perceived tendency of public hearings to empower groups favouring the status quo. These concerns may be overcome by giving local governments the power to draw on different ways of engaging the public.

Second, it moves the legislation away from rule-bound regulation of how local governments engage with their public. Another frequent complaint of public hearings is that their formal nature inhibits deliberation and frustrates local governments. A shift in focus from detailed rules to broad principles addresses this concern.

Third, it ensures that public engagement takes place on all land-use bylaws on a consistent basis that's informed by stated principles. Under the *Local Government Act*, a local government must hold a public hearing in most cases, but it's not required in some cases (i.e., if the land-use bylaw at issue is a zoning bylaw that's consistent with the official community plan for the area it covers). This means that, in some cases, the public hearing may be eliminated and no public engagement need take place at all. This creates a kind of all-or-nothing feel to the current legislation, which could be addressed by ensuring that public engagement takes place in all cases.

But some committee members weren't in favour of this option. In their view, the current law, which calls for public hearings in all but limited circumstances, still provides the best framework for public engagement on local-land-use bylaws.

These committee members were concerned about what they saw as uncertainties in the majority's proposal. In particular, they were concerned about the following results:

173. See, above, at 40–45.

- local governments using their enhanced flexibility not to hold a public hearing and using a form of public engagement that doesn't provide direct access to decision makers;
- local governments using their enhanced flexibility to provide less information to the public;
- uncertainty over the meaning of the guiding principles leading to litigation.

This approach could be criticized as failing to respond to concerns about the public hearing. In these committee members' view, these concerns can be best addressed by incremental changes to current laws on public hearings, rather than replacing public hearings with a new system of public engagement.

Between these two ends of the spectrum of options, there may be a wide range of other options. In particular, there are potentially a large number of ways to build on the current law, which allows for the public hearing not to held in a specific set of circumstances. This logic could be extended, with legislation that keeps public hearings at the centre of public engagement on land-use bylaws but expands the circumstances in which the public hearing could be eliminated.

This approach could be seen as striking a balance that preserves what's best in the current law and addresses criticisms of it. On the other hand, it could be argued that this approach is too limited to deliver a real improvement to the law.

Summary of options for reform

- *An amendment to BC legislation should enable principle-based public disclosure and engagement processes for amendments to local-land-use bylaws, that when used by local governments would not require public hearings.*
- *BC's legislation on public engagement on land-use bylaws should allow local governments not to hold a public hearing when the following conditions are met: . . .* [readers may fill in their own list of principles in the comments section].
- *BC's legislation on public engagement on land-use bylaws should continue to only allow local governments not to hold a public hearing when (a) the proposed bylaw at issue is a zoning bylaw; (b) there is an official community plan in effect for the area that is the subject of the zoning bylaw; and (c) the zoning bylaw is consistent with that official community plan.*

Chapter 4. Forms of Public Engagement Other Than Public Hearings

Overview: A Focus in this Chapter on Specific Examples of Public Engagement and How They Might Fit into Reformed Legislation

The last chapter concluded by discussing the issue of whether the public hearing may be eliminated. One of the options for addressing this issue turned on local governments using other forms of public engagement.

For many readers, this discussion likely brought to mind the question, what other forms of public engagement are there for use in considering a local-land-use bylaw?

This chapter seeks to answer that question. It starts off by giving readers some background information on the current law, which in BC is focused on the public hearing as the standard of public engagement. From there, it proceeds to describe other forms of public engagement that may be used for land-use bylaws.

The other goal of this chapter is to consider options for how other forms of public engagement may be integrated into BC's legislation on land-use bylaws. For example, should the legislation be amended to enable specific forms of public engagement? Or is a general legislative authorization a better approach?

As readers will discover, discussion of these issues raises one of the general themes of this consultation paper. That theme concerns differing approaches to legislation: one, rules based; the other, principles based.

Background Information: Public Hearings and Other Forms of Public Engagement

Public hearings: BC legislation's main vehicle for public engagement on land-use bylaws

Currently in British Columbia, legislation's main instrument for public engagement on local-land-use bylaws is the public hearing.

Under the *Local Government Act*, public hearings are required whenever a local government proposes to adopt certain specified types of land-use bylaws,[174] unless the proposed bylaw is a zoning bylaw that is consistent with the local government's official community plan.[175] Public hearings are subject to detailed legislative standards as well as standards imposed by the common law (i.e., judgments in court cases).[176]

A similar requirement applies to zoning bylaws in the City of Vancouver.[177]

Criticisms of public hearings and why alternatives to them may help to address concerns

As discussed more fully above,[178] public hearings have long been viewed as a "cornerstone of democracy," because they provide for "[p]articipation of the governed in their government."[179] But lately criticism of public hearings has become more and more prominent.

While the range of this criticism is discussed in detail earlier in this consultation paper,[180] one aspect of it is worth drawing out now.

Recently, a law professor summarized in concrete and colourful terms what critics see as the pathologies of public hearings. In a law-review article, he noted that if someone were to enter a hall in which "normally mild-mannered neighbors turn a

174. See *supra* note 4, s 464 (1). See also, above, at 28 (for more discussion of the scope of the *Local Government Act*'s provision on public hearings).

175. See *ibid*, s 464 (2). See also, above, at 48–49 (for more discussion of when a local government isn't required to hold a public hearing).

176. See Buholzer, *BC Planning Law*, *supra* note 6 ("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" at vol 2, § 16.53).

177. See *Vancouver Charter*, *supra* note 5 , 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."). One noteworthy difference between the *Vancouver Charter* and the *Local Government Act*, *supra* note 4, is that the former lacks an equivalent provision to the latter's section 464 (2), which provides that a public hearing isn't required "on a proposed zoning bylaw if (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."

178. See, above, at 28–35.

179. Arnstein, *supra* note 16 at 216.

180. See, above, at 35–39.

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."[181]

These passages illustrate the complaint that public hearings have failed to provide a deliberative forum for meaningful public engagement with land-use bylaws. This criticism has also featured in two recent reports on the housing crisis in British Columbia, which were noted earlier.[182]

The BC *Development Approvals Process Review* addressed a broader range of public engagement apart from just public hearings, finding an "opportunity" of "high importance" to conduct a "[p]rovincial review of public hearings and *consideration of alternative options for more meaningful, earlier public input and in different formats*."[183] And the Canada–British Columbia Expert Panel on the Future of Housing Supply and Affordability endorsed this finding.[184]

As these publications note, other forms of public engagement may help to address some of the perceived democratic failings of public hearings by providing a more responsive and deliberative process. The sections that follow discuss concrete examples of public engagement on land-use bylaws, some of which have a basis in existing legislation and some of which do not.

Public consultation during development of an official community plan

Beginning with the *Local Government Act*: in select circumstances, this statute imposes one form of public engagement in addition to the public hearing, which it calls a *consultation*.

181. Kazis, *supra* note 135 at 2340 [footnotes omitted].

182. See *DAPR Report*, *supra* note 17; *Opening Doors Report*, *supra* note 17. See also Hemingway & Pek, *supra* note 132 (highlighting recent study of "undemocratic" public hearings as a source of "housing gridlock" in British Columbia).

183. *DAPR Report*, *supra* note 17 at 24—opportunity (2.b) [emphasis added].

184. See *Opening Doors Report*, *supra* note 17 (recommending implementation of opportunity (2.b) from *Development Approvals Process Review* at 26).

When a local government is developing an official community plan, the *Local Government Act* requires the local government to provide "opportunities" for consultation with affected people and organizations.[185] The legislation leaves a lot of the details up to the local government, so long as it abides by a set of high-level guidelines.[186] The act also makes it clear that this public consultation is "in addition to the public hearing."[187]

Additional consultation is required with respect to planning for school facilities.[188] A similar consultation requirement for school facilities and official development plans applies to the City of Vancouver.[189]

First Nations consultation during development of an official community plan

As noted in chapter 2, BCLI heard from a number of First Nations about not being consulted by local governments in the development of an official community plan.[190] BCLI also heard of some consultations happening with select local governments, but those were described as not being in the spirit of government-to-government relationship building. Overall, experiences of consultations during the development of an official community plan were reported by Reconciliation Listening Series participants to be widely varied and largely dependent upon the individuals in leadership roles. This is not surprising given that the legislation is discretionary as to any re-

185. See *supra* note 4, 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.").

186. See *ibid*, s 475 (2) ("For the purposes of subsection (1), the local government must (a) consider whether the opportunities for consultation with one or more of the persons, organizations and authorities should be early and ongoing, and (b) specifically consider whether consultation is required with the following: (i) the board of the regional district in which the area covered by the plan is located, in the case of a municipal official community plan; (ii) the board of any regional district that is adjacent to the area covered by the plan; (iii) the council of any municipality that is adjacent to the area covered by the plan; (iv) first nations; (v) boards of education, greater boards and improvement district boards; (vi) the Provincial and federal governments and their agencies.").

187. *Local Government Act*, *ibid*, s 475 (3).

188. See *Local Government Act*, *ibid*, s 476.

189. See *Vancouver Charter*, *supra* note 5, s 562.1.

190. See, above, at 23.

quirements to consult with First Nations and courts have not applied the duty to consult in relation to local governments.

Some participants from the Reconciliation Listening Series highlighted the official community plan process as a key decision-making stage for local governments and First Nations to address decision-making process. It was shared that clearly establishing consultation and cooperation obligations as well as provisions for infrastructure and financing to support co-planning at the official community plan stage could help ease the capacity concerns for First Nations in relation to zoning decisions consistent with the official community plan. It can also provide an opportunity for First Nations to be involved in decision making around the form of and procedures for subsequent public engagement—an issue that's explored further in chapter 6.[191]

Other types of public engagement may be required by local policy

In practice, public hearings and consultations aren't the only types of public engagement. Other forms of public engagement may even be required in a given case. This is because many BC local governments appear to have adopted broad public-engagement documents—variously called policies, strategies, guidelines, and the like—even though they aren't required by land-use legislation in this province.[192] These policies and strategies may commit a local government to certain forms of public engagement on a land-use bylaw.

Examples of public engagement on land-use bylaws

Overview: There are many forms of public engagement

There is a vast number of approaches to public engagement on land-use bylaws. Probably the only way to define them as a class would be by reference to high-level principles, such as those set out the International Association for Public Participation.[193]

191. See, below, at 86–88.

192. See e.g. City of Surrey, *Engage Surrey: Surrey's Public Engagement Strategy* (last visited 17 October 2023), online: <surrey.ca/sites/default/files/media/documents/EngageSurreyPublicEngagementStrategy.pdf>; City of Kelowna, *Engage Policy* (14 April 2014), online: <kelowna.ca/sites/files/1/docs/city-hall/policies/engage_policy_-_no.372_.pdf>.

193. See *IAP2 Core Values*, *supra* note 151 and accompanying text.

But to keep the discussion from becoming too abstract, the following pages will set out some specific, concrete examples of public engagement. Note that some of these examples may have a basis in general legislation on municipal law (i.e., not specific to land-use regulation), such as the *Community Charter*.[194] Other examples may not have a legislative basis; they may simply be methods that local governments have decided to use.

Community open houses and public information sessions

These are public events that "provide an opportunity for citizens to seek clarification on a proposed project, bylaw or other matter and to express their opinions for consideration by elected officials."[195] As these events typically occur earlier than a public hearing, "[t]he feedback received at public information sessions may assist the local government to change a proposal if it appears the public will not support one or more aspects of it."[196]

Open houses and information sessions appear to be commonly used by BC local governments to remedy some of the perceived deficiencies of public hearings.[197]

Advisory bodies

Advisory bodies may be used "as a means to engage community members or specific sectors on proposed projects, policy decisions or new initiatives."[198] Their membership "is generally a combination of municipal council or regional district board members and members of the public or specific sectors usually appointed based on their particular expertise."[199] They "are often tasked with considering various policy options, evaluating the options and making recommendations to the council or board."[200]

194. See *supra* note 159, s 83.

195. British Columbia, "Local Government Public Engagement" (last visited 17 October 2023), online: <gov.bc.ca/gov/content/governments/local-governments/governance-powers/councils-boards/public-engagement> at para [12].

196. *Ibid* at para [13].

197. See Buholzer, *BC Planning Law*, *supra* note 6 at vol 2, § 16.49.

198. British Columbia, "Local Government Public Engagement," *supra* note 195 at para [14].

199. *Ibid* at para [15].

200. *Ibid* at para [17].

Surveys and non-binding opinion polls

These are measures of public opinion. They may "be done by voting or any other process that the municipal council or regional district board considers appropriate (including social media and online community discussion boards)."[201] Surveys and polls "are a useful indicator of whether or not there is broad support for local government initiatives."[202]

Petitions

These are "informal petitions to a municipal council or regional district board to bring attention to matters of interest in the community."[203] The petition "must include the full name and residential address of each petitioner."[204]

The petitions referred to here are "informal" and "informational": they "are not the same as formal petitions to establish municipal local area services or regional district service establishing or loan authorization bylaws which have specific legislative requirements."[205]

Surveys and meetings with a strong visual component

A recent law-review article listed "design charettes, impact assessments, land use mapping, and visual survey techniques" as examples of forms of public engagement that have recently risen in prominence.[206] These are variously small-scale, intensive meetings and types of surveys and open houses that feature an emphasis on visualization.

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201. *Ibid* at para [6]. See also *Community Charter*, *supra* note 159, s 83.

202. British Columbia, "Local Government Public Engagement," *supra* note 195 at para [6].

203. *Ibid* at para [9].

204. *Community Charter*, *supra* note 159, s 82 (2).

205. British Columbia, "Local Government Public Engagement," *supra* note 195 at para [9].

206. Gilman, *supra* note 101 at 554. A *charette* is "[a] meeting or conference devoted to a concerted effort to solve a problem or plan something": see *Shorter Oxford English Dictionary*, *supra* note 97, vol 1, *sub verbo* "charette (2) (b)." The word derives from a French word for *cart* or *chariot*, with reference to "the use of a cart in the École des Beaux-Arts in Paris in the 19th cent. to collect students' work just prior to a deadline": *ibid*.

Use of modern technology itself may generate public engagement or create variations on the forms of public engagement listed earlier. Some American jurisdictions use technology to create highly visual forms of public engagement.[207]

Mini-publics and community assemblies

"While mini-publics come in many forms," a recent article noted, "central to all of them is some form of democratic lottery to select participants, coupled with various practices to bring about high-quality and well-informed discussions among those participants."[208] The article touted this selection mechanism as a means to overcome the problem of public hearings being dominated by neighbours to a proposed development: "[r]ather than relying solely on self-selection—which, as we have seen, can lead to public hearings skewed towards groups like home owners, older individuals and whites—mini-publics select participants through some form of democratic lottery."[209]

Mini-publics (which occasionally go by the older name of *community assemblies*) "often include a learning phase, in which participants can read balanced briefing materials and hear from and question expert and stakeholder witnesses."[210] They are heralded as being a more deliberative forum than public hearings: "[w]ith the aid of trained facilitators, participants can have honest conversations with each other in both small-group and plenary sessions to make sense of this information in light of their own experiences."[211]

Issue for reform: Should BC legislation be amended to enable other forms of public engagement on local land-use bylaws?

Brief statement of the issue

BC's legislation on land use relies on the public hearing as its main instrument of public engagement. Public hearings have been criticized as failing to foster a deliberative and effective process for public engagement. Critics have suggested a host of

207. See Patrick Sisson, "The Tech That Tries to Tackle NIMBYs" *CityLab Government* (8 August 2022), online: <bloomberg.com/news/features/2022-08-08/the-virtual-tools-built-to-fix-real-world-housing-problems>.

208. Hemingway & Pek, *supra* note 132 at para [7].

209. *Ibid* at para [26].

210. *Ibid* at para [27].

211. *Ibid*.

other approaches for earlier and more thoughtful engagement. Some BC local governments have embraced other forms of public engagement (some of which are authorized by the *Community Charter*). Is the time right to amend the *Local Government Act*'s and the *Vancouver Charter*'s provisions on land-use bylaws to expressly enable a broader range of public engagement on land-use bylaws? If so, then precisely how should BC's legislation be amended?

Options for reform

Readers will notice that options for many of the issues in this consultation paper are introduced by describing them as a spectrum or a range. That's probably an apt description of the options for this issue—up to a point. But it's better to say that this issue generates potentially a large number of options, some of which differ in degrees, but others of which introduce quite different approaches to resolving the issue and have little in common with the other options.

As a starting place, the first option is simply to retain the status quo. Some readers might conclude that the current legislation in the *Local Government Act* and *Vancouver Charter* provides the best legal framework for public engagement on land-use bylaws.

Supporters of the current law could point to some perceived strengths:

- it gives the public a platform to make representations directly to local-government decision makers;
- it has a well-defined procedure and provides for extensive disclosure of information;
- it has an extensive body of case law, which lends certainty to the legal framework.

But from another standpoint these strengths can appear as weaknesses. Each of these points feeds into criticisms of the current law:

- it relies too much on the public hearing as the only form of public engagement, which elevates a forum that doesn't foster consensus, deliberation, and informed decision making;
- it is heavily rule-bound and formal, leading to frustration for both local governments and the public;
- it tends to empower only select segments of the public.

Another option, which would begin to respond to some of the criticisms of public hearings, would be to amend BC's legislation on land use to have it expressly enable other forms of public engagement. There are two approaches that could be taken to implement this option.

One approach would be to add a new section that provides a general authorization to local governments to use other forms of public engagement. Such an approach would highlight the desirability of using other forms of public engagement. It would also give local governments a great deal of flexibility in employing these other forms of public engagement.

But this approach would also have some significant downsides. In practice, it might not amount to much of a reform to the law. Local governments are already free to use other forms of public engagement.[212] So it's not clear what a legislative authorization would really add to the legal framework.

A second approach would be to amend BC's legislation and require that local governments use specific forms of public engagement on land-use bylaws. This approach would follow in the footsteps of one other province. Ontario's legislation specifically calls for a local government to hold an open house in certain circumstances.[213]

There are advantages to this option. If a specific form of engagement—such as an open house—is seen to be particularly helpful for the development of a land-use bylaw, it could be expressly identified in the legislation. This approach would create a high level of certainty for local governments about the nature and extent of their obligations for public engagement.

Having additional forms of public engagement in the legislation might also improve the public hearing. It would make the hearing less of an all-or-nothing event. The public would have another opportunity at another forum to make its views known. This could expand the range of comment and lessen the pressure often felt at public hearings.

212. See e.g. *Community Charter*, *supra* note 159, ss 82 (petitions), 83 (surveys). See also Hemingway & Pek, *supra* note 132 at para [41] (discussing how local governments could implement mini-publics under the current legislative framework).

213. See *Planning Act*, *supra* note 31, ss 17 (16), 34 (12).

But there are also drawbacks to this option. It would add more time to local governments' consideration of land-use bylaws. This could lead to direct costs for local governments. It could also inhibit real-estate development.

This approach could also perpetuate features of BC's legal framework that have attracted recent criticism. It would add a new set of imperative rules to that framework. And it would also ensure that public hearings continue to have a major place in that framework.

Another option would involve taking a significantly different approach to the legal framework. Instead of rule-based legislation that relies mainly on the public hearing, a reformed legal framework could draw instead on principles of public engagement.[214] A principles-based approach to public engagement with flexibility around the forms of engagement also enables opportunities for co-designing the forms of engagement together with First Nations.

There are different ways to design this option. One approach would be simply to require that local governments undertake public engagement that is consistent with the principles. This would be the simplest way to amend the legislation. It would also leave the most flexibility in the hands of local governments to carry out public engagement.

But this approach could also be criticized. Critics could say that leaving public engagement to local governments with only the guidance provided by a list of principles is too vague and uncertain. There is also a risk that this uncertainty could spark disputes that would lead to litigation. It also risks leaving the decision of whether to consult and cooperate with First Nations largely in the hands of individual local governments with little guidance.

Another approach would be to require local governments to have a public-engagement policy. Under this approach, local governments would have to spell out in some detail how they plan to carry out public engagement on land-use bylaws. This approach lends itself to a framework that explicitly includes expectations and obligations around co-development of a public-engagement policy with First Nations governments.

214. See, above, at 40–45 (discussion of principles of public engagement).

Other Canadian provinces have adopted this approach in their legislation. For example, Nova Scotia simply has a legislative provision requiring a policy.[215]

Alberta and Québec provide more detail in their legislation and regulations.

Alberta has legislation requiring the establishment of a "public participation policy."[216] The policy is subject to guidelines spelled out in a regulation.[217]

Québec takes an approach that integrates the local government's policy with legislative principles of public engagement.[218]

These approaches have several advantages. They strike a balance between flexibility for local governments and certainty in the forms of public engagement that may be used. This would allow for a greater range of forms of public engagement to be considered, all within a principled legal framework. Such an approach may address significant concerns with the current law: its failure to provide a deliberative forum and its formal and rule-bound nature.

But there may be disadvantages to this approach. Critics could say that it might represent a step backward for the public, who could seem to lose clear rights to information and to make representations directly to the local government.

Summary of options

- *BC legislation on local-land-use bylaws should be amended to require local governments to have a principles-based public-engagement policy.*
- *BC legislation on local-land-use bylaws should be amended to require local governments to develop a principles-based public-engagement policy in consultation and cooperation with First Nations rights and title holders.*
- *BC legislation on local-land-use bylaws should be amended to require local governments to have a public-engagement policy, the content of which to be determined by the local government.*

215. See *Municipal Government Act*, *supra* note 31, s 204 (1) ("A council shall adopt, by policy, a public participation program concerning the preparation of planning documents.").

216. *Municipal Government Act*, *supra* note 31, s 216.1 (1).

217. See *ibid*, s 216.1 (3); *Public Participation Policy Regulation*, *supra* note 33.

218. See *An Act respecting land use planning and development*, *supra* note 31, s 80.3; *Regulation respecting public participation in matters of land use planning and development*, *supra* note 33. See also, above, at 42–43 (discussion of Québec's principles of public engagement).

- *BC legislation on local-land-use bylaws should be amended to require local governments to use the following forms of public engagement in addition to the public hearing: . . .* [readers may fill in their own selections of forms of public engagement in the comments section].
- *BC legislation on local-land-use bylaws should be amended to provide local governments with a general authorization to use forms of public engagement other than public hearings.*
- *BC legislation on local-land-use bylaws should not be amended to deal with forms of public engagement other than the public hearing.*

Chapter 5. Timing of Public Engagement and Public Hearings

Overview: Timing Has Been a Point of Contention

This chapter continues to narrow the focus of inquiry on the details of a legislative framework for public engagement on land-use bylaws.

The timing of public hearings has been a perennial point of contention with the current law. Public engagement, on the other hand, may take place on a more flexible timeline. This chapter considers whether that more flexible approach can be incorporated in legislation on land-use bylaws.

Background Information on the Current Law

Local Government Act strictly controls the timing of public hearings

As discussed at length in the previous chapter, BC's current legislation on land-use planning and regulation only addresses public hearings. It has little to say about broader processes for public engagement on a local-land-use bylaw.

Under the *Local Government Act*, "[a] public hearing . . . must be held after first reading of the bylaw and before third reading."[219]

In contrast, the *Vancouver Charter* is silent on the timing of a public hearing.

Commentary has raised concerns about the timing of public hearings

A recent BC report pointed to the timing of public hearings as one of the "challenges" that tend to make public hearings "an ineffective means of engaging and receiving input from the public."[220] "Public hearings occur late in the development approvals process," the report noted, "after considerable time (sometimes years) and signifi-

219. *Supra* note 4, s 465 (1).

220. *DAPR Report*, *supra* note 17 at 14.

cant cost has gone into a proposed project. Consequently, change can be difficult to accommodate."[221]

As a result, 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."[222] It characterized this review as being of "high importance."[223] A subsequent report by an expert panel[224] endorsed this recommendation.[225]

These two reports focused broadly on land-use planning and the real-estate sector. But commentary that is more narrowly focused on the experience of the general public in public hearings has made a similar point.

A recent American report described public hearings as mainly being effective when they provide "a sense of closure" to a varied, deliberative process of engagement.[226] Unfortunately, the legal framework in the United States (as in British Columbia) only recognizes public hearings in a singular, fairly rigid form.

So the "varied, deliberative process" leading up to a public hearing is absent. As a result, the public hearing is the only mandated form of public engagement. And instead of the hearing providing a satisfying sense of closure, the public experiences the frustration of participating late in the process, when it appears that all the critical decisions have been made.

Academic commentary has also criticized the timing of public hearings, characterizing the law as "making the process one of 'decide, announce, and defend.' "[227]

221. *Ibid*.

222. *Ibid* at 24 (recommendation 2.b) [emphasis added].

223. *Ibid*.

224. See *Opening Doors Report*, *supra* note 17.

225. See *ibid* at 26.

226. Working Group on Legal Frameworks for Public Participation, *Making Public Participation Legal* (Oct. 2013) at 3–4, online: <nationalcivicleague.org/wp-content/uploads/2015/03/MakingPublicParticipationLegal.pdf>.

227. Gilman, *supra* note 101 ("hearings are typically held after the local government has already settled on a plan (or negotiated one with a developer), making the process one of 'decide, announce, and defend' in lieu of a 'true discussion or engagement of the public in a deliberative decision making process' " at 552 [footnotes omitted]).

Why is a public hearing held near the end of the process?

The current timing rule in the *Local Government Act* goes back many years. It first appeared in 1985,[228] as part of a package of amendments that established the current legal framework for public hearings.[229]

There are likely a number of reasons supporting legislation that establishes strict boundaries for the timing of a public hearing. But one reason worth noting is that holding a public hearing toward the end of the process of adopting a land-use bylaw dovetails with what the courts have said about standards of procedural fairness for public hearings.

As one recent case has put it, "[w]hen the City is considering rezoning a property, local residents have two important rights."[230] One of these rights is the right extended by legislation to the public to express its views on the proposed change at a public hearing.[231] This right goes hand in hand with a right established in the case law. This is "the right to be given information sufficient to enable them to come to an informed, thoughtful and rational opinion about the merits of the rezoning."[232]

"While there can be no hard and fast rule for the degree of disclosure required," a recent judgment noted, "in general, members of the public are entitled to receive in advance of the public hearing all documents put before council."[233] Further, "several factors" may lead a court to decide that "the public is entitled to more expansive or restricted access."[234]

This approach to disclosure of documents doesn't compel public hearings to be held at a specific time. But it does create incentives that favour holding a public hearing late in the process.

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228. See *Municipal Amendment Act, 1985*, SBC 1985, c 79.

229. See *ibid*, s 8 (adding s 956 (2), which read "[t]he public hearing shall be held after first reading of the bylaw and before third reading.").

230. *New Yaletown*, *supra* note 15 at para 153.

231. See *ibid*.

232. *Ibid*.

233. *Vancouver Island Community Forest Action Network v Langford (City of)*, 2010 BCSC 1357 at para 61, Fenlon J.

234. *Ibid*. See also *Pitt Polder*, *supra* note 99 at para 63; *Eddington*, *supra* note 94 at para 19; *Karamanian*, *supra* note 94 at para 9.

The earlier a public hearing takes place, the less likely that the local government will meet the general standard of disclosing "all documents put before council" in connection with a land-use bylaw. Certain relevant documents may not be prepared. Others may change. The substance of the bylaw itself may be uncertain early in the process, so it may change too. Any of these developments would create the risk of a court finding the process to be unfair.

Issue for reform: Should legislation determine the timing of public disclosure and engagement processes for land-use bylaws?

Brief statement of the issue

A majority of committee members has tentatively recommended that legislation on land-use regulation recognize and enable broader forms of public disclosure and engagement. ("An amendment to BC legislation should enable principle-based public disclosure and engagement processes for amendments to local-land-use bylaws, that when used by local governments would not require public hearings.")[235] The rationale for this proposal is to remedy flaws seen in public hearings, which are required by legislation to come late in the process of adopting a land-use bylaw. How should legislation deal with the timing of new forms of public disclosure and engagement?

Options for reform

There is a wide range of options to consider for this issue. At one end of the scale, legislation could be silent on timing. At the other end, it could take a directive approach, similar to how the *Local Government Act* deals with public hearings. And in between these two options, there are potentially any number of options that provide some limited direction on timing.

One approach would be for legislation on public disclosure and engagement processes to acknowledge that decisions about the timing of such processes are to be made by local governments. This is essentially the approach Nova Scotia takes by granting a broad discretion to local councils to determine the content of their public-participation program[236] and engagement program.[237] Québec goes even further

235. See, above, at 51–52.

236. See *Municipal Government Act*, *supra* note 31, s 204 (3).

237. See *ibid*, s 204A (2).

along this line by acknowledging that "[a] public participation process may begin at any time determined by the municipality, including before the adoption of any draft by-law."[238]

This approach has the advantage of clearly assigning responsibility for timing to local governments. It also gives local governments space to tailor public disclosure and engagement processes to the needs and desires of the local community.

But there are potential drawbacks to this approach too. It's likely to create considerable variety among the processes actually employed by local governments and the timing of those processes. This variety could lead to uncertainty among participants in the real-estate sector and among the public. This approach also relies to significant degree on the goodwill and capacity of local governments to design appropriate processes and employ them at appropriate times.

Another legislative approach would be simply not to mention timing at all. Alberta and Saskatchewan take this approach.[239]

This option shares many of the advantages of the previous option. It can be viewed as a way to implicitly hand decision-making authority over timing to local governments. This approach would give local governments a high amount of flexibility to determine when to conduct public disclosure and engagement processes.

But there are disadvantages to this approach. Similar to the previous option, this option could create uncertainty. Further, leaving the legislation silent on timing might also invite litigation over disagreements on timing. With no guidance from the legislature, the courts might step in to provide that guidance for local governments.

On the other hand, provincial legislation on land use could take an approach at the opposite end of the spectrum. It could set out a specific time frame in which local governments would have to provide public disclosure and engagement processes.

238. *Regulation respecting public participation in matters of land use planning and development*, *supra* note 33, s 6.

239. See Alberta: *Municipal Government Act*, *supra* note 31, s 216.1 (requiring local government to establish public participation policy); *Public Participation Policy Regulation*, *supra* note 33; Saskatchewan: *The Planning and Development Act, 2007*, *supra* note 31, s 206 (2) (public participation in addition to public hearing).

This option would create certainty on the timing of public disclosure and engagement processes. Standardizing the timing of these processes might also help to simplify and streamline participation in them.

But there may also be downsides to a directive approach. It may be difficult to identify a precise time frame that works for all forms of public disclosure and engagement processes. It could also make the process overly rigid, creating the same criticisms that have been levelled at the *Local Government Act*'s provisions on the timing of public hearings.

Summary of options for reform

- *Proposed BC legislation on public disclosure and engagement processes for local-land-use bylaws should provide that these processes may be carried out at any time determined by the local government.*
- *Proposed BC legislation on public disclosure and engagement processes for local-land-use bylaws should be silent on the timing of these processes.*
- *Proposed BC legislation on public disclosure and engagement processes for local-land-use bylaws should require that these processes must be held . . .* [readers may set out a specific time frame in the space for comment].

Issue for reform: Should the public hearing come earlier in the process to adopt a land-use bylaw?

Brief statement of the issue

BC's *Local Government Act* takes a highly directive approach to the timing of public hearings. It requires that a public hearing "must be held after first reading of the bylaw [dealing with land-use regulation] and before third reading."[240] Critics have argued that this approach results in many public hearings coming very late in the process. It can leave participants in the public hearing frustrated because their views aren't able to affect the local government's decision. It may also reduce the public hearing's utility from the local government's point of view, as it may discover relevant information too late in the process. Should the *Local Government Act* be amended to respond to these concerns and take a new approach to the timing of public hearings?

240. *Supra* note 4, s 465 (1).

Options for reform

This consultation paper has consistently offered readers the option of largely retaining the current law, supplemented by fine-tuning reforms. One area that could see such fine tuning is the perennial issue of the timing of the public hearing.

There are potentially a range of options to address this issue. This discussion highlights three of them.

One approach would be to shift the legislation to give discretion over the timing of public hearings to local governments. Three provinces outside BC employ a version of this approach.[241] The *Vancouver Charter* also appears to leave the matter of timing to the City of Vancouver, as it doesn't include language similar to that found in the *Local Government Act*.[242]

This option would give local governments the power to tailor the timing of the public hearing to the nature of the land-use bylaw. This flexible approach may help to alleviate concerns about public hearings being held too late in the process.

This approach could be criticized, though, for failing to directly address the main concerns about the timing of public hearings. It relies on an indirect method, placing the decision on timing in the hands of local governments. Local governments may be able to craft decisions that allay concerns on the timing of public hearings. But they could also simply continue to hold them late in the process because that's what has always been done in the past.

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241. See Québec: *Act respecting land use planning and development*, *supra* note 31, s 125 ("The municipality shall hold a public meeting in connection with the draft by-law, presided by the mayor or by a member of the council designated by the mayor. *The date, time and place of the meeting shall be fixed by the council*, which may delegate all or part of this power to the clerk or clerk-treasurer of the municipality." [emphasis added]); New Brunswick: *Community Planning Act*, *supra* note 31, s 111 ("Subject to subsection (2), with respect to a by-law made under this Act, a council shall (a) by resolution, *fix a time and place for the consideration of objections to the proposed by-law*" [emphasis added]; Newfoundland and Labrador: *Urban and Rural Planning Act, 2000*, *supra* note 31, s 18 (1) ("Where a proposed plan and development regulations have been adopted under subsection 16(1), *a council or a regional authority shall set a date, time and place for the holding of a public hearing* to consider objections and representations which may be made by a person or association of persons to the plan or development regulations or a part of them." [emphasis added]).

242. See *supra* note 5, s 566 (3) (a) (notice of public hearing must include "the time and date of the hearing").

Another option would be to continue the approach of having legislation direct the timing of public hearings but shift the time frame to earlier in the process. This approach would directly address what is seen to be the main concern about the timing of public hearings.

But there may be downsides to this direct approach. No province or territory currently requires a public hearing before a bylaw or a draft bylaw has been made public. So this approach would be untested in practice.

Further, this option depends on a kind of trade off. The public gets a chance to have input earlier in the process. But this input comes at a stage when the content of the land-use regulation isn't certain. This may substitute a new set of problems and concerns for the old set.

Finally, a third option would be to propose retaining the status quo. This is, after all, the majority position in Canadian land-use legislation: most of the other provinces have provisions like the one on timing in the *Local Government Act*.[243] (That said, there are variations in when the various provinces and territories require a local government to hold a public hearing.)

It could be argued that the status quo represents the best balance to be struck in the legislation. It could also be argued that, if the public hearing is going to take on a more limited role, then changes to address timing aren't a pressing concern.

243. See Alberta: *Municipal Government Act*, *supra* note 31, s 216.4 (1) ("When this or another enactment requires council to hold a public hearing on a proposed bylaw or resolution, the public hearing must be held, unless another enactment specifies otherwise, (a) before second reading of the bylaw, or (b) before council votes on the resolution."); Saskatchewan: *The Planning and Development Act, 2007*, *supra* note 31, s 207 (2) ("After the first reading of a bylaw mentioned in subsection (1) and before the second reading of the bylaw, council shall hold a public hearing."); Manitoba: *The Planning Act*, *supra* note 31, ss 46 (1), 74 (1) (before or after first reading), 144 (3) (after first reading); Ontario: *Planning Act*, *supra* note 31, ss 17 (9), 34 (14.1) (no earlier than 20 days after giving notice of public hearing); PEI: *Planning Act*, *supra* note 31, s 11 (2) (b) ("shall be held not less than seven clear days after the date of publication of the notice"); Yukon: *Municipal Act*, *supra* note 31, ss 281 (1) (after first reading and before second reading for official community plan), 296 (not earlier than seven days after last date of publication of notice for zoning bylaw); Northwest Territories: *Charter Communities Act*, *supra* note 31, s 133 (2); *Cities, Towns and Villages Act*, *supra* note 31, s 129 (2); *Hamlets Act*, *supra* note 31, s 131 (2) (all providing "[a]fter a bylaw that requires a public hearing receives first reading but before it receives second reading"); Nunavut: *Planning Act*, *supra* note 31, s 25 (1) ("[a]fter giving a proposed by-law first reading and before giving it second reading").

Summary of options for reform

- *BC legislation on public hearings for local-land-use bylaws should be amended to provide that the public hearing may be held at any time determined by the local government.*
- *BC legislation on public hearings for local-land-use bylaws should be amended to require that the public hearing must be held . . .* [readers may set out a specific time frame in the space for comments].
- *BC legislation on public hearings for local-land-use bylaws should continue to provide that the public hearing must be held after first reading of the bylaw and before third reading.*

Chapter 6. Procedural Issues for Public Hearings and Public Engagement

Introduction

This chapter explores some of the procedural steps being taken by local governments to enhance public engagement through the current framework for public hearings as well as suggestions BCLI heard through the Reconciliation Listening Series for making public hearings more inclusive.

Background

Commentary has raised concerns about participation in public hearings

Public hearings have been criticized for tending to "attract and empower well-organized interest groups that may not represent the broad perspective of the community or even those who would be the most directly impacted by a decision."[244] In a recent forum held by the SFU Wosk Centre for Dialogue on public hearings, participants identified a need for public-hearing processes to be more accessible, transparent, and equitable. Concerns shared within that forum included that public hearings serve to empower those with property interests and exclude the voices of equity-denied and minoritized communities.[245]

Some of the people most impacted by local government land-use bylaws and zoning decisions—particularly in relation to housing—include Indigenous people, disabled people, renters, and those from racialized communities. Flexibility in public-hearing procedures has been identified as a way of moving toward greater inclusion of marginalized voices.[246]

244. *DAPR Report*, *supra* note 17 at 14.

245. See Simon Fraser University, Morris J Wosk Centre for Dialogue, *Renovate the Public Hearing: Innovators Forum Report* (March 2023) at 4, online: <renovatethepublichearing.ca/_files/ugd/f79cdf_a383088c03354ce9b3b63883ce57ced6.pdf>.

246. See *ibid*.

Procedural flexibility under the current framework

The current legislation sets out some procedural requirements for public hearings, which largely relate to notice requirements, timing, and what can happen after a public hearing. In terms of the hearing itself, the legislation does not speak directly to the format of the hearing. However, many of the procedures adopted by local governments have been shaped by the standards for procedural fairness set by courts. Rezoning decisions have been described by the courts as an exercise of quasi-judicial powers giving rise to a duty of procedural fairness. In relation to the public hearing, this gives rise to a right to disclosure of information and a right to be heard.[247]

Flexibility to expand on public engagement opportunities

The requirement to hold a public hearing does not preclude other forms of public engagement. However, creating opportunities for public engagement in addition to a public hearing requires more resources.

The right to be heard by council in a public hearing depends on a format where one person can speak at a time. Providing this opportunity for interested parties can also be resource intensive for local governments. In practice, limitations are often placed on how many people can speak and for how long. This approach can favour participation by people comfortable participating in this way. However, it can create barriers for other individuals including those who do not speak English as their first language, people with communication challenges, and people uncomfortable with public speaking.

Some local governments, developers, and landowners are creating opportunities for early public engagement on land-use planning.

New Westminster Public Engagement Strategy

The City of New Westminster has recently developed a Public Engagement Strategy and Policy which complements the public hearing by expanding on the opportunities for public input. The Be Heard New West platform is an online space where residents can learn about City projects and share feedback with the City in a variety of ways. Some of the participation options include online discussion boards, idea boards, interactive maps, and surveys.[248] The use of the platform is not limited to

247. See *New Yaletown*, *supra* note 15.

248. See City of New Westminster, "Be Heard New West" (last visited 7 November 2023), online:

contexts where a public hearing is required. Rather, it provides a forum for public participation in city-planning initiatives generally.

Some decision making does not require a public hearing, but a local government may hold one nonetheless—for example, where the zoning bylaw is consistent with the official community plan. In these situations, input from earlier public engagement can help inform the local government's decision on whether to hold a public hearing.[249]

New Westminster's approach also ensures a high level of sharing of information. Within the Be Heard New West online platform, members of the public can access detailed information about individual project proposals, including drawings, information about feedback received in applicant-led consultations, reports to council, and the avenues for providing feedback both online and in person. The City of New Westminster makes this same information available in a paper format to enhance access. In addition to being able to provide feedback through the online platform, the public can learn about in-person engagement sessions on the platform.

The Jericho Lands Planning Program

The Jericho Lands are located on the unceded territories of the Musqueam, Squamish, and Tsleil-Waututh Nations, within the jurisdiction of the City of Vancouver. These 90 acres of land are owned as fee-simple land by the governments of the Musqueam, Squamish, and Tsleil-Waututh Nations in partnership with the Canada Lands Company. There are plans for the land to be developed by MST Development Corporation, a First Nations government–owned corporation.

As part of the planning process, the landowners have been leading engagement with community members of the Host Nations. Feedback from this engagement, which is ongoing throughout the planning process, allows for Indigenous values and knowledge to be tangibly embedded into the development plans. The ongoing engagement carried out by MST is in parallel to public-engagement activities carried out by the City of Vancouver. The public engagement co-hosted by the City and the landowners has included a variety of activities, including open houses, in-person and virtual events, surveys, stakeholder meetings, and communication through newslet-

<beheardnewwest.ca>.

249. City staff shared with BCLI that up until this point in time, New Westminster's city council has been actively voting on decisions of whether to waive a public hearing in relation to zoning bylaw decisions where a public hearing is not required by legislation.

ters and presentations. All of this engagement precedes any public hearing and rezoning vote by city council.[250]

What We Heard about Making Public Hearings and Public Engagement More Inclusive of Indigenous Voices

As noted in chapter 2, the UN Declaration speaks not only to land rights, but also to rights to develop priorities and strategies for the use of lands, the right to conserve and protect the environment, and the right to improvement of economic and social conditions, including housing.[251]

As part of the Reconciliation Listening Series, BCLI spoke with a number of people from organizations that work to improve economic and social conditions for Indigenous people living in urban settings, including by building housing. This included both Indigenous and non-Indigenous people who shared with us their stories about participating in public hearings in their capacity as members of the public and as representatives of Indigenous housing organizations.

Ensure early and ongoing engagement with First Nations

Many participants of the Reconciliation Listening Series shared the need for a sustainable engagement framework with First Nations and their community members. BCLI heard about of the desire of First Nations to be involved in decision making, but also the lack of capacity to consider the small-scale level of decision making that often happens at public hearings. In addition, BCLI heard that when public hearings are the only forum for First Nations voices, First Nations are treated as the public or stakeholders and are not recognized as rights and title holders.

Building a framework to support meaningful and ongoing input from First Nations and co-planning requires capacity funding. Such frameworks can be supported through protocol agreements[252] or memorandums of understanding.[253] Legislative

250. See City of Vancouver, *Jericho Lands Policy Planning Program* (last visited 7 November 2023), online: <syc.vancouver.ca/projects/jericho-lands/combined-cov-and-proponent-info-boards.pdf>.

251. See UN Declaration, *supra* note 20, arts 21 (1), 29 (1), 32 (1). See also, above, at 17 (further discussion of rights under the UN Declaration).

252. For example, the Council of the Haida Nation has protocol agreements with the local govern-

support for these types of frameworks is well suited to being built into the steps for developing official community plans. This approach allows government to government co-planning to happen at a broad level.

While agreements are being entered into between some First Nations and local governments, these are largely dependent upon the individuals who are in leadership roles. BCLI heard from Reconciliation Listening Series participants of the need for legislation delegating decision making to local governments to clarify the obligations of local governments to recognize First Nations as rights and title holders.

Early and ongoing engagement with First Nations can also be a means of enabling First Nations to have a voice in the shape and format of public hearings when they are held.

Work with First Nations to inform the format of public hearings

Some participants of the Reconciliation Listening Series shared with BCLI the value of incorporating ceremony and including Elders in creating spaces for dialogue and conversation. Including Elders in meetings and engagement sessions can be one way of showing respect for the impact of the decision to be discussed on the traditional stewards of the land. BCLI also heard of the valuable perspectives Elders can bring to support a dialogue that balances strong emotions. It was shared with BCLI that incorporating this lens can change how people behave toward each other and create opportunities to build relationships as opposed to an adversarial environment.

This was just one example of how input from a First Nation may inform the procedure and format of public hearings.

Increase informal opportunities for input

When land-use planning is supported through relationships, rather than being transactional, more time and opportunities must be provided for learning and meaningful input. Public hearings provide a limited opportunity for input within a very formal structure. BCLI heard of the value of building relationships supported by ongoing and informal opportunities to learn about how decisions affect Indigenous people and space to share concerns effectively. A full scope of consultation and co-

ments operating on their traditional territories. The Squamish and Lil'wat Nations have also entered into protocol agreements with local governments.

253. The W̱SÁNEĆ Leadership Council has a memorandum of understanding with the District of Saanich to support the development of protocol agreements for sustainable cooperative discussions on shared priorities.

operation requires time to review the information, provide responses, and receive feedback on how responses were integrated. Including all these components allows more opportunities to evaluate whether the communication is effective and for greater transparency in decision making.

Employ codes of conduct

It was shared with BCLI that public hearings can tend to be acrimonious and heated exchanges of opinions that do not foster dialogue among community members.

Codes of conduct were identified by some Reconciliation Listening Series participants as a way of supporting dialogue even when people feel passionately about an issue. This is a measure that has been adopted by the New Westminster city council. At the outset of each public hearing, a statement of expectations for respectful language and treatment of others is read out. In addition, members of council or senior city staff may call a point of order if a speaker's language is disrespectful.

Include urban Indigenous voices

In BC, 78% of Indigenous people live, work, and study off reserve and in urban areas. These populations do not necessarily have access to the engagement opportunities made available to land-based Nations.[254] In some urban settings, there are coalitions of Indigenous organizations who liaise between urban Indigenous people and governments (including both Crown and Indigenous governments). These organizations do not represent land-based First Nations, but rather provide a collective voice for urban Indigenous people.

For example, the Metro Vancouver Aboriginal Executive Council brings together 22 Aboriginal organizations to collectively plan service and program delivery and policies impacting the Metro Vancouver urban Aboriginal population. Member organizations include housing providers.[255]

254. See Women Transforming Cities, *The TRC Calls to Action in BC Municipalities: Progress, Barriers, and Opportunities to Accelerate Implementation* (January 2023) at 42, online: <womentransformingcities.org/_files/ugd/285f92_e803e9cd6b35414da36fb320180d37c8.pdf>.

255. See Metro Vancouver Aboriginal Executive Council, "Home Page" (last visited 7 November 2023), online: <mvaec-members.org>.

In Surrey, the Surrey Urban Indigenous Leadership Committee provides a collective voice for urban Indigenous people living in Surrey. Their work involves supporting engagement between urban Indigenous people and governments.[256]

BCLI heard of the efforts of these types of organizations to develop engagement strategies between the organizations or individuals they represent, First Nations governments, and Crown governments. These models for community engagement can provide guidance for non-Indigenous people, organizations, and governments seeking to engage with urban Indigenous people.[257]

Considerations shared with BCLI as they relate to engagement with urban Indigenous populations spoke to some of the ways colonialism in Canada has contributed to the displacement of Indigenous peoples and the need for reconciliation efforts by Crown governments to include both land-based First Nations and urban Indigenous people. This includes the need to recognize the intergenerational impacts of colonialism on Indigenous people, whether they reside on their traditional territories or not. In relation to planning and zoning decisions made by local governments, important considerations that were shared with BCLI include:

- The ongoing barriers First Nations face under federal laws in relation to financing and providing housing for community members off reserve. This contributes to the ongoing displacement of Indigenous people from their traditional territories.
- The overrepresentation of Indigenous people among survivors of violent crime and the need for victim services and anti-violence programs designed to meet the unique needs of Indigenous survivors of crime in the locales where they live. This includes a need for residential shelter space and localized, culturally appropriate services to respond to homelessness, mental health, substance-use challenges, and encampments. The Truth and Reconciliation Commission of Canada's call to action no. 40 calls on "all levels of government, in collaboration with Aboriginal people, to create adequately funded and accessible Aboriginal-specific victim programs and services with appropriate evaluation mechanisms."[258]

256. See Surrey Urban Indigenous Leadership Committee, "Home Page" (last visited 7 November 2023), online: <surreyindigenousleadership.ca>.

257. See e.g. Surrey Urban Indigenous Leadership Committee, *Statement of Community Engagement* (April 2023), online: <surreyindigenousleadership.ca/downloads/suilc-community-engagement-policy.pdf>.

258. See Women Transforming Cities, *supra* note 254 at 41–43; Truth and Reconciliation Commission

- Local-government zoning decisions can impact the delivery of culturally appropriate health care for Indigenous people. Local governments have the jurisdiction to approve rezoning applications for the development of supportive housing, which includes culturally appropriate healing and wellness services. These types of decisions by local governments and the correlated public engagements should give special attention to the unique needs of Indigenous people.[259]
- The UN Declaration affirms the right of Indigenous peoples to improve their economic and social conditions without discrimination, including in the areas of education, employment, vocational training and retraining, housing, sanitation, health, and social security.[260] Through their authority over zoning decisions, local governments exercise considerable power over the economic and social conditions of urban Indigenous people. The UN Declaration requires state governments to "take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions," with particularly attention to "the rights and special needs of indigenous elders, women, youth, children and persons with disabilities."[261]

Issue for Reform: Should BC legislation on local-land-use bylaws specify procedural requirements for public engagement and public hearings?

Brief statement of the issue

Legislation on public hearings is focused on select aspects around timing of the hearing and notice requirements. The procedures for how public hearings are conducted have largely been shaped with a view to ensuring compliance with the courts' view of them as serving a quasi-judicial function subject to standards of procedural fairness. Criticism of public hearings has pointed to the failure of the process to create inclusive spaces for all interested persons to learn and share input. On the contrary, public hearings and their procedures are noted as being well suited to empowering a small segment of the public.

of Canada, *supra* note 37 at 4.

259. See Women Transforming Cities, *supra* note 254 at 36–38.

260. See UN Declaration, *supra* note 20, art 21 (1).

261. *Ibid*, art 21 (2).

This has led to developers and local governments leading alternative forms of public engagement. However, the scope and benefit to the general public of these other forms of engagement in the current legislative framework depend upon the individuals in roles where they can lead these engagements.

Discussion of options for reform

One option to address this issue would be to amend legislation to expressly provide procedural requirements for public hearings and public engagement. A downside to this approach would be that local governments who are working collaboratively with First Nation governments to co-plan and co-develop engagement strategies could lose the flexibility to devise engagements as part of their intergovernmental relationships.

Another approach would be to amend BC's legislation to clarify the expectations of local governments to work with First Nations as rights and title holders on co-planning, including in creating opportunities for engagement and dialogue with members of the public.

The advantage to this option is that it could help clarify for local governments some of their obligations as state governments under the UN Declaration. Additionally, by allowing for flexibility in public-hearing or public-engagement procedures, the procedures can be adapted at a local level to include local Indigenous approaches to engagement and better meet the needs of the community.

This approach could be further supported by some of the options discussed in chapter 4.[262] For example, if legislation were amended to require local governments to have a principles-based public-engagement policy, the legislation could further specify a requirement to co-develop the policy in consultation and cooperation with First Nations rights and title holders whose territories are impacted by the local government's exercise of jurisdiction.

Such an amendment may need to be crafted in such a way as to ensure that local governments in working with First Nations meet First Nations where they are at and are able to find innovative and accommodating ways to do so. In terms of intergovernmental co-planning and working towards free, prior, and informed consent, BCLI heard from participants in the Reconciliation Listening Series that capacity support for First Nations is essential, as are frameworks for supporting an ongoing relation-

262. See, above, at 62–67.

ship as opposed to point-in-time information dumps and correlated requests for input on short timelines.

BCLI also heard from Reconciliation Listening Series participants of the need for these frameworks to be well supported in legislation so that they are not dependent upon the will of individuals in leadership roles.

Summary of options

- *BC legislation on local-land-use bylaws should be amended to clarify the obligations of local governments to work collaboratively with First Nations governments in developing procedures for public engagement and public hearings, where required.*
- *BC legislation on local-land-use bylaws should be amended to set out procedural requirements for public hearings.*
- *BC legislation on local-land-use bylaws should be amended to provide local governments with a general authorization to set the procedure for public hearings as they see appropriate.*
- *BC legislation on local-land-use bylaws should not be amended to set out procedural requirements for public hearings.*

Chapter 7. Conclusion

This consultation paper has sought readers' responses to a series of issues for reforming BC's legislation on public hearings on land-use bylaws. Each of these issues has been presented to readers with a set of options for reform. These options gauge readers' views both on concrete proposals for reforming BC's legislation and on big-picture questions such as whether the law should be fine-tuned or fundamentally reformed by moving in the direction of principles-based public engagement that deemphasizes the role of the public hearing.

The first and second chapters of this consultation paper were dedicated to setting out foundational information on BC's current law. Chapter one introduced the public hearing by situating it within BC's legal framework for local regulation of land use, distinguished the public hearing from the broader category of public engagement, and discussed the Renovate the Public Hearing Project and its goals. Chapter two set out important information on the UN Declaration,[263] BC's *Declaration Act*,[264] and the framework for this project's recommendations for reform.

The consultation paper began its consideration of issues for reform in chapter three. After discussing the purposes of public hearings and calls for their reform, this chapter set out options for reform on the principles of public engagement. It then asked readers to consider when local governments may be allowed not to hold a public hearing.

Chapter four considered other forms of public engagement. The chapter discussed a wide range of specific forms of public engagement. It then canvassed readers on options for reforming BC legislation to accommodate forms of public engagement other than public hearings.

Chapter five set out a range of options on a specific issue. There have long been concerns that the public hearing comes too late in the process to allow the public to have a meaningful effect on local governments' consideration of land-use bylaws. This chapter presented a range of options for the timing of public engagement.

Chapter six considered the procedural requirements for public hearings and public engagement. It asked readers to consider ways of making public hearings and public engagement more inclusive, particularly for Indigenous peoples and other people

263. See *supra* note 20.

264. See *supra* note 22.

highly impacted by local government land-use bylaws and zoning decisions whose voices are often excluded from public hearings.

BCLI and the Renovate the Public Hearing Project Committee strongly encourage the public to consider the options for reform set out in this consultation paper and to provide a response. Responses are important for helping the committee move to the next stage in this project, which involves crafting final recommendations for reform of the law.

APPENDIX A

List of Options for Reform

This is a list of all the issues for reform and each option for reform canvassed for each issue, set out above in the consultation paper. The numbers in parentheses represent the pages where a given issue and its options are discussed.

Should BC legislation on public engagement on local-land-use bylaws contain a list of principles?

- *BC's legislation on public engagement on land-use bylaws should be based on the following principles: (a) transparency; (b) accountability; (c) inclusivity; (d) equity; (e) reconciliation; and (f) proportionality.*
- *BC's legislation on public engagement on land-use bylaws should be based on the following principles: . . .* [readers may fill in their own list of principles in the comments section].
- *BC's legislation on public engagement on land-use bylaws should continue not to include a list of principles.* **(45–47)**

When should the public hearing not be held?

- *An amendment to BC legislation should enable principle-based public disclosure and engagement processes for amendments to local-land-use bylaws, that when used by local governments would not require public hearings.*
- *BC's legislation on public engagement on land-use bylaws should allow local governments not to hold a public hearing when the following conditions are met: . . .* [readers may fill in their own list of principles in the comments section].
- *BC's legislation on public engagement on land-use bylaws should continue to only allow local governments not to hold a public hearing when (a) the proposed bylaw at issue is a zoning bylaw; (b) there is an official community plan in effect for the area that is the subject of the zoning bylaw; and (c) the zoning bylaw is consistent with that official community plan.* **(51–53)**

Should BC legislation be amended to enable other forms of public engagement on local land-use bylaws?

- *BC legislation on local-land-use bylaws should be amended to require local governments to have a principles-based public-engagement policy.*
- *BC legislation on local-land-use bylaws should be amended to require local governments to develop a principles-based public-engagement policy in consultation and cooperation with First Nations rights and title holders.*
- *BC legislation on local-land-use bylaws should be amended to require local governments to have a public-engagement policy, the content of which to be determined by the local government.*
- *BC legislation on local-land-use bylaws should be amended to require local governments to use the following forms of public engagement in addition to the public hearing: . . .* [readers may fill in their own selections of forms of public engagement in the comments section].
- *BC legislation on local-land-use bylaws should be amended to provide local governments with a general authorization to use forms of public engagement other than public hearings.*
- *BC legislation on local-land-use bylaws should not be amended to deal with forms of public engagement other than the public hearing.* **(62–67)**

Should legislation determine the timing of public disclosure and engagement processes for land-use bylaws?

- *Proposed BC legislation on public disclosure and engagement processes for local-land-use bylaws should provide that these processes may be carried out at any time determined by the local government.*
- *Proposed BC legislation on public disclosure and engagement processes for local-land-use bylaws should be silent on the timing of these processes.*
- *Proposed BC legislation on public disclosure and engagement processes for local-land-use bylaws should require that these processes must be held . . .* [readers may set out a specific time frame in the space for comment]. **(72–74)**

Should the public hearing come earlier in the process to adopt a land-use bylaw?

- *BC legislation on public hearings for local-land-use bylaws should be amended to provide that the public hearing may be held at any time determined by the local government.*

- *BC legislation on public hearings for local-land-use bylaws should be amended to require that the public hearing must be held . . .* [readers may set out a specific time frame in the space for comments].
- *BC legislation on public hearings for local-land-use bylaws should continue to provide that the public hearing must be held after first reading of the bylaw and before third reading.* **(74–77)**

Should BC legislation on local-land-use bylaws specify procedural requirements for public engagements and hearings?

- *BC legislation on local-land-use bylaws should be amended to clarify the obligations of local governments to work collaboratively with First Nations governments in developing procedures for public engagement and public hearings, where required.*
- *BC legislation on local-land-use bylaws should be amended to set out procedural requirements for public hearings.*
- *BC legislation on local-land-use bylaws should be amended to provide local governments with a general authorization to set the procedure for public hearings as they see appropriate.*
- *BC legislation on local-land-use bylaws should not be amended to set out procedural requirements for public hearings.* **(86–88)**

APPENDIX B

Biographies of Project-Committee Members

Bruce Woolley, KC (committee chair), has had a long career practising primarily in real-estate matters. He has worked as in-house counsel for organizations such as Expo 86, Cominco, BC Enterprise Corporation, and the Bank of Bermuda. He has spent many years in private practice, working with Clark Wilson, Stikeman Elliott, and now as a sole practitioner. His private practice included advising the provincial government on the four modern treaties for First Nations and acting for the Real Estate Council of BC. He is a past bencher of the Law Society of BC and was an active participant in CLE and the Canadian Bar Association. In addition to his practice, he has taught extensively in the real-estate industry and also in the Law Faculty at UBC.

Merle C. Alexander, KC, is a "life of project" lawyer at Miller Titerle + Company assisting with negotiations of all stages of impact benefit agreements, joint ventures, regulatory engagement, traditional knowledge collection, and other corporate and tax-related advice. He is continuously engaged in legal support for emerging government-to-government negotiations in all resource areas, including mining, oil and gas, forestry, pipelines, run-of-river, and hydro projects. As a member of the co-development team for the *Declaration on the Rights of Indigenous Peoples Act* in BC, a major component of Merle's practice currently involves the ongoing legislative implementation of UNDRIP in BC. Merle is continuously adapting his solicitor experience and skill set to the emerging and developing needs of Indigenous clients.

Merle was recognized in 2021 and 2022 by Business in Vancouver's BC500, the 500 most influential business leaders in BC, as a Leader in Law; Kings Counsel in 2020; received a UVic Distinguished Alumni Award in 2018 and Top 40 under 40 in 2009. He holds a Bachelor of Arts and Bachelor of Laws from the University of Victoria.

Nathalie Baker is a litigator practising primarily in the area of municipal law, with a particular interest in land use and planning matters. She represents landowners, developers, citizens groups, and business owners on a wide range of municipal issues arising under the *Local Government Act*, the *Community Charter*, and the *Vancouver Charter*. Nathalie also acts for members of municipal councils and regional boards on motions to censure and allegations of conflict of interest or misconduct.

Nathalie has represented clients in the Provincial Court of British Columbia on by-law prosecution matters, in the Supreme Court of British Columbia on applications for judicial review and in the Court of Appeal. She also appears regularly before administrative tribunals, including the Board of Variance.

Nathalie is a contributing author to the *B.C. Real Estate Development Practice Manual*.

Tyler Baker is the director of development for the interior region at BC Housing. BC Housing's development division partners with communities and stakeholders to deliver the Province's affordable housing mandate through new construction, renovation, and strategic acquisitions. Tyler previously worked at Toronto Community Housing, where he managed the redevelopment of several inner-city neighborhoods into mixed-income, mixed-use districts. Tyler's background is in urban planning and urban design and he has worked as a consultant in many communities across Canada and the Caribbean.

Alyssa Bradley is a partner with the law firm Young Anderson in Vancouver. She practises in the areas of municipal and administrative law. She is a solicitor as well as a litigator and has appeared in all levels of court in BC for local governments. Her focus is on defending local government decisions on judicial review as well as enforcing local government bylaws.

Alyssa has been a guest lecturer at the UBC Faculty of Law in municipal law, the University of Victoria Faculty of Law in administrative law and the UBC School of Community and Regional Planning in planning and land use law. She also co-chairs the Planning and Development course for the Continuing Legal Education Society of BC and updates the chapter on Development Rights in the Continuing Legal Education Society's *Real Estate Development Practice Manual*.

Deborah Carlson is a staff lawyer at West Coast Environmental Law for the Green Communities Program. She works with communities in British Columbia to support land and water management that maintains and restores healthy connections to nature, including ecosystem-based measures to adapt to climate change. The work involves understanding regulatory gaps and limitations in existing Canadian law, and supporting new approaches to policy and management at landscape scales, with full recognition and respect for Indigenous laws and authority, and constitutionally protected title and rights. Deborah has civil and common law degrees from McGill University and was called to the B.C. Bar in 1997.

Michael Drummond is a public policy and management professional with a proven track record of providing strategic counsel to governments, corporations, and not-

for-profit organizations. He currently serves as Vice President, Corporate & Public Affairs at the Urban Development Institute (UDI).

With more than 900 corporate members UDI represents thousands of individuals involved in all facets of land development and planning, including developers, planners, architects, financial lenders, lawyers, engineers, property managers, appraisers, brokers, local governments, and government agencies. Michael leads the organization's communications, stakeholder relations, government affairs, and strategic planning functions.

Prior to his work at UDI, Michael has served in senior roles in the Government of Canada as a political advisor in Ottawa, and most recently as a partner at one of Canada's leading full-service public affairs consultancies.

Janae Enns is a Registered Professional Planner, Member of the Canadian Institute of Planners, and a lawyer at Lidstone & Company. Janae graduated from Thompson Rivers University as the recipient of the Law Society of British Columbia Gold Medal. She holds a bachelor's degree in geography with a concentration in planning and a master's degree in community planning. Janae has spent several years working in local government in planning and economic development. In her roles, she has worked on a variety of economic strategies, organized, and facilitated community engagement initiatives, provided technical planning advice, and processed land-use applications. As a lawyer at Lidstone & Company, Janae assists local government clients on a wide range of planning, development, and land-use matters. Her work includes drafting bylaws and legal agreements, and providing support through development approval processes.

Arielle Guetta is a Senior Planning Analyst in the Governance and Structure Branch of the Ministry of Municipal Affairs. She has been with the Branch since 2013 and prior to that completed a Master's in Public Administration through the University of Victoria. She also holds a Local Government Administration Certificate from Capilano University. In her time with the Ministry of Municipal Affairs she has had the opportunity to work on a variety of local government issues and legislative amendments including modernizing the public notice provisions in the *Community Charter*.

Ashley Murphey, RPP, MICP, is a Registered Professional Planner, Member of the Canadian Institute of Planners, and works as the Planning Services Manager for the Peace River Regional District. She is currently the Chair of the Central North Chapter of the Planning Institute of BC and enjoys helping to connect planners throughout northern BC through various social and learning activities. Ashley holds a certificate in IAP2 Public Participation and enjoys engaging with community members on various topics related to planning and land use. She recognizes the challenges involved

with working in rural and remote areas and that innovative solutions are often needed to ensure that members of the public are able to participate effectively in public processes.

Originally from the Lower Mainland, she obtained her planning degree from UNBC, where she discovered her love for the northern and rural lifestyle. Ashley and her spouse live on a farm outside of Fort St. John where they produce hay, raise chickens, grow a large volume of vegetables and fruits, and have several horses. Ashley is passionate about food security in the north and works to support agriculture through her role as a planner and a farmer.

In addition to her busy work and farm life, Ashley is actively involved in the community and was the Volunteer Coordinator for the Marketing Directorate of the 2020 BC Winter Games in Fort St. John. She has previously participated in the City's annual homeless counts and is always looking to find innovative ways that planners can create inclusive public processes. Currently, she is looking forward to a new role as a volunteer for the Spark Women's Leadership Conference, hosted annually in Fort St. John.

Eric Nicholls is a Director of Planning and Land Use at BC's Ministry of Housing. Eric has been working on various aspects of the local government planning and land use framework for nearly 10 years, with responsibilities including developing and implementing legislation (related to rental zoning, housing needs reports and most recently, public hearings), overseeing the framework for regional growth strategies, reviewing local bylaws, and developing funding programs to support local governments. Currently Eric is leading elements of the province's Development Approvals Process Review (DAPR) initiative. Eric previously worked on urban transportation and other policy issues for the federal government. He holds a BA in Political Science with International Relations (UBC), and an MPhil in International Studies (Cambridge), and has completed urban studies courses at SFU on planning, design, and transportation.

Edward Wilson is senior counsel with the Vancouver law firm Lawson Lundell LLP. Ed practises in the real estate and municipal law fields with a specialty in real estate development. Working closely with sellers, buyers, and developers, Ed is a trusted advisor in connection with property and development projects spanning a wide variety of commercial, residential, industrial, resort, and financing matters. Ed also provides advice on environmental matters in connection with real property. He often assists clients on rezonings and project approval processes including advising on the public hearings.

Ed is a Director of the BC Law Institute and was a member of BCLI's Strata Property Law (Phase Two) Project Committee

Dr. Jennifer Wolowic is a cultural anthropologist and ethnographer with over 15 years of experience working with diverse groups, including visible minorities, First Nations, LGBTQ, and youth. For 2.5 years, she co-led the Simon Fraser University Morris J. Wosk Centre for Dialogue's Strengthening Canadian Democracy Initiative and was the founding lead of the Renovate the Public Hearing Project. She's written opinion pieces on public hearings and their challenges, interviewed dozens of stakeholders on the topic and helped shape the activities of the overall reform project. She is now the Principal Lead of the Aberystwyth University Dialogue Centre and responsible for bringing her experience in Vancouver to Wales and creating collaborative knowledge exchange opportunities to make a positive impact in the real world.

Tom Zworski is the City Solicitor for the City of Victoria and provides advice on all aspects of municipal law and legal issues involving City of Victoria, including administrative, constitutional, construction, general litigation, and zoning and development-law matters. He has appeared before all levels of BC courts and the Supreme Court of Canada, as well as various administrative boards and tribunals. He is also an Adjunct Professor at UVic Law School where he teaches municipal law. He is a frequent speaker at local and national conferences and continuing legal education programs in BC and Ontario.

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- Real Estate Foundation of British Columbia
- Simon Fraser University
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