REPORT ON

RENOVATING THE PUBLIC HEARING

BRITISH COLUMBIA LAW INSTITUTE

MARCH 2025

Report on Renovating the Public Hearing

A Report Prepared for the British Columbia Law Institute by the Members of the Renovate the Public Hearing Project Committee

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- 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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Introductory Note

Report on Renovating the Public Hearing

Public hearings give people a forum in which to express their views on proposed changes to local land use. For about 100 years, public hearings have been a part of BC legislation that creates a legal framework for local governments. Within this framework local governments can exercise their decision-making authority on regulating land use.

For most of this 100 years public hearings have enjoyed a favourable reputation. They've been seen as a unique aspect of local-government law, which enhanced local governments' land-use decisions through direct contact with their citizens' views.

But recently people have expressed discontent with the public hearing. Critics have said that public hearings don't really put local governments in touch with a broadly representative range of local opinion. Responding in part to these criticisms, British Columbia enacted legislation in late 2023 to restrict the use of public hearings. Yet public hearings remain the only form of public engagement that BC legislation requires for land-use changes.

This report contains eight recommendations for reforming this legal framework. These recommendations tackle the scope of the legislative requirement to hold a public hearing by considering when a public hearing should and should not be held, the encouragement of local governments to consider other forms of public engagement through principles-based guidance from the provincial government, and the maintenance of current legislation on timing of and procedures for public hearings.

On behalf of the board of directors of the British Columbia Law Institute, I want to thank the members of the project committee for their dedication to this project and their thorough work on this report. BCLI fully supports the committee's recommendations and endorses this report.

Edward L. Wilson
Chair,
British Columbia Law Institute
March 2025

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 are set out in the project's final report.

The members of the committee are:

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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/

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The British Columbia Law Institute thanks the members of the Renovate the Public Hearing Project Committee, without whose ongoing dedication this project would not have been possible. Committee members have generously shared their time and expertise over the course of the project. A special thanks is due to Bruce D. Woolley, KC, who took on the added responsibilities of serving as the committee's chair.

BCLI also thanks everyone who participated in the public consultation that preceded this report. Their responses and comments greatly helped the committee in shaping and evaluating the final recommendations contained in this report.

BCLI thanks participants in the project's Reconciliation and Community Listening Series.

The Renovate the Public Hearing Project has been made possible by support from the Simon Fraser University Morris J. Wosk Centre for Dialogue and the Canada Mortgage and Housing Corporation, which BCLI thanks for its generous contribution to the project.

EXECUTIVE SUMMARY

The subject of the report

This report is about how local governments engage the public on the regulation of land use. The report's impetus is found in concerns about the one mode of engagement required by legislation: the public hearing. The report examines a range of options from improving the public hearing to replacing it with other forms of public engagement and sets out eight recommendations for reforming the law.

In British Columbia, local governments are empowered to regulate land use, which they mainly do by adopting or changing a land-use bylaw. But local governments must operate within a legislative framework set up by the province of British Columbia. An important part of this framework is the requirement to hold a public hearing.

Public hearings are designed to give people a forum in which to express their views directly to the local government on a proposed land-use 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.

These criticisms were given added force in late 2023, when BC enacted legislation restricting local governments from holding public hearings. While the legislation didn't eliminate the public hearing entirely, it did prohibit local governments from holding a public hearing on certain types of bylaws (primarily those consistent with a broader land-use plan or with legislative goals regarding new residential housing).

While the 2023 legislation gave a practical but limited answer to concerns about public hearings in some cases, it left open fundamental questions about the role public engagement should play in the process of adopting a land-use bylaw. Can the public hearing be reformed to provide a more effective forum for public input? Should local governments be allowed more flexibility to choose the types and timing of

public engagement? What is the best way to engage the public on land-use bylaws? This report charts a path for government in answering these and related questions.

Ultimately, the recommendations set out in this report do not favour significant legislative reforms to the provisions related to public hearings themselves. However, opportunities for reform at earlier stages of local-government decision making are identified, particularly with a view to strengthening relationships with First Nations. In addition, the report identifies some opportunities for non-legislative guidance and resources for local governments to support public engagement.

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 was to recommend reforms to the public-hearing provisions in the *Local Government Act* and the *Vancouver Charter*. These recommendations—found in this report—have been informed by comparative research and public consultation.

A major component of this project involved considering reforms to the law that may advance alignment with Indigenous governance, as called for under BC's *Declaration on the Rights of Indigenous Peoples Act*. The project identified 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 was designed to support a Reconciliation and Community Listening Exploration Series, which allowed 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 formed the Renovate the Public Hearing Project Committee. The committee's primary task was to assist BCLI in developing recommendations for reform of the law. It was made up of experts in local-government law, land use and planning, and public engagement.

BCLI carried out this project in conjunction with the Simon Fraser University Morris J. Wosk Centre for Dialogue. Over the course of the project, the SFU Wosk Centre engaged with impacted groups in a variety of ways, including through interviews, workshops, and events. The committee took findings from the SFU Wosk Centre's project into account in developing recommendations.

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

Content of the report

The organization of the report

The majority of the report'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, proceed to examine a range of options for reform to address these issues, and conclude with a recommendation for reform.

The report opens with four chapters setting out introductory and foundational information for the chapters that follow.

Introduction and report overview

The introductory chapter explains why BCLI has tackled 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 report.

What we heard in the public consultation

In December 2023, BCLI published the *Consultation Paper on Renovating the Public Hearing*, which initiated a public-consultation period that ran until 31 March 2024. This chapter describes events and activities during the consultation period. It also examines the responses that BCLI received to its 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.

The legislative requirement to hold a public hearing

This chapter provides an overview of BC's legislation on holding a public hearing. It briefly describes the development of the legislation from its beginnings to the recent changes enacted in 2023.

Should BC legislation on local regulation of land use continue to require a public hearing?

The report's fifth chapter marks a shift from providing background information to tackling issues for reform. It considers the fundamental issue of whether the public hearing should continue to be required when a local government adopts a land-use bylaw.

The project committee addressed this issue by examining three questions about the scope of the legislative requirement. The committee unanimously agreed that legislation shouldn't be adopted to require a public hearing on *all* land-use bylaws. But it was divided on the next two questions, which probed how to define the remaining scope of the legislation.

A majority of the committee recommended that legislation continue to require public hearings and that it not prohibit local governments from choosing to hold a public hearing. A minority of committee members were open to removing the legislative requirement and to prohibiting public hearings in certain, defined circumstances.

Forms of public engagement other than the public hearing

There are many ways for local governments to engage the public over land use. This chapter describes some of these public-engagement tools. It concludes by considering whether any specific forms of public engagement should be given express recognition in BC legislation. The committee recommended not introducing any new legislative requirements for public engagement.

Principles of public engagement and principles-based guidance

This chapter examines issues related to provincial oversight of local governments' regulation of land use. Currently, BC legislation takes a highly directive approach, mandating when and how a specific type of public engagement (the public hearing) is used. This chapter considers whether a shift to principles-based regulation would be a better approach to public engagement on land-use bylaws and, if so, what principles should be used.

The committee recommended that the provincial government draw on the concept of principles-based regulation in formulating policies and guidance for local governments on how to engage with the public on land-use bylaws under the new legislative framework for public hearings adopted in 2023.

Timing of public hearings

This chapter considers the narrow issue of when the public hearing 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, which the committee considered but ultimately recommended no legislative change to the timing of public hearings.

Procedural issues for public hearings

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.

The committee considered these options but decided not to recommend that new legislation be enacted to implement additional procedural requirements for public hearings.

Conclusion

The report ends with a brief concluding chapter, which sums up the report's discussion of issues and options, and reviews its recommendations for reform.

Chapter 1. Introduction and Report Overview

An Overview of this Report's Subject

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

This report takes a close look at 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 report takes. Instead, this report 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 report because they're outside the area of expertise for the British Columbia Law Institute. This report's focus is on the law and land use. That's the first step in narrowing the focus of inquiry.

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

1. H. Epstein, *Land-use Planning* (Irwin Law, 2017) at p 37 (quoting H.-L. Leung, *Land Use Planning Made Plain*, 2nd ed (University of Toronto Press, 2003) at p 2).

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 report has narrowed the field of inquiry. The report has very little to say about the federal role in regulating land use. While this report does discuss court decisions, they are considered in a supporting role.

The primary aim of this report 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 and territories 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*.

BC's legislation on land use and planning 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 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

2. Epstein at p 304 ("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.").

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

4. *Local Government Act*, RSBC 2015, c 1.

5. *Vancouver Charter*, SBC 1953, c 55.

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 report arrives at its subject.

While this legal framework collectively and each of the items within it make for valid and important areas of study, BCLI has limited the scope of this report 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 report's subject is reforming provincial legislation that calls for a public hearing when 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 report 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 report 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]

- **They are legislated as 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

6. W. Buholzer, *British Columbia Planning Law and Practice* (LexisNexis Canada, 2001) (loose-leaf updated March 2024, release 65) at vol 1, s 1.99.

7. *Local Government Act* at ss 464-470; *Vancouver Charter* at ss 559.02-559.07 (enacted by *Vancouver Charter Amendment Act (No 2), 2024*, SBC 2024, c 12 at s 5; in force 25 April 2024).

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) https://www.bcli.org/publication/13-study-paper-on-public-hearings/ (archived at https://archive.ph/0z6wL) at pp 21-50.

development plans for a city, town, village, or regional district) and (with exceptions)[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 have made 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 information 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

9. See, below, at pp 39-42 (discussion of scope of public-hearings legislation before and after amendments passed in 2023).

10. But see *Local Government Act* at ss 475-476 (references to holding "public consultations" in connection with official community plans); *Vancouver Charter* at s 562.08 (parallel provisions for City of Vancouver—not in force). See also, below, at p 66 (further discussion of public consultations as a form of public engagement on an official community plan).

11. *Local Government Act* at ss 465–468, 470. See also *Vancouver Charter* at ss 559.03-559.07.

12. *Local Government Act* at s 465 (1).

13. *Local Government Act* at s 466 (2); *Vancouver Charter* at s 559.04 (2).

14. *Local Government Act* at s 470; *Vancouver Charter* at s 559.07.

15. *Community Association of New Yaletown v Vancouver (City),* 2015 BCCA 227 at para 153, leave to appeal to SCC refused 2015 CanLII 69439, [2015] 3 SCR vi, Bauman CJ.

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

16. S.R. Arnstein, "A Ladder of Citizenship Participation" (1969) 35:4 *Journal of the American Planning Association* at p 216. See also, below at pp 42-49 (for a more detailed discussion of the goals and purposes of public hearings).

17. British Columbia, Ministry of Municipal Affairs, *Development Approvals Process Review: Final Report from a Province-Wide Consultation* (September 2019) [*DAPR Report*] at pp 14-15, https://www2.gov.bc.ca//assets/gov/british-columbians-our-governments/local-governments/planning-land-use/dapr_2019_report.pdf (archived at https://archive.ph/1isSD) at pp 14-15 [*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) https://engage.gov.bc.ca/app/uploads/sites/121/2021/06/Opening-Doors_BC-Expert-Panel_Final-Report_Jun16.pdf (archived at https://archive.ph/kD3KJ) at p 60 [*Opening Doors Report*].

18. *DAPR Report* at p 24; *Opening Doors Report* at p 26. See also, below, at pp 51-55 (for a more detailed discussion of criticisms of public hearings).

A further development occurred during the life of this project which gave added force to this criticism. In November 2023, the BC government introduced a series of bills in the legislative assembly designed to implement recommendations from these two reports, encourage residential development, and alleviate the crisis in housing affordability that has developed in BC.[19] These bills brought in major changes to local regulation of land use. Among the changes were provisions that addressed some of the concerns about public hearings by prohibiting local governments from holding a public hearing on zoning bylaws concerning residential developments that were consistent with the locality's official community plan or other legislative goals.[20]

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.[21] This list of institutions included First Nations and other Indigenous governing institutions. But their role has differed from that of state governments (federal, provincial, local) 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 100 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.

19. Bill 44, *Housing Statutes (Residential Development) Amendment Act, 2023*, 4th Sess, 42nd Parl, British Columbia, 2023; Bill 46, *Housing Statutes (Development Financing) Amendment Act, 2023*, 4th Sess, 42nd Parl, British Columbia, 2023; Bill 47, *Housing Statutes (Transit-Oriented Areas) Amendment Act, 2023*, 4th Sess, 42nd Parl, British Columbia, 2023.

20. *Housing Statutes (Residential Development) Amendment Act, 2023*, SBC 2023, c 45 [*2023 Act*] at ss 5–8 (amending part 14, division 3 of the *Local Government Act*), 36 (amending s 566 of the *Vancouver Charter*), 37 (adding s 566.1 to the *Vancouver Charter*). (Note that these provisions of the *Vancouver Charter* were subsequently replaced by ss 559.02-559.07, as enacted by *Vancouver Charter Amendment Act (No 2), 2024*). See also, below, at pp 40-42 (further discussion of the *2023 Act*'s implications for public hearings).

21. See, above, at pp 1-2.

This change is due to the United Nations Declaration on the Rights of Indigenous Peoples.[22] After initial opposition, Canada reversed its position and in 2010 announced that it formally endorsed the UN Declaration.[23]

In 2019, BC implemented the UN Declaration by passing the *Declaration on the Rights of Indigenous Peoples Act*.[24] The *Declaration Act* commits the government of British Columbia, "[i]n consultation and cooperation with the Indigenous peoples in British Columbia," to "take all measures necessary to ensure that the laws of British Columbia are consistent with the Declaration."[25]

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 project on public hearings?

BCLI began this law-reform 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 report.

First, this report 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.

22. United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR 61st Sess, UN Doc A/61/295 (2007).

23. Indian and Northern Affairs Canada, News Release, 2-3429, "Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010) https://www.canada.ca/en/news/archive/2010/11/canada-endorses-united-nations-declaration-rights-indigenous-peoples.html (archived at https://archive.ph/ftV5B); Canada, "Archived—Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010) https://rcaanc-cirnac.gc.ca/eng/1309374239861/1621701138904 (archived at https://archive.ph/0ybor).

24. *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*Declaration Act*].

25. *Declaration Act* at s 3.

Second, this report 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*.

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 report 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*[26] and the equivalent provisions of the *Vancouver Charter*[27] and publish a report recommending changes to reform the law of

26. *Local Government Act* at ss 464-470 (entitled "Public Hearings on Planning and Land Use By-laws").

27. *Vancouver Charter* at ss 559.02-559.07 (entitled "Public Hearings and Procedures for Planning and Development").

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.[28]

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

Reconciliation and Indigenous Community Listening Series

An important component of the project was 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*, which requires that all Crown legislation be aligned to be consistent with the UN Declaration. BCLI's project has identified 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 has carried out this project in conjunction with the Simon Fraser University Morris J. Wosk Centre for Dialogue. Over the course of the project, the SFU Wosk Centre engaged 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.)[29] This engagement had a particular focus on populations that are in greatest need of housing or that face barriers to achieving affordable housing supply

28. For a list of committee members and their biographies see, below, Appendix B at pp 111-115.

29. 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) https://www.renovatethepublichearing.ca/_files/ugd/f79cdf_9f44e1ad2d214539b4fe0f1f77caaa86.pdf (archived at https://archive.ph/ztOWT).

due to public hearings pre-development approval processes. The SFU Wosk Centre has shared findings and results from its engagement with the BCLI project committee, to help inform its deliberations.[30]

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.[31]

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.

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 was 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.

30. For more information see Simon Fraser University, Morris J. Wosk Centre for Dialogue, "Renovate the Public Hearing" (n.d.) https://www.renovatethepublichearing.ca/ (accessed 23 July 2024, archived at https://archive.ph/NX1ed).

31. Canada Mortgage and Housing Corporation, "Housing Supply Challenge" (August 2021) https://www.cmhc-schl.gc.ca/professionals/project-funding-and-mortgage-financing/funding-programs/all-funding-programs/housing-supply-challenge (archived at https://archive.ph/TshSW).

A public consultation was held in the winter of 2023–2024. There is further discussion of the public consultation in chapter 2.[32]

The project committee reconvened at the end of the consultation period. It reviewed consultation results over the spring and summer of 2024 and developed recommendations for reform of the law in the fall and winter of 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.[33]

All this Canadian legislation is broadly similar.[34] 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.[35] This legislation will be discussed in more detail later in this report, because it is a source of options for reforming the law in BC.

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32. See, below at pp 15-22.

33. Alberta: *Municipal Government Act*, RSA 2000, c M-26 at s 216.4; Saskatchewan: *The Planning and Development Act, 2007*, SS 2007, c P-13.2 at ss 206–212; Manitoba: *The Planning Act*, CCSM c P80 at ss 16 (3), 44 (1) (a), 46, 74, 96, 105, 144, 168 (2), 170 (1); Ontario: *Planning Act*, RSO 1990, c P.13 at ss 17 (15)–(23.2), 34 (12)–(14.6); Quebec: *An Act respecting land use planning and development*, CQLR c A-19.1 at ss 123–127; New Brunswick: *Community Planning Act*, SNB 2017, c 19 at ss 25–26, 111; Prince Edward Island: *Planning Act*, RSPEI 1988, c P-8 at ss 11 (2), 18; Nova Scotia: *Municipal Government Act*, SNS 1998, c 18 at ss 205 (3)–(7), 206, 210 (2); Newfoundland and Labrador: *Urban and Rural Planning Act, 2000*, SNL 2000, c U-8 at ss 17–23; Yukon: *Municipal Act*, RSY 2002, c 154 at ss 280–281, 294–296; Northwest Territories: *Charter Communities Act*, SNWT 2003, c 22, Schedule A at s 133; *Cities, Towns and Villages Act*, SNWT 2003, c 22, Schedule B at s 129; *Hamlets Act*, SNWT 2003, c 22, Schedule C at s 31; Nunavut: *Planning Act*, RSNWT (Nu) 1988, c P-7 at ss 24–25.

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

35. See e.g. Alberta: *Municipal Government Act* at s 216.1; *Public Participation Policy Regulation*, Alta Reg 193/2017; Quebec: *An Act respecting land use planning and development* at 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.

About the Report

An overview of this report's chapters

This report begins with a series of chapters on background information about the project, broader issues in land law, and the current legislation on public hearings.

Immediately following this introductory chapter is a chapter describing the public consultation that preceded this report. The chapter discusses outreach and events held during the consultation period and reviews the responses BCLI received.

The next chapter gives readers foundational information that's important for understanding this report. It reviews the UN Declaration and discusses how it provides a framework for this report's recommendations for reform.

Finally, this series of introductory chapters presenting background information ends with a close look at legislation on the public hearing. It consists of a review of what provisions BC legislation on this subject contains and discusses the reasons why such legislation has been enacted.

From the fifth chapter on, this report turns its attention to discussing issues for reform and setting out the committee's recommendations for reform. These recommendations touch on fundamental issues concerning: the continued existence of public-hearings legislation; whether other forms of public engagement should be enshrined in local-land-use legislation; using principles to develop guidance for local governments on public engagement; the timing of public hearings; and procedural issues for public hearings.

What is this report's general approach?

These chapters considering issues for reform settle into a consistent pattern. Their general approach 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 Government Act*.[36] Along with this act, there are parallel sections in the *Vancouver Charter* that apply just to the City of Vancouver.[37]

36. *Local Government Act* at ss 464–470.

37. *Vancouver Charter* at ss 559.02-559.07.

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, the discussion wraps up with the committee's recommendation for reform, which is set out in each case after an explanation of the committee's reasons for settling on the recommendation.

Chapter 2. What We Heard in the Public Consultation

Structure of the Public Consultation

Overview of the consultation paper and consultation activities

BCLI published its *Consultation Paper on Renovating the Public Hearing* in December 2023.[38] The consultation paper presented key learnings to date and options for reform to address legal and social issues identified in those key learnings. Public input was invited on the consultation paper over a three-month period.

The consultation paper provided readers with information about the impetus behind reviewing this area of the law, BCLI's research on public hearings and public engagement, and set out a variety of options for reforming the legislation. In addition to the consultation paper, information about key learnings and options for reform was also shared through community presentations, a short video on BCLI's website, and an accessible, short-form pamphlet.

Public feedback was invited by way of written submissions, survey responses, and in the context of community forums and one-on-one discussions.

Public consultation events

BCLI staff participated in community events over the consultation period to share key learnings and receive feedback from participants. This included attendance at a National Dialogue on Public Hearings hosted by our project partner, SFU Wosk Centre for Dialogue, held on 26 January 2024. It also included attendance at the BC Local Government Leadership Academy 2024 annual forum held on 31 January and 1 February 2024. At both events, information about the consultation paper and opportunities for providing input were shared with participants.

BCLI partnered with the Canadian Bar Association—BC Branch (CBABC) and Women Transforming Cities to share information about the consultation paper with their members and to hold two virtual presentations. CBABC is a legal professional association with more than 8000 members in BC. Women Transforming Cities, an

38. British Columbia Law Institute, *Consultation Paper on Renovating the Public Hearing* (December 2023) https://bcli.org/wp-content/uploads/2023-12-19_BCLI-CP-on-Renovating-the-Public-Hearing.pdf (archived at https://archive.ph/nQWgk).

organization with approximately 150 members, works to build civic-engagement skills among individuals who have historically been excluded from civic processes, in part through public workshops and knowledge sharing. The workshops co-organized with CBABC and Women Transforming Cities each had approximately 40 participants.

Listening Series events

Throughout the public-consultation period, BCLI continued to reach out to Indigenous peoples to share insights on reform options and alignment with the UN Declaration.[39] BCLI also hosted a focus group for Indigenous peoples working at the intersection of First Nations governance and local government. This group workshop was an opportunity for participants to share feedback on the consultation paper, to offer perspectives and guidance on First Nations and local government working relationships, and to explore ways provincial legislation can support relationships between First Nations and local governments.

Overview of Input Received

Introduction and summary of consultation responses

In the context of community presentations, workshops, and focus groups, feedback was shared in general discussions and issue-specific breakout rooms by participants. This feedback was gathered by BCLI and reviewed in conjunction with responses received in writing. BCLI received 21 responses in writing, including 19 survey responses and two written submissions.

Feedback was organized around the six broad issues covered in the consultation paper. Some feedback was more general and presented further options for reform.

Feedback on issue 1: Should BC legislation on public engagement on local land-use bylaws contain a list of principles?

On the survey, there was an even split between respondents in favour of legislation based on principles and those who felt the legislation should not include a list of principles. There was feedback shared within survey responses and in workshop discussions that the principles were too vague and broad for people to feel comfortable with their inclusion in the legislation. There was concern expressed with the level of interpretation of the principles that would be left up to local governments. In

39. United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR 61st Sess, UN Doc A/61/295 (2007).

particular, the implementation of principes such as equity, inclusivity, and accountability without interpretive guidance created concerns for some participants.

Feedback on issue 2: When should the public hearing not be held?

Due to the timing of the release of the consultation paper, this issue was framed in relation to BC's previous legislation. In late 2023—just a couple of weeks before BCLI published its consultation paper—BC enacted major amendments to the legislative framework that applies to local land use and planning.[40]

While these amendments had a significant bearing on the issue posed in the consultation paper (which goes to the scope of legislation requiring public hearings on land-use bylaws), they appeared too late for the committee to take them into account in preparing the consultation paper. As a result, the consultation paper set out a range of options that related to the law as it stood just before the amendments were enacted.

Survey respondents largely favoured the option which would have maintained the status quo prior to the 2023 amendments being enacted. This option was framed as BC's legislation would allow local governments to not 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; and (c) the zoning bylaw is consistent with that official community plan.

Survey respondents shared concerns within their comments about the capacity of smaller and rural local governments to implement new procedures as well as their capacity to hold public hearings for every zoning amendment.

Within community workshops, some participants expressed concerns that the people who could potentially benefit from a development (i.e., future residents of a proposed development) are often not included at public hearings. As public hearings are not necessarily determinative of outcomes, concerns were also expressed that the presence or absence of public hearings would have no impact on decision making. Some participants shared that for reform to be impactful it may require a change to the structures and procedures so as to overvalue the interests of people most impacted by the decision.

40. *Housing Statutes (Residential Development) Amendment Act, 2023*, SBC 2023, c 45 [*2023 Act*]. See also, below, at pp 40-42 (further discussion of the *2023 Act* and its implications for public hearings).

In a detailed written submission, a question was raised about the continuing relevance of any policy that treats land-use bylaws differently from other classes of bylaws. Similar feedback was shared by a workshop participant. These comments challenged the rationale behind having differing levels of public engagement in relation to land-use bylaws versus other significant decisions such as municipal budget approvals. It was shared that continuing to characterize land-use bylaws as extraordinary in their impact on citizens—and warranting of more extensive public engagement than other classes of bylaws—perpetuates the obsolete rationale that land-use bylaws impinge upon the common-law right of landowners to use their land as they see fit.

Feedback on issue 3: Should BC legislation be amended to enable other forms of public engagement on local land-use bylaws?

Responses received in relation this issue were quite varied. However, a majority of survey respondents favoured options for reform which would support greater flexibility at the local level for employing other forms of public engagement. In comments, some participants suggested that greater guidance for local governments on when a public hearing is required and what other tools are available for engagement would be beneficial.

Feedback on issue 4: Should legislation determine the timing of public disclosure and engagement processes for land-use bylaws?

Responses on this issue were also quite varied. However, most survey respondents favoured an approach without prescribed times for public-engagement processes and where legislation is either silent as to timing or specifically enables local government to determine the timing of public-disclosure and engagement processes.

Feedback on issue 5: Should the public hearing come earlier in the process to adopt a land-use bylaw?

This issue was framed more narrowly than issue 4 and only looked at the timing of public hearings. Survey respondents strongly favoured the option of continuing to hold public hearings after the first reading of the bylaw and before the third reading. In the comments, it was noted that public hearings could continue to have these timing requirements while further engagements could be held at other times in the process.

Feedback on issue 6: Should BC legislation on local-land-use by laws specify procedural requirements for public engagements and hearings?

Reponses on this issue were quite divided. However, most responses did favour greater flexibility at the local-government level for establishing procedural requirements for public hearings either through legislative silence on procedural requirements or by way of a general authorization for local governments to establish procedures. It was noted in the comments that flexibility is needed to enable local governments to meet host First Nations where they are at. This feedback resonated with what we heard through the Listening Series as well.

Additional responses on public consultation

Some of the input received did not centre around the issues set out above. This feedback was primarily received in the form of two written submissions to the consultation paper.

One of these responses favoured a public-consultation process that is transparent, responsive to public input, procedurally fair, provides an appeal process, and which is not conducted by project proponents.

From the public consultation

"If public engagement is desirable for this class of bylaws, then it's equally desirable for other classes of bylaws and the government may perhaps in the general management of the municipal level of government wish to enunciate public engagement principles. Focusing on this class of bylaws would perpetuate the obsolete notion that the bylaws are somehow extraordinary in their impact on citizens and that our underlying principles of representative government and political accountability cannot be trusted to produce acceptable governance outcomes."

—Consultation Participant / Bill Buholzer

Another response questioned whether public hearings in relation to land-use bylaws continue to be appropriate at all. In this response, it was noted that the public-hearing requirement was not conceived of as a mechanism to support public engagement, but rather as a policy rationale for protecting the interests of individual property owners who may be impacted by a bylaw. This response highlights the discrepancy in holding public hearings in relation to land-use bylaws, but not in relation to bylaws dealing with such matters as watering restrictions, parking restrictions, and property-tax bylaws, which arguably could have a greater impact on the lives of citizens.

Given the policy rationale for the public hearing in the first place, this respondent suggested that it is an inappropriate tool to attempt to recast towards serving a public engagement purpose. The respondent suggests that attempts to do so merely maintain the status quo of prioritizing the impact of land-use bylaws over other aspects of municipal governance and decision making.

Reconciliation and Community Listening Series Responses

During the public-consultation period, one-on-one conversations as well as a focus-group workshop were held as part of the Listening Series. The input and perspectives shared in these conversations built on the input received through the Listening Series leading up to the public consultation and reflected in the consultation paper.

Where Reconciliation Listening Series feedback relates to specific topics explored in this report, it is reflected in those parts of the report.

Reconciliation Listening Series participants were also invited to share examples of First Nations and local governments building working relationships and government-to-government agreements. These examples demonstrate some of the efforts to advance reconciliation at a local level and can help inform efforts in other communities looking to build and strengthen relationships between local government and nations on whose traditional territories they operate as well as neighbouring First Nations. These examples included the following:

1. The signing of protocol agreements between Sḵwx̱wú7mesh Úxwumixw (Squamish Nation) and local governments operating on Squamish territory (the District of Squamish, the City of North Vancouver, and the City of Vancouver) to help guide the relationship between governments and advance reconciliation.
2. The Squamish Nation and the District of Squamish working toward a community development plan for the Nation's land holdings and an official community plan for the district that are built together on the principles of the UN Declaration.
3. The adoption of a reconciliation framework and the approval of a strategy to implement the UN Declaration by the City of Vancouver.
4. Service agreements for local-government provision of services and infrastructure on reserve lands.
5. Williams Lake city council raising Indigenous relations as a core pillar of the city's strategic plan.

6. The signing of treaties, which include provisions for working with local governments.

These collaborative efforts to build relationships were reflected upon by participants as opportunities for creating foundational change. Participants also reflected on how they were situations that came out of persistent effort over the long term, which both required and enabled policy changes and opportunities for reflection on how local governments engage in decision making.

Example of how policy can stand in the way of recognizing Indigenous jurisdiction

Metro Vancouver Regional District has jurisdiction to limit access to watersheds and holds decisive authority over the ability of First Nations to access watersheds for cultural uses.

Reconciliation Listening Series participants also shared their perspectives on when and how First Nations governments need to be included in decision making. It was shared that this needs to happen early, which some articulated as at the stage of the development of an official community plan and others suggested it come earlier than that. It was also shared that it needs to happen in a way that allows for First Nations governmental influence on decisions and outputs and accounts for readiness and capacity on the part of First Nations. This feedback resonates strongly with rights recognized in the UN Declaration and is elaborated upon in chapter 3.

From the Reconciliation and Community Listening Series

"Land-use planning is a pathway to restoring the quality of life for our people to what we had before contact."

—Kim Baird

Some ideas shared around how early collaborative decision making could be better supported include the following:

1. Creation and funding of an Indigenous-led body to build capacity, similar to the BC First Nations Justice Council within the justice sector.
2. Development of memorandums of understanding with First Nations to determine protocol for shared decision making as well as when public hearings or other forms of engagement ought to be held and the process of these engagements.

From the Reconciliation and Community Listening Series

"Any authority we can collect on our reserve land will never be surrendered to any municipality."

—Khelsilem

It was also shared that certain topics should not be up for debate at public hearings. These include traditional Indigenous land borders, traditional Indigenous land use, overlapping and shared Indigenous territories, Indigenous rights, distinctions between rights of First Nations versus Métis, the jurisdictions of hereditary and elected governments in Indigenous communities, and the need for archeological assessments.

Chapter 3. 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 introductory 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,[41] the enactment of the BC *Declaration Act*,[42] and the enactment of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*.[43] 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 Indigenous Peoples in BC.

Part of this involves understanding the various rights engaged when land-use bylaws are enacted by local governments.[44] 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.

41. Truth and Reconciliation Commission of Canada, *Calls to Action* (Truth and Reconciliation Commission of Canada, 2012) https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf (archived at https://archive.ph/NHIkH) [*TRC Calls to Action*].

42. *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*Declaration Act*].

43. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

44. The term *local government* is used throughout this paper, consistent with the *Local Government Act*, RSBC 2015, c 1, to refer to municipal councils and regional district boards. See, above, at p 2.

Within BC, there are eight modern treaty nations.[45] Jurisdiction over land-use decisions, including management, planning, zoning, and development of treaty lands forms part of the negotiations in the treaty process.[46] 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.[47] Nor do municipalities have general powers to regulate zoning and land use planning on Indian reserve lands.[48] 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 and the *Constitution Act, 1867*.

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.[49] Aboriginal title, as it has been defined within Canadian law, comes with a bundle of associated rights, including jurisdictional rights inherent in collective title.[50]

45. Various other First Nations in BC are in the process of negotiating agreements. See BC Treaty Commission, "Negotiations Update" (n.d.) https://bctreaty.ca/negotiations/negotiations-update/ (accessed 24 July 2024, archived at https://archive.ph/X9384).

46. BC Treaty Commission, "Why Treaties?" (n.d.) https://bctreaty.ca/negotiations/why-treaties/ (accessed 24 July 2024, archived at https://archive.ph/iR7tB).

47. 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) http://bctreaty.ca/wp-content/uploads/2016/09/Tsawwassen_final_initial_0.pdf (archived at https://archive.ph/kTUyN) at ch 17, paras 19, 20.

48. *Kits Point Residents Association v Vancouver (City)*, 2023 BCSC 1706 at para 247, Forth J. First Nations and local governments may reach agreements with regards to co-planning as will be discussed later in this paper. See, below, at pp 102-103.

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

50. *Delgamuukw v British Columbia*, 1997 CanLII 302 at paras 154-158, [1997] 3 SCR 1010 (SCC), Lamer CJ [*Delgamuukw*].

The rights affirmed in the UN Declaration[51] 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 state governments. It is an articulation of the "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[52]

Ensuring consistency with the UN Declaration, as mandated by the BC *Declaration Act*, requires considering the inherent rights of Indigenous Peoples, which are impacted by local-land-use bylaws and the exercise of jurisdiction by local governments in relation to unceded lands traditionally held by Indigenous Peoples. It further requires ensuring those rights are upheld.

The individual and collective rights affirmed within the UN Declaration can be characterized within broad categories. Some of the categories of rights engaged in relation to local-land-use decision making include: self-determination and jurisdiction rights, land title,[53] rights flowing from title,[54] and social and economic rights.[55] In BC, title and rights flowing from title are held by First Nations.

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 report, particularly in chapter 9.[56]

Indigenous self-determination and land-based rights

BCLI heard through the Reconciliation Listening Series that acknowledging First Nations as governments with inherent land rights within their traditional territories is

51. United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR 61st Sess, UN Doc A/61/295 (2007) [UN Declaration].

52. UN Declaration at art 43.

53. For example, Indigenous Peoples' right to lands, territories and resources they have traditionally owned, occupied, used or acquired. See UN Declaration at art 26 (1).

54. For example, Indigenous Peoples' right to develop priorities and strategies for the development or use of their lands and the right to control traditionally owned lands and territories. See UN Declaration at arts 26 (2), 32 (1).

55. For example, the right to determine and develop priorities related to housing and to the improvement of social and economic conditions. See UN Declaration at arts 21, 23.

56. See, below, at pp 97-106.

important in the context of public hearings. BCLI also heard that it is significant to distinguish between engagement between local governments and Indigenous peoples 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 distinctly from public engagements. Government-to-government level relationships engage many of the collective rights affirmed in the UN Declaration. We heard from Reconciliation Listening Series participants about the need for consultation and cooperation with First Nations to 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.

In addition, we heard from Reconciliation Listening Series participants about the need for local government public hearings and public-engagement procedures to be more inclusive, including of Indigenous voices.[57]

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.[58] That unceded territory is impacted by the jurisdiction and decisions of colonial governments, including 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 on whose traditional territories local governments are exercising jurisdiction. 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.

57. See, below, at pp 97-106 for a fuller discussion of this issue.

58. Okanagan College Library, "WET 219—Applied Water Law—Indigenous Rights—Unceded Lands" (modified 21 January 2024) https://libguides.okanagan.bc.ca/c.php?g=721994&p=5175676 (archived at https://archive.ph/LdDYi).

The BC government has made commitments to ensuring the rights and title of Indigenous Peoples in the BC *Declaration Act Action Plan*.[59] One such commitment is ensuring: "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."[60] The *2022–2027 Action Plan* also affirms that Canada is legally plural, which includes "Indigenous laws and legal orders with distinct roles, responsibilities and authorities."[61]

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.[62]
- The right to own, use, develop, and control lands, territories, and resources possessed by reason of traditional ownership, occupation, or use.[63]
- The right to maintain and strengthen their distinctive spiritual relationship with the land they have traditionally owned or otherwise occupied and used.[64]
- 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.[65]

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:

59. British Columbia, Ministry of Indigenous Relations and Reconciliation, *Declaration on the Rights of Indigenous Peoples Act Action Plan 2022–2027* (n.d.) https://www2.gov.bc.ca//assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf (accessed 24 July 2024, archived at https://archive.ph/VqtSj) at p 10 [*2022–2027 Action Plan*].

60. *2022–2027 Action Plan* at p 14.

61. *2022–2027 Action Plan* at p 6.

62. UN Declaration at art 26 (1).

63. UN Declaration at art 26 (2).

64. UN Declaration at art 25.

65. UN Declaration at art 28 (1).

- The right to determine and develop priorities and strategies for the use and development of their lands or territories.[66]
- The right to improvement of economic and social conditions in the areas of education, employment, housing, sanitation, health, and social security.[67]
- The right to conserve and protect the environment and productive capacity of their lands or territories and resources.[68]

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 of land holding. In most of Canada, English common law was imported through settlement by the British.[69] This imposition of English property law is inconsistent with the fact that Indigenous Peoples had existing jurisdiction and rights in the land.[70] 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. For the most part, this is not the case in BC, where colonial acquisition of land and the import of English property law was not by way of treaty and has not extinguished Indigenous land title and rights.[71]

Despite the fact that 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.[72]

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

66. UN Declaration at art 32 (1).
67. UN Declaration at art 21 (1).
68. UN Declaration at art 29 (1).
69. E. Kaplinsky, M. Lavoie & J. Thomson, eds, *Ziff's Principles of Property Law*, 8th ed (Thomson Reuters Canada, 2023) at p 83.
70. Kaplinsky et al. at p 80.
71. Kaplinsky et al. at pp 87, 222.
72. Kaplinsky et al. at p 83.

Crown, not owned outright by individuals.[73] Most private landowners in Canada hold land in the form of a fee-simple estate. Fee simple is, for most practical 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.[74]

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,[75] property taxes,[76] and expropriation and seizure frameworks.[77] Additionally, if fee-simple ownership lapses such that no person is entitled to the land, it reverts to the Crown.[78] This process, known as escheat, is considered one of the longest surviving elements of feudal tenure to continue to form part of the law in BC.[79] In summary, fee-simple 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 the ultimate owner of land.

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73. Kaplinsky et al. at pp 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 A.W. La Forest, ed, *Anger and Honsberger Law of Real Property*, 3rd ed (Thomson Reuters, 2019) (loose-leaf release 2023-2) at vol 1, ss 3:3, 3:24.

74. Kaplinsky et al. at p 75.

75. 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.

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

77. 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.

78. 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 Kaplinsky et al. at pp 77, 200.

79. 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*, RSC 1985, c I-5. See La Forest at vol 1, s 3:26.

At common law, how one uses their land has generally been governed by the law of nuisance 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.[80]

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. 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, however, account for Indigenous laws pertaining to title and jurisdiction over land.

Aboriginal Title in Comparison with Inherent Indigenous Land Rights

Conceptions of Aboriginal title within Canadian common law, the allocation of reserves and certain approaches to modern treaties fall short of fully reflecting traditional Indigenous land-tenure systems and recognizing Indigenous jurisdiction and title as affirmed in the UN Declaration.[81]

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.[82] 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;

80. La Forest at vol 3, s 36:13.

81. S. Morales & B. Thom, "The Principle of Sharing and the Shadow of Canadian Property Law" in A. Cameron, S. Graben & V. Napoleon, eds, *Creating Indigenous Property: Power, Rights, and Relationships* (University of Toronto Press, 2020) at pp 152-153, 157.

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

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.[83]

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

Within BC, there are numerous First Nations with distinct laws and legal orders. It is important, therefore, to not conceive of Indigenous 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.[84]

The legal principle of sharing within some land-tenure systems means two or more residence groups "may jointly own certain productive resources, locales or portions of a territory."[85] This principle can coexist with a principle of exclusion. Kinship, relationships, and explicit understandings around shared access interact with principles of exclusion and trespass which may operate in relation to territorial boundaries.[86]

With colonization, large expanses of Indigenous territories were granted to settlers as fee-simple lands and First Nations were allocated reserve lands. 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

83. *Delgamuukw* at para 143. In *Tsilhqot'in 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."
84. Morales & Thom at p 134.
85. Morales & Thom at p 134.
86. Morales & Thom at p 137.

allocation of reserve lands did not account for traditional ownership of lands and the legal principle of sharing of lands and resources by neighbouring residence groups.[87] Nor did it account for Indigenous systems of governance.

As noted above, the concept of Aboriginal title, which requires proof of exclusive occupation of land, also does not account for the 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.[88] 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.[89]

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

If the inherent rights of Indigenous Peoples to self-determination and self-governance are to be honoured,[90] 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 consistent with the UN Declaration means that Indigenous laws and systems of governance must also inform the new framework.

87. Morales & Thom at p 135.

88. Morales & Thom at pp 140-141.

89. Morales & Thom at p 152.

90. UN Declaration at arts 3, 5.

What We Heard about Relationships between First Nations and Local Governments

The need for early and ongoing engagement and cooperation with First Nations governments by local governments was highlighted as a priority throughout the Reconciliation Listening Series. Participants shared perspectives on existing relationships between First Nations and local governments. Some of the positive examples of working relationships are set out in chapter 2. Numerous experiences of unsuccessful engagements with First Nations by local governments were also shared. For example, situations where local governments have refused to acknowledge the traditional First Nations territories on which they exercise jurisdiction were cited as highlighting the need for a stronger framework recognizing Indigenous title across the province.[91] Below are some examples shared with the BCLI of situations where engagements with First Nations did not strengthen relationships and which might have benefited from improved provincial guidance.

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).[92] Within this context of land-use decision making, local governments must consider consultation with First Nations.[93] However, it is left up to the sole discretion of council whether consultation with First Nations is in fact undertaken. BCLI heard from Reconciliation Listening Series participants in various communities around BC who had not observed local government making any attempts to consult with or engage in collaborative decision making with First Nations on the development of or amendments to OCPs.

Some Reconciliation Listening Series participants noted that First Nations were consulted in their communities during the OCP process but noted that those consultations were not done in a way that respected First Nations input or supported ongoing relationships.

BCLI also heard of some experiences where Nations were consulted during the OCP process, but not in a way that supported ongoing relationships. Two separate stories

91. CBC News, "Surrey's rejection of Indigenous land acknowledgement enforces systemic racism, BCAFN says" (14 January 2021) https://www.cbc.ca/news/canada/british-columbia/surrey-council-indigenous-land-acknowledgement-1.5874240 (archived at https://archive.ph/64nyl).

92. *Local Government Act* at s 475 (1), (3). See also, below, at p 66 (further discussion of public consultations on the development of official community plans).

93. *Local Government Act* at s 475 (2).

were shared with BCLI of OCP consultations 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 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 on 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.

From the Reconciliation and Community Listening Series

"Including First Nations governments needs to begin at the development of an OCP and consultation needs to be mindful of First Nations capacity. It can't be an empty consultation."

—Michael Moses

BCLI also heard of experiences where some First Nations, through agreements, memorandums of understanding, or treaties, 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. BCLI heard about the necessity for capacity funding for First Nations to be involved in co-planning of land use.

The UN Human Rights Council has clarified that genuine consultation by state governments with Indigenous Peoples as informed by the UN Declaration should include the following features:

- ensure adequate resources and capacity are provided for Indigenous governing bodies to participate in decision making;
- be free of intimidation, coercion, manipulation, and harassment;
- be based on a good-faith relationship;
- occur as early as possible in the process of conceptualizing or designing a project;
- share information in a clear and understandable format;
- Indigenous Peoples must have freedom to choose their representatives according to their laws, customs, and protocols;

- Indigenous Peoples should be able to guide and direct the process of consultation;
- Indigenous Peoples should have the ability to inform timelines; and
- there should be sufficient time for Indigenous Peoples to take in and analyze all the information and undertake their own decision-making processes.[94]

A framework supporting shared decision making

Throughout this report we highlight some examples of agreements and working relationships between local governments and First Nations for supporting shared decision making. 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 BC Court of Appeal has held that for the courts to find a legal obligation to consult to apply to local governments as creatures of statute, legislation must confer that power to them.[95] While the legislation does provide that local governments "consider whether consultation is required" with First Nations when adopting or varying an OCP,[96] the nature of any such consultation is up to city council and BC courts have held it is not a delegation of a constitutional duty to consult with rights and title holders.[97]

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

From the Reconciliation and Community Listening Series

"Indigenous governments are the architects of certainty in BC. Consent-based decision making is the quickest way to get a decision."

—Khelsilem

94. UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/39/62 (10 August 2018) at paras 20-22.
95. *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379 at paras 70-72, Newbury JA [*Neskonlith*].
96. *Local Government Act* at s 475 (2).
97. *Gardner v Williams Lake (City)*, 2006 BCCA 307 at paras 24, 27, Saunders JA.

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.[98] 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. It was also shared that early and ongoing consultation and cooperation can facilitate collaborative decision making and alleviate concerns around delays associated with late-stage consultations.

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 collective right grounded in self-determination and a principle within the UN Declaration that applies to a number of land rights affirmed therein. FPIC has been described by the UN Human Rights Council as a means of operationalizing the right to self-determination with a particular focus on the ability of Indigenous Peoples to recover control over their lands and resources as an element of self-determination. It includes the right to be fully informed, freely able to accept or refuse plans, projects or proposals affecting their lands and resources.[99]

From the Reconciliation and Community Listening Series

"Indigenous bodies with jurisdiction must have the ability to influence outputs when municipalities operating on unceded territories are making land-use decisions. Changes need to enable power sharing on issues that matter to Indigenous Peoples."

—Khelsilem

Within the UN Declaration, FPIC serves to restore rights. For example, to restore the right of Indigenous Peoples to control lands they have traditionally owned, used, and occupied. It also serves to redress power imbalances between states and Indigenous Peoples.[100]

FPIC informs the obligation of states to consult and cooperate with Indigenous Peoples.[101] This obligation has been described by the UN as requiring a "qualitative process of dialogue and negotiation, with consent as the objective."[102] It goes beyond being involved in decision making

98. *Neskonlith* at paras 70, 72.

99. UN Human Rights Council at paras 6-8.

100. UN Human Rights Council at para 11. Articles 18 and 19 of the UN Declaration speak to remediating power imbalances through such means as government-to-government agreements.

101. As affirmed in UN Declaration at art 19.

102. UN Human Rights Council at para 15.

and includes the right of Indigenous Peoples to influence the outcome of the decision making affecting them, this could include putting forward a different proposal for consideration.[103]

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 Indigenous governments, the approach to achieving FPIC may vary somewhat nation to nation.

However, engagement approaches can be guided by best practices. Some considerations shared with BCLI as important 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.
- 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. This resonates with the right of Indigenous Peoples to participate in accordance with their own procedures.[104]

103. UN Human Rights Council at para 15.

104. UN Declaration at art 19.

While not every land-use decision by local governments will fully engage the principles of FPIC with local Indigenous governments, Reconciliation Listening Series participants expressed strong support for FPIC being an element of the development of official community plans by local governments supported by an opt-in framework and support for early adopters to proof out models. Some existing models for supporting intergovernmental relationships that were shared with BCLI included:

From the Reconciliation and Community Listening Series

"Inclusive governance is important. I want to see changes that allow for non-treaty nations to join regional boards as full voting members who are part of the decision-making processes."

—John Jack

- Arrangements between the Tla'amin Nation and the regional district that form part of the Tla'amin treaty.
- Permissive tax exemptions and waiving of development charges for Indigenous-led developments as some local governments have adopted.
- Allocated representation for Indigenous representatives within local government. Examples include expansion of representation on regional boards as provided for in modern treaties beyond the treaty context; local-government-council models as adopted in the Northwest Territories that ensure both settler and Indigenous representation; and allocation of local-government seats to Indigenous representatives as permitted in New Zealand.
- Integration of Indigenous cultural design principles into land-use planning as for example in New Zealand with Tauranga Design Principles.
- The creation of intergovernmental planning bodies such as the body established for transit planning in North Vancouver, which includes representatives from the federal, provincial, and local government as well as local First Nations.

From the Reconciliation and Community Listening Series

"The Tsawwassen Treaty resolved a lot of the issues we experienced previously with local government. We now have agreements and clarity around how we engage."

—Kim Baird

A number of Reconciliation Listening Series participants pointed to modern treaties as examples of where new relationships were created between treaty nations and local governments. It was shared that these types of arrangements should not be limited to treaty nations.

Chapter 4. The Legislative Requirement to Hold a Public Hearing

An Overview of this Chapter

This chapter provides background information on BC's legislation on public hearings. It seeks to answer two basic questions: (1) what's contained in BC's legislation on public hearings? (2) why does that legislation requiring local governments to hold public hearings on land-use bylaws exist (or, to put it another way, what goals is the legislation trying to achieve)?

The chapter begins by discussing in brief BC's evolving legislation on public hearings. The focus of this discussion is on the scope of the legislation—that is, when it applies in practice.

Then the chapter turns to examining the purposes of legislation requiring a public hearing. This examination focuses on what legislation, courts, and commentary have described as the goals of legislation on public hearings. It ends by spelling out the three leading purposes of public hearings: (1) improving decision making; (2) fact finding; and (3) enhancing accountability and redistributing power.

The Public-Hearing Requirement in BC Legislation

The legislation as it stood at the start of this project

When this project began in fall 2022, part 14, division 3 of the *Local Government Act* established 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]*."[105] The division also included detailed provisions on procedures, notices, and steps to be taken after the public hearing concludes.[106]

105. *Local Government Act*, RSBC 2015, c 1 at 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* at s 547 (1). Given their largely defunct status, land-use contracts don't figure into the discussion of land-use bylaws in this report. For a version of the *Local Government Act* as it existed in fall 2022 see https://canlii.ca/t/55gzv.

106. *Local Government Act* at ss 465 (public hearing procedures), 466 (notice of public hearing), 467 (notice if public hearing not held), 470 (procedure after public hearing).

In 2022, the *Vancouver Charter* had an equivalent provision imposing a requirement to hold a public hearing on a proposed zoning bylaw.[107]

Part 14, division 3 of the *Local Government Act* also had a provision limiting the scope of the public-hearing requirement. The legislation provided that a local government was "not required to hold a public hearing on a proposed zoning bylaw," so long as "(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."[108]

In fall 2022, there was no equivalent to this provision in the *Vancouver Charter*.

Legislative amendments in 2023 change aspects of the public-hearing requirement

On 1 November 2023 (about 2/3 of the way through this project), the BC government introduced Bill 44 in the legislative assembly.[109] This bill proposed major changes to the public-hearing requirement, which came into force in November and December of that year.[110]

The changes mainly concerned the last topic discussed in the previous section: the scope of the public-hearing requirement. They placed some significant new limitations on the use of public hearings.

The most direct limitation on public hearings is a new prohibition on holding them. In brief, this prohibition applies to zoning changes concerning residential

107. *Vancouver Charter*, SBC 1953, c 55 at s 566. ("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.") As discussed, below, at p 41, fn 111, this provision was amended in 2023 and repealed in 2024. For a version of the *Vancouver Charter* as it existed in fall 2022 see https://canlii.ca/t/55gzr.

108. *Local Government Act* at s 464 (2).

109. Bill 44, *Housing Statutes (Residential Development) Amendment Act, 2023*, 4th Sess, 42nd Parl, British Columbia, 2023.

110. *Housing Statutes (Residential Development) Amendment Act, 2023*, SBC 2023, c 45 [*2023 Act*]. Several provisions of the *2023 Act* relating to public hearings became law on royal assent (30 November 2023). Others came into force by regulation on 7 December 2023. See *Local Government Zoning Bylaw Regulation*, BC Reg 262/2023, OC 673/2023, https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0673_2023 (archived at https://archive.ph/Qv59G).

developments. Specifically, local governments are no longer allowed to hold a public hearing on "a proposed zoning bylaw" if all of the following conditions apply:

> (a) an official community plan is in effect for the area that is the subject of the zoning bylaw,
>
> (b) the bylaw is consistent with the official community plan,
>
> (c) the sole purpose of the bylaw is to permit a development that is, in whole or in part, a residential development, and
>
> (d) 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.[111]

Why did the provincial government bring in these changes? The goal was to streamline residential development and support the delivery of more homes, all in an effort to combat the housing crisis in BC.[112] As the minister of housing explained when introducing the bill for second reading, "public hearings can slow down getting approvals for new homes, delaying construction and adding costs to housing. These delays often result in fewer units being built or in developers making the units more expensive, to offset the added costs."[113]

It's evident from these comments that the 2023 legislation was aimed at more than just reforming the public hearing. Its goals were larger, as it sought to reduce barriers to residential developments across a range of areas.

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111. *2023 Act* at s 5 (adding subs (3) to s 464 of the *Local Government Act*). See also *2023 Act* at s 36 (b) (adding new subs (1.3) to s 566 of the *Vancouver Charter*). In spring 2024, a further amendment to the *Vancouver Charter* repealed the changes made to it by the *2023 Act* and replaced them with provisions that closely parallel the provisions in the *Local Government Act*. See *Vancouver Charter Amendment Act (No. 2), 2024*, SBC 2024, c 12 [*2024 Act*] at ss 5 (adding ss 559.02-559.07 to the *Vancouver Charter*—new s 559.02 (4) is substantially the same as the provision of the *Local Government Act* quoted in the text), 18 (repealing s 566 of the *Vancouver Charter* and replacing it with an unrelated provision on fees for amendment of a zoning bylaw), 19 (repealing s 566.1 of the *Vancouver Charter*).

112. British Columbia, Ministry of Housing, News Release, 2023HOUS0063-001737, "Legislation introduced to streamline delivery of homes, services, infrastructure" (modified 7 November 2023) https://news.gov.bc.ca/releases/2023HOUS0063-001737 (archived at https://archive.ph/3L1tE).

113. British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 42nd Parl, 4th Sess, No 357 (7 November 2023) (R. Kahlon), https://www.leg.bc.ca/hansard-content/Debates/42nd4th/20231107am-Hansard-n357.html#bill44-2R at p 12505.

To accomplish its goals, the 2023 legislation introduced reforms across the spectrum of land-use regulation. For example, the BC government will now require local governments to have official community plans and to update those plans every five years.[114] The updated plans must take into account housing needs reports for the community.[115]

These changes are likely going to ratchet up the importance of official community plans, probably at the expense of one-off or small-scale rezoning bylaws. Such a change in emphasis will also likely have an indirect effect on public hearings.

This indirect effect may prove to be a further limitation on public hearings, alongside the direct limitation created by the prohibitions noted earlier. Fewer small-scale zoning bylaws will result in fewer occasions in which a local government may decide to hold a public hearing. So another aspect of the 2023 legislation is intended to emphasize public engagement on the official community plan.

The Purposes of Public Hearings

Legislative statements of purpose

Local Government Act: Representations on proposed bylaw

Having sketched out what provisions legislation requiring public hearings contains, let's turn to the question of why this legislation exists.

The *Local Government Act* describes the purpose of a public hearing as "allowing the public to make representations to the local government respecting matters contained in the proposed [land-use] bylaw."[116]

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

114. *2023 Act* at ss 9 (amending s 472 of the *Local Government Act*—in force 30 November 2023), 11 (adding s 473.1 to the *Local Government Act*—in force 7 December 2023), 17 (replacing subs (3) of s 585.31 of the *Local Government Act*—in force 30 November 2023). See also *2024 Act* at s 13 (adding ss 562.02 (2), 562.03 (1) to the *Vancouver Charter* as equivalent provisions—not in force).

115. *2023 Act* at s 11 (adding s 473.1 to the *Local Government Act*—in force 7 December 2023). See also *2024 Act* at s 13 (adding s 562.05 to the *Vancouver Charter*—not in force).

116. *Local Government Act* at s 464 (1).

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 until 2024

The equivalent provision in the *Vancouver Charter* didn't contain a similar statement of the public hearing's purpose, until one was added in April 2024.[117]

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 approach that Canadian courts take to interpreting legislation emphasizes the importance of the legislation's purpose.[118]

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."[119]

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

117. *Vancouver Charter* at s 559.02 (1).

118. *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 at para 21, [1998] 1 SCR 27 (SCC), Iacobucci J (quoting E. Driedger, *Construction of Statutes*, 2nd ed (Butterworths, 1983) at p 87).

119. *Karamanian v Richmond (Township)*, 1982 CanLII 287 at para 9, 38 BCLR 106 (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 (QL) (BCCA), Esson JA [*Eddington*].

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."[120]

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."[121]

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"[122]—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*."[123]

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.[124] 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."[125] In short, "participatory procedures such as public hearings on land use or zoning bylaws tend to dispel perceptions of arbitrariness, bias or

120. *Karamanian* at para 9 [emphasis added].

121. *Karamanian* at para 9 [emphasis added].

122. A. Stevenson, ed, *Shorter Oxford English Dictionary*, 6th ed (Oxford University Press, 2007) "hearing (4)."

123. *Karamanian* at para 9 [emphasis added].

124. *Pitt Polder Preservation Society v Pitt Meadows (District)*, 2000 BCCA 415 [*Pitt Polder*].

125. *Pitt Polder* at para 45, Rowles JA.

other impropriety on the part of local government in the decision-making process and tend to enhance public acceptance of such decisions."[126]

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.

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."[127]

This section of the report 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 may improve government decision making.

126. *Pitt Polder* at para 47.

127. M.E. Gilman, "Beyond Windows Dressing: Public Participation for Marginalized Communities in the Datafied Society" (2022) 91:2 *Fordham Law Review* at pp 505-506 [footnotes omitted].

"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."[128] These perspectives "can provide needed information and novel problem-solving ideas," which may, "[i]n turn, . . . [lead] to improved outcomes."[129]

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."[130] 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."[131] 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."[132]

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

Accountability and redistributing power

A recent critical law-review article[133] 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."[134]

128. Gilman at p 523.

129. Gilman at p 523.

130. Gilman at p 523.

131. Gilman at p 523.

132. Gilman at p 523.

133. A.S. Lemar, "Overparticipation: Designing Effective Land Use Public Processes" (2021) 90:3 *Fordham Law Review* at p 1086 (arguing that "local control, community empowerment, and public participation are among the building blocks of residential segregation").

134. Lemar at pp 1093-1094 [footnote omitted].

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."[135] The idea is that "existing residents lack capital, [so] they cannot exert power by participating in the marketplace by purchasing and redeveloping land."[136] Since 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.[137] This results in harmful initiatives, such as the failed postwar schemes of urban renewal.[138]

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."[139]

Public hearings, in this view, "serve an instrumental function by redistributing the benefits of redevelopment from wealthy outsiders to low- or moderate-income residents."[140] This theme of redistributing power draws on an influential characterization of various forms of public engagement as rungs on a ladder.[141]

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135. Lemar at p 1097.

136. Lemar at p 1107.

137. Lemar at p 1103.

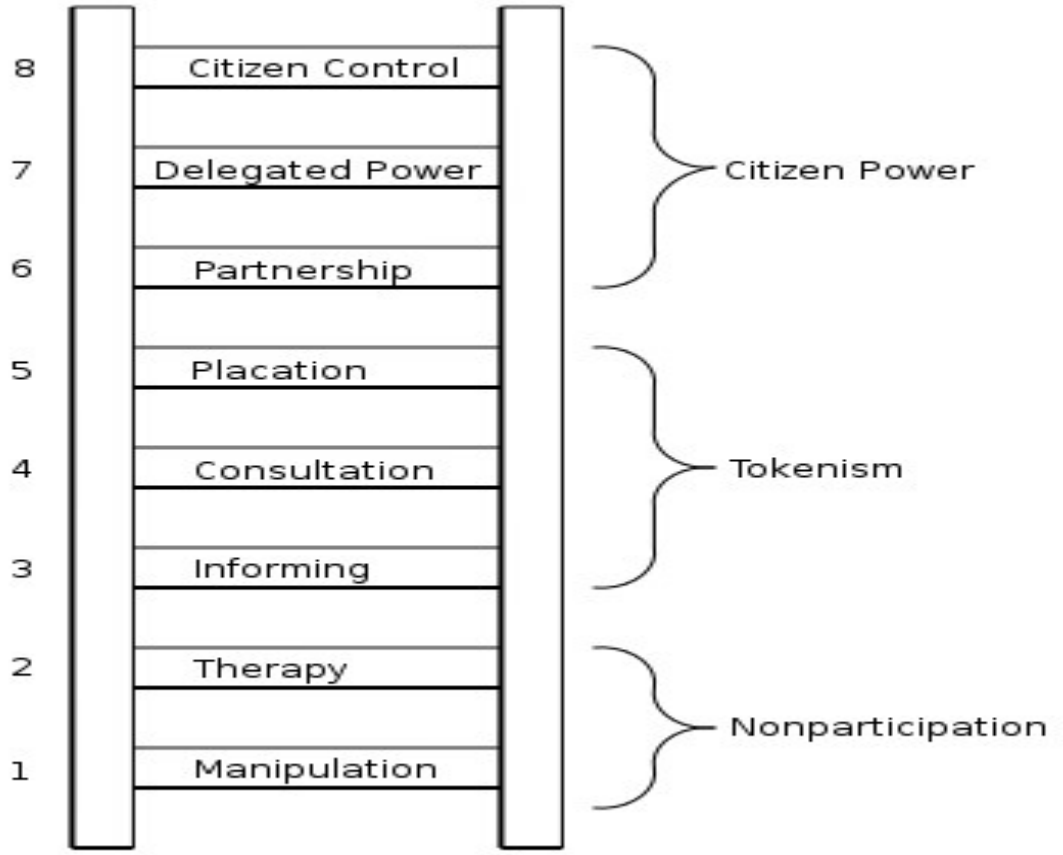
138. Lemar at pp 1094-1097. See also A.G. McFarlane, "When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development" (2000) 66:3 *Brooklyn Law Review* at pp 868-871.

139. Lemar at p 1103.

140. Lemar at p 1106 [footnote omitted].

141. S.R. Arnstein, "A Ladder of Citizenship Participation" (1969) 35:4 *Journal of the American Planning Association* at 217. See also B.L. Bezdek, "Citizen Engagement in the Shrinking City: Toward Development Justice in an Era of Growing Inequality" (2013) 33:1 *Saint Louis University Public Law Review* at p 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.").

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.[142] "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."[143]

142. 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 at p 43 ("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."). In this view, the task is more a matter of attaching the right level of engagement with the public in the circumstances.

143. Gilman at p 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."[144] 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.[145]

144. *Local Government Act* at s 464 (1).

145. Counterpoints to each of the points noted in the preceding pages are discussed in this report's next chapter.

Chapter 5. Should BC Legislation on Local Regulation of Land Use Continue to Require a Public Hearing?

Overview: The Goals of this Chapter

With this chapter, the report turns to considering issues for reform. It begins with a foundational issue.

This chapter opens with some background information on criticisms of public hearings. Then it discusses the key issue of whether the requirement to hold a public hearing should remain in BC's legislation governing local regulation of land use.

Background: Recent Criticism of Public Hearings

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.[146] 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.

146. For a sampling of the range of criticisms 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) https://www.bcli.org/publication/13-study-paper-on-public-hearings/ (archived at https://archive.ph/0z6wLat) at pp 60-66.

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."[147]

And "[p]ublic hearings," an American lawyer has argued, "do not resemble the rational, problem-solving dialogues described by participation proponents."[148] 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."[149]

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."[150] 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

147. M.E. Gilman, "Beyond Windows Dressing: Public Participation for Marginalized Communities in the Datafied Society" (2022) 91:2 *Fordham Law Review* at p 551 [footnote omitted]. See also British Columbia, Ministry of Municipal Affairs, *Development Approvals Process Review: Final Report from a Province-Wide Consultation* (September 2019) https://www2.gov.bc.ca//assets/gov/british-columbians-our-governments/local-governments/planning-land-use/dapr_2019_report.pdf (archived at https://archive.ph/1isSD) at p 14 [*DAPR Report*].

148. A.S. Lemar, "Overparticipation: Designing Effective Land Use Public Processes" (2021) 90:3 *Fordham Law Review* at p 1118.

149. Lemar at p 1118.

150. W. Buholzer, *British Columbia Planning Law and Practice* (LexisNexis Canada, 2001) (loose-leaf updated March 2024, release 65) at vol 2, s 16.49 [Buholzer, *BC Planning Law*].

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."[151] The experience "provides for one-way communications from local government officials to the public or from the public to government officials, without dialogue."[152] 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.' "[153]

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 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."[154]

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."[155] 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."[156] 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.

151. Gilman at pp 551-552 [footnote omitted].

152. Gilman at p 551.

153. Gilman at p 552 [footnote omitted].

154. Buholzer, *BC Planning Law* at vol 2, s 16.53.

155. *DAPR Report* at p 14.

156. S.J. Plager, "Participatory Democracy and the Public Hearing: A Functional Approach" (1969) 21:2 *Administrative Law Review* at p 158.

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, such as surveys, focus groups, and interviews. 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."[157]

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.[158] This leads into the third reason why public hearings can fail to support local governments with useful information.

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."[159] 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."[160]

As a recent BC report has put it, "[p]ublic hearings tend to attract and empower well-organized interest groups."[161] The reason for this can be found in the legal framework for public hearings.

157. J. Jowell, "The Limits of the Public Hearing as a Tool of Urban Planning" (1968) 21:2 *Administrative Law Review* at p 141.

158. *DAPR Report* at p 14.

159. A. Hemingway & S. Pek, "To break housing gridlock, we need to democratize unrepresentative public hearings" *Policynote* (22 February 2023), https://www.policynote.ca/democratize-public-hearings/ (archived at https://archive.ph/xqaS0) at para [1].

160. Hemingway & Pek at para [1].

161. *DAPR Report* at p 14.

"Land use law, by design," explained a law professor, "activates a project's fiercest opponents."[162] 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."[163]

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 the right to be heard at the public hearing or to make written submissions to the local government.[164]

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.[165] 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."[166] 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.[167]

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."[168]

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162. N.M. Kazis, "Transportation, Land Use, and the Sources of Hyper-Localism" (2021) 106:5 *Iowa Law Review* at p 2345 [footnote omitted].

163. Kazis at pp 2344-2345.

164. *Local Government Act* at s 465 (2) [emphasis added]. See also *Vancouver Charter*, SBC 1953, c 55 at s 559.03 (4) (in force 25 April 2024).

165. M.C. Gleba, "Toward Alienable Zoning" (2021) 6 *Journal of Law, Property, and Society*.

166. Hemingway & Pek at para [3].

167. See K.L. Einstein, D.M. Glick & M. Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis* (Cambridge University Press, 2019).

168. Lemar at p 1137.

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 processes 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 participants 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.

Another Listening Series participant who had attended a number of public hearings described them as unsafe spaces, which are focused on process, not outcomes. They further described public hearings as "the opposite of how I try to convene engagement in my community."

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 in the public hearing takes their time away from their 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.

As discussed in chapter 3, many Listening Series participants noted that early and ongoing engagement with First Nations rights and title holders is needed, starting at the stage of the development of the official community plan or earlier and in a manner that supports the capacity needs of First Nations to participate. Some participants also noted the importance of dialogue and engagement between local governments and organizations such as the Union of BC Indian Chiefs, the Aboriginal Housing Management Association, the BC Association of Friendship Centres, and urban Indigenous organizations such as the Metro Vancouver Aboriginal Executive Council and the Surrey Urban Indigenous Leadership Committee.

Issues for Reform

Introduction: Summary and Approach

Brief statement of the broader problem

The modern public hearing has developed over many years through legislation and court decisions. Through these means, British Columbia's law has created a framework for public input on local governments' land-use decisions.

The public hearing's purpose is to give people a forum in which to express their views on a proposed land-use bylaw. In this way, public hearings are intended to bolster local democracy and improve local governments' decisions on land use.

Recently, critics of the public hearing have argued that it is failing to achieve these goals. In their view, the public hearing empowers only a small segment of the public. By doing this, the public hearing is actually leading local governments astray in making decisions on land use.

About a year ago, BC's legislature passed legislation that significantly restricts the scope of public hearings. Specifically, it prohibited local governments from holding public hearings on certain kinds of land-use bylaws (mainly those involving residential developments).

This legislative development—along with the criticism of public hearings—calls for a more fundamental re-examination of the place of public hearings within BC's legislative framework on local regulation of land use. Should the public hearing retain its prominent place in BC's legislation on local land use?

The committee's approach to the broader problem

The committee decided to tackle this broader problem by breaking it down into three smaller-scale issues for reform. This approach yielded a more focused inquiry into the fundamental aspects of the legislative requirement to hold a public hearing.

Two of the three issues engage with the ends of a spectrum of legislation on public hearings. They concern whether legislation should require a public hearing in all cases in which a local government is adopting or amending a land-use bylaw and the converse position, in which a public hearing wouldn't be required as part of the process for adopting or amending a land-use bylaw.

The third issue was inspired by a development that appeared with the legislative changes enacted at the end of 2023. One of the amendments prohibited local governments from holding public hearings on certain land-use bylaws. The committee considered whether such a prohibition should have a place in the legislative framework.

Should BC legislation on local regulation of land use require public hearings on all land-use bylaws, including zoning bylaws and official community plans?

Brief statement of the issue

As a starting point, the committee decided to tackle the foundational question of whether a public hearing should be required whenever a local government is considering any land-use bylaw. While this issue contemplates a significant change to the legislation (which, since 1985, has allowed exceptions to the requirement to hold a public hearing), the committee was of the view that it was necessary to begin by clarifying the extent to which a public hearing should be required.

The requirement to hold a public hearing gives people a forum in which to express their views on a proposed land-use bylaw. Do the benefits of this requirement outweigh its disadvantages in all cases? Or do certain circumstances call for the requirement's scope to be tailored to accommodate other interests and factors?

Discussion of options for reform

The committee dealt with this issue as a yes-or-no question. This approach yielded two options for reform: either recommend changing the legislation and require a public hearing in connection with all land-use bylaws or don't recommend this change.

The first option would entail amending the *Local Government Act* and the *Vancouver Charter* to require a public hearing whenever a local government is considering a land-use bylaw. This option shows the most faith in the public hearing to deliver on its goals of providing a forum for the public and improving local governments' decisions on land use.

But this option would have the downside that critics could say it doesn't address their concerns about the public hearing. The option would also face the practical difficulty of requiring the government to reverse course on recent legislative changes.

The committee's recommendation for reform

The committee viewed this issue as a key first step in determining the future of the legislative requirement to hold a public hearing. It did not support recommending that this requirement be extended to cover all cases in which a local government was considering a land-use bylaw.

In the committee's view, such a recommendation isn't warranted and wouldn't improve the legal framework.

The committee recommends:

1. BC legislation on local regulation of land use should not require public hearings on all land-use bylaws, including zoning bylaws and official community plans.

Where BC legislation on local regulation of land use requires a public hearing right now, should that legislation be amended to remove all requirements for public hearings?

Brief statement of the issue

BC's legislation on local land use currently requires a public hearing in specific circumstances, such as when a local government is considering a new official community plan or amending an existing plan or when it is considering a rezoning bylaw that is inconsistent with the official community plan or legislative goals regarding residential housing. Critics have argued that public hearings fail to meet their

objectives of improving local governments' decision making on land use and empowering local residents. Recently, the BC government accepted these and other criticisms, enacting legislation to restrict when a local government may hold a public hearing. Should the government go a further step and repeal all the existing requirements to hold a public hearing on a local-land-use bylaw, effectively leaving it to the local government's discretion in these circumstances to decide whether to hold a public hearing?

Discussion of options for reform

Repealing legislation requiring public hearings on land-use bylaws is probably the most radical option to consider. Choosing this option would result in a sharp break with BC's approach to land-use regulation over the past century. It would also leave BC as the only province in Canada not to require a public hearing on a proposed land-use bylaw.[169]

But supporters of this option may say that concerns with the current law on public hearings might have reached a point that demands a radical new approach. Critics have argued that public hearings are counterproductive because they fail to advance their assigned purposes.

Public hearings, in the view of these critics, can hamper local democracy because they don't foster deliberation about land use. Instead, the public hearing can empower a limited range of public opinion. This has a direct, negative impact on local governments' decisions about land use.

The clearest and simplest way to address these concerns is by repealing BC's existing legislation that requires a public hearing on a proposed land-use bylaw. This wouldn't necessarily eliminate all public engagement on these bylaws. But it would allow local governments to move beyond a flawed model of public engagement. Local governments would be free to choose from among many other forms of public engagement.

A second argument in favour of this option is almost the mirror image of the first. This argument begins by noting the unique status of public hearings on land-use bylaws.

Making decisions about land use is just one of many powers local governments possess. But it's the only one that comes with this special requirement for a specific form of public engagement (i.e., the public hearing).

169. See, above, at p 11, fn 33 (listing legislation in force in other Canadian provinces and territories).

Critics argue it's never been fully clear what justifies this separate treatment for land-use decisions. These decisions are important, but so are decisions about (for example) business licensing, transportation, and the local government's budget. Yet those latter classes of decisions (which are often made after various forms of public engagement) aren't subject to a legislative public-hearing requirement.

So, in this view, repealing the public-hearing requirement shouldn't be thought of as some radical departure. Instead, it would be the means to treat land-use decisions similar to all the other decisions local governments must make.

But there may be drawbacks to this approach. It opens the door to replacing what may be a flawed method of public engagement with potentially poorer methods of public engagement—or even no public engagement at all—on potential land-use bylaws.

Lowering the amount or quality of public engagement on land-use bylaws could exacerbate the concerns currently associated with public hearings. It could result in decisions on land use regularly being made after a limited deliberative process that failed to bring forward useful information.

This approach also very likely will result in a variety of approaches to public engagement on land-use bylaws among local governments. The province-wide consistency that's currently guaranteed by legislation would disappear. This could cause confusion and, potentially, added costs to land development.

The committee's recommendation for reform

The committee wasn't able to agree on a single recommendation to address this issue for reform.

The larger group of committee members was concerned that repealing the public-hearing requirement altogether was too dramatic a departure from the status quo. Recent legislation has limited the scope of the requirement. The occasions that still require a public hearing—particularly as part of the development of an official community plan—still benefit from having a public hearing as part of the process. This group of committee members was concerned that repealing the public-hearing requirement would result in a lower level of engagement with the public.

This group also looked favourably upon the case law that has grown up alongside the legislative requirement to hold a public hearing. In its view, these common-law protections and guarantees of procedural fairness confer a valuable benefit on the

public. This benefit could be lost if the legislation that supports it were repealed or altered in significant ways.

A majority of the committee recommends:

2. Where BC legislation on local regulation of land use requires a public hearing right now, that legislation should not be amended to remove all requirements for public hearings.

A smaller group of committee members accepted the criticisms of the public-hearing requirement. They felt that this requirement was standing in the way of local governments' developing more effective means to engage the public on land use.

A minority of the committee recommends:

2. Where BC legislation on local regulation of land use requires a public hearing right now, that legislation should be amended to remove all requirements for public hearings.

Are there any circumstances in which local governments should be prohibited from conducting public hearings?

Brief statement of the issue

In 2023 amendments to the *Local Government Act* and 2024 amendments to the *Vancouver Charter*, British Columbia enacted a prohibition on local governments holding public hearings. The prohibition operates only in legislatively defined circumstances. These circumstances involve a local-land-use bylaw that is consistent with the applicable official community plan (or, in the case of Vancouver, official development plan) and with legislative goals for residential development.

This was an unprecedented step for BC's legislation on local regulation of land use. Should it be reconsidered?

Discussion of options for reform

This issue presented the committee with another yes-or-no question. The options were to accept the recent restrictions on holding public hearings or to recommend that they be removed.

Prohibitions on holding a public hearing could be justified by reference to the criticisms of public hearings discussed throughout this report, which tend to emphasize their failure as deliberative bodies and inability to foster better decision making

about land use. But they are more clearly and effectively justified as a kind of deregulatory exercise, which removes barriers to the construction of new housing.

While this approach has the advantage of encouraging new construction, it also may have disadvantages. It saddles local governments with a rigid new framework for public engagement, which reduces their flexibility. It may also introduce confusion and administrative problems.

The committee's recommendation for reform

The committee was divided on this issue.

The larger group of committee members didn't favour imposing a prohibition on local governments. In their view, local governments should always have the flexibility to use a public hearing as part of the means to engage the public on land-use decisions.

These committee members were also concerned about reports that local governments are beginning to encounter problems in practice with the prohibition. For example, since public hearings have always allowed members of the public to make written submissions to the local government, would accepting written correspondence on a proposed land-use bylaw that is subject to the prohibition come within a particularly expansive definition of holding a public hearing? If so, should local governments be taking steps to avoid such correspondence?

A majority of the committee recommends:

3. There should be no circumstances in which local governments should be prohibited from conducting public hearings.

A smaller number of committee members were of the view that legislation prohibiting the public hearing might sometimes be necessary. They were reluctant to endorse a recommendation that would take this tool away from the provincial government.

A minority of the committee recommends:

3. There should be circumstances in which local governments should be prohibited from conducting public hearings.

Chapter 6. Forms of Public Engagement Other Than Public Hearings

Overview: This Chapter's Content and Goals

This report has consistently noted that public hearings are one example of the broader class of public engagement. For many readers, this point 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? Or should the legislation simply avoid mentioning specific forms of public engagement?

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. The elements and scope of this requirement were discussed earlier in this report.[170]

Other forms of public engagement

But the public hearing isn't the only form of public engagement that a local government may use for a proposed land-use bylaw. The following sections of this report discuss specific examples of public engagement, some of which have a basis in legislation and others of which don't.

170. See, above, at pp 39-42.

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*.

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.[171] 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.[172] The act also makes it clear that this public consultation is "in addition to the public hearing."[173]

Additional consultation is required with respect to planning for school facilities.[174] A similar consultation requirement for school facilities and official development plans applies to the City of Vancouver.[175]

171. *Local Government Act*, RSBC 2015, c 1 at 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.").

172. *Local Government Act* at 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.").

173. *Local Government Act* at s 475 (3).

174. *Local Government Act* at s 476.

175. *Vancouver Charter*, SBC 1953, c 55 at s 562.1. See also *Vancouver Charter* at s 562.08 (imposing public consultation requirements similar to those found in the *Local Government Act* on the City of Vancouver—enacted 25 April 2024 but not in force).

First Nations consultation during development of an official community plan

As noted in chapter 3, BCLI heard from a number of First Nations about not being consulted by local governments in the development of an official community plan.[176] BCLI also heard of some consultations happening with select local governments, which 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 requirements 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 clarifying 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 opportunities 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 9.[177]

Some participants proposed that an interim approach to supporting co-planning between First Nations and local governments should allow governments to opt in. It was also shared that an interim approach should provide support for early adopters to proof out different models of collaborative agreements and approaches to inclusion. Inclusion was used in this context to refer to inclusion of Indigenous culture in planning and design approaches, inclusion of Indigenous culture in the format of meetings, and representation of Indigenous peoples within local governments and decision-making bodies.

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

176. See, above, at pp 33-34.

177. See, below, at pp 100-104.

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.[178] 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.[179]

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*.[180] 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."[181] As these events typically occur earlier than a public hearing, "[t]he feedback received at public information sessions may assist the

178. See e.g. City of Surrey, *Engage Surrey: Surrey's Public Engagement Strategy* (n.d.) https://www.surrey.ca/sites/default/files/media/documents/EngageSurreyPublicEngagementStrategy.pdf (accessed 2 August 2024, archived at https://archive.ph/FAnkK); City of Kelowna, *Engage Policy* (14 April 2014) https://www.kelowna.ca/sites/files/1/docs/city-hall/policies/engage_policy_-_no.372_.pdf (archived at https://archive.ph/d0cHD).

179. International Association for Public Participation, "Core Values for the Practice of Public Participation" (n.d.) https://www.iap2.org/general/custom.asp?page=corevalues (accessed 31 July 2024, archived at https://archive.ph/Va4i9).

180. *Community Charter*, SBC 2003, c 26 at s 83.

181. British Columbia, "Local government public engagement" (modified 28 February 2024), https://www2.gov.bc.ca//gov/content/governments/local-governments/governance-powers/councils-boards/public-engagement (archived at https://archive.ph/SKBsg) at para [12] ["Local Government Public Engagement"].

local government to change a proposal if it appears the public will not support one or more aspects of it."[182]

Open houses and information sessions appear to be commonly used by BC local governments to remedy some of the perceived deficiencies of public hearings.[183]

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."[184] 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."[185] They "are often tasked with considering various policy options, evaluating the options and making recommendations to the council or board."[186]

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)."[187] Surveys and polls "are a useful indicator of whether or not there is broad support for local government initiatives."[188]

Petitions

These are "informal petitions to a municipal council or regional district board to bring attention to matters of interest in the community."[189] The petition "must include the full name and residential address of each petitioner."[190]

182. "Local Government Public Engagement" at para [13].

183. W. Buholzer, *British Columbia Planning Law and Practice* (LexisNexis Canada, 2001) (loose-leaf updated March 2024, release 65) at vol 2, s 16.49.

184. "Local Government Public Engagement" at para [14].

185. "Local Government Public Engagement" at para [15].

186. "Local Government Public Engagement" at para [17].

187. "Local Government Public Engagement" at para [6]. See also *Community Charter* at s 83.

188. "Local Government Public Engagement" at para [6].

189. "Local Government Public Engagement" at para [9].

190. *Community Charter* at s 82 (2).

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."[191]

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.[192] These are variously small-scale, intensive meetings and types of surveys and open houses that feature an emphasis on visualization.

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.[193]

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."[194] 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

191. "Local Government Public Engagement" at para [9].

192. M.E. Gilman, "Beyond Windows Dressing: Public Participation for Marginalized Communities in the Datafied Society" (2022) 91:2 *Fordham Law Review* at p 554. A *charette* is "[a] meeting or conference devoted to a concerted effort to solve a problem or plan something": see A. Stevenson, ed, *Shorter Oxford English Dictionary*, 6th ed (Oxford University Press, 2007) "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."

193. P. Sisson, "The Tech That Tries to Tackle NIMBYs" *CityLab Government* (8 August 2022), https://www.bloomberg.com/news/features/2022-08-08/the-virtual-tools-built-to-fix-real-world-housing-problems (archived at https://archive.ph/QPtzP).

194. A. Hemingway & S. Pek, "To break housing gridlock, we need to democratize unrepresentative public hearings" *Policynote* (22 February 2023), https://www.policynote.ca/democratize-public-hearings/ (archived at https://archive.ph/xqaS0) at para [7].

and whites—mini-publics select participants through some form of democratic lottery."[195]

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."[196] 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."[197]

Issue for Reform

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

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 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 report 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.

195. Hemingway & Pek at para [26].

196. Hemingway & Pek at para [27].

197. Hemingway & Pek at para [27].

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 main 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.[198] 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.[199]

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.

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.

The committee's recommendation for reform

The committee noted that public engagement is often a useful tool for local governments. The methods of public engagement discussed in this chapter may supplement the public hearing or provide the local government with feedback in those cases in which holding a public hearing is prohibited. The committee encourages local governments to continue to develop and explore ways to use forms of public engagement other than the public hearing.

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

199. *Planning Act*, RSO 1990, c P.13 at ss 17 (16), 34 (12).

But the committee didn't think that this issue required new legislation. The committee noted that some forms of public engagement are already enabled by existing municipal legislation, such as the *Community Charter*. It was reluctant to supplement this legislation with specific legislation on public engagement for land use. It was also concerned that new legislation could end up inhibiting local governments and reducing their flexibility to pursue novel uses of public engagement.

The committee recommends:

4. BC legislation on local regulation of land use should continue to enable forms of public engagement on land bylaws other than public hearings.

Chapter 7. Principles of Public Engagement and Principles-Based Guidance

Overview: The Goals of this Chapter

This chapter works toward a recommendation that the provincial government provide guidance to local governments on public engagement for land-use bylaws. As readers will learn, the committee recommends a specific approach to this guidance. This approach is based on a concept that has taken hold in the development and drafting of legislation. It's called principles-based legislation.

This chapter discusses two issues for reform: (1) whether BC's legislation or guidance on local-land-use regulation should adopt a principles-based model; and (2) if so, what principles should be spelled out in the legislation or guidance.

Before considering these two issues for reform, this chapter discusses principles-based legislation. It sets out a list of principles developed by the project committee for this project's public consultation. And it reviews similar lists used in jurisdictions outside BC.

Background Information on Principles-Based Legislation

What is principles-based legislation?

Defined by contrast with rules-based legislation. Principles-based legislation is a name given to an approach governments may take in drafting legislation and designing legal frameworks. In legal commentary, its distinctive features are typically illustrated by way of a contrast with another approach, commonly called rules-based legislation.

Leading features of rules-based legislation. "The rules approach," explains a commentator, "requires the regulator to mandate as much as possible all of the legal dos and don'ts."[200] Rules are prescriptive, and they're meant to completely cover the field that's being regulated. "If a rule is valid and applicable," notes another legal

200. J.P. Allen, "Rules- or Principles-Based Regulation? Factors for Choosing the Best Language Strategy" (2015) 56:3 *Canadian Business Law Journal* at p 375.

commentator, "then one is ordered to do exactly as it demands; no more and no less."[201]

A classic example of the rules-based approach is traffic laws.[202] As one commentator has noted, "[s]peed limits say 'Maximum—100 km/hr' . . . Signs say 'Stop,' 'No Left Turn,' 'Yield,' or 'Watch for Children.' ":[203] "[t]he rule sets out, in advance and with precision, the boundary of acceptable conduct. This leaves very little discretion to the front-line decision-maker, who needs only to determine whether the car in question was exceeding that predetermined and non-negotiable limit."[204]

How principles-based legislation differs from rules-based legislation. In contrast to rules-based legislation, the "principles approach is more co-operative: the regulator communicates general principles or objectives to achieve, and calibrates the interpretation of those principles over time as the need arises, through dialogue with the regulated and with stakeholders."[205] This approach is best understood through its two main points of contrast with the rules-based approach.[206]

First, the principles-based approach favours high-level, general statements over detailed legislative and regulatory provisions. "In the context of statutory drafting," a law professor has explained, "principles-based regulation means legislation that contains more directives that are cast at a higher level of generality. A principles-based system looks to principles first and uses them, instead of detailed rules, wherever feasible."[207]

"The second major distinguishing feature of more principles-based legislation," a commentator has explained, "is that it tends to be structured in a more outcome-

201. J.B. Etcheverry, "An Approach to Legal Principles Based on Their Justifying Function" (2019) 32:2 *Canadian Journal of Law and Jurisprudence* at p 325 (quoting R. Alexy, *El concepto y la validez del derecho*, translated by J.M. Sefia (Gedisa, 1997) at p 162).

202. Allen at p 376. See also C. Ford, "Principles-Based Securities Regulation in the Wake of the Global Financial Crisis" (2010) 55:2 *McGill Law Journal* at pp 264-265.

203. Allen at p 376.

204. Ford at p 264.

205. Allen at p 375.

206. Ford at pp 272-277.

207. Ford at p 265. See also Ford at p 274 ("[w]here the rules-based and principles-based approaches diverge, however, is in the additional details provided in the statute itself").

oriented, as opposed to process-oriented, manner."[208] This point goes hand-in-hand with the first one.

Much of the detail in legislation and regulation often goes to fleshing out procedural requirements. Under the principles-based approach, the legislation's emphasis is on the statements of principle and the results they are meant to deliver. This approach gives the people and organizations regulated under it significantly more discretion to determine how they will achieve these results.

Example of principles-based legislation. While the principles-based approach is less commonly used than the rules-based approach, it tends to prevail in certain areas of the law. The leading example is financial regulation.[209]

A difference of degree, not kind. It's easy to overstate this distinction between principles-based and rules-based legislation. There really isn't a hard-and-fast division between the two approaches. Instead, it's a matter of degree because "[n]o workable system consists entirely of rules or of principles, but different systems can be comparatively more rules- or principles-based."[210]

Use of both approaches for local-government legislation. What about legislation on local governments and public hearings? Canadian legislation in this area tends to gravitate toward the rules-based approach. But there are a couple of examples that use the principles-based approach, which are discussed below.

BC's legislation contains examples of both approaches. Because it sets out the provisions on public hearings, the *Local Government Act* has been the focus of this report. It is very much a rules-based statute. But BC's other major act in this area—the *Community Charter*[211]—is more of a principles-based statute.[212]

This statute opens with two sections that respectively spell out the "principles of municipal governance" and the "principles of municipal–provincial relations." These sections spell out existing principles in the broader framework of municipal law that

208. Ford p 275.

209. Allen at pp 378-379; Ford at pp 262-263.

210. Ford at p 265.

211. SBC 2003, c 26.

212. See W.A. Buholzer, *Local Government: A British Columbia Legal Handbook*, 8th ed (Continuing Legal Education Society of British Columbia, 2020) at p vii (contrasting "the modern world of broad powers" represented by the *Community Charter* with "the arcane detail of the *Local Government Act*").

should have some bearing on the development of principles for public engagement on land use.

Principles of municipal governance

1 (1) Municipalities and their councils are recognized as an order of government within their jurisdiction that

(a) is democratically elected, autonomous, responsible and accountable,

(b) is established and continued by the will of the residents of their communities, and

(c) provides for the municipal purposes of their communities.

(2) In relation to subsection (1), the Provincial government recognizes that municipalities require

(a) adequate powers and discretion to address existing and future community needs,

(b) authority to determine the public interest of their communities, within a legislative framework that supports balance and certainty in relation to the differing interests of their communities,

(c) the ability to draw on financial and other resources that are adequate to support community needs,

(d) authority to determine the levels of municipal expenditures and taxation that are appropriate for their purposes, and

(e) authority to provide effective management and delivery of services in a manner that is responsive to community needs.

Principles of municipal-provincial relations

2 (1) The citizens of British Columbia are best served when, in their relationship, municipalities and the Provincial government

(a) acknowledge and respect the jurisdiction of each,

(b) work towards harmonization of Provincial and municipal enactments, policies and programs, and

(c) foster cooperative approaches to matters of mutual interest.

(2) The relationship between municipalities and the Provincial government is based on the following principles:

(a) the Provincial government respects municipal authority and municipalities respect Provincial authority;

(b) the Provincial government must not assign responsibilities to municipalities unless there is provision for resources required to fulfill the responsibilities;

(c) consultation is needed on matters of mutual interest, including consultation by the Provincial government on

(i) proposed changes to local government legislation,

(ii) proposed changes to revenue transfers to municipalities, and

(iii) proposed changes to Provincial programs that will have a significant impact in relation to matters that are within municipal authority;

(d) the Provincial government respects the varying needs and conditions of different municipalities in different areas of British Columbia;

(e) consideration of municipal interests is needed when the Provincial government participates in interprovincial, national or international discussions on matters that affect municipalities;

(f) the authority of municipalities is balanced by the responsibility of the Provincial government to consider the interests of the citizens of British Columbia generally;

(g) the Provincial government and municipalities should attempt to resolve conflicts between them by consultation, negotiation, facilitation and other forms of dispute resolution.[213]

Project committee's list of six principles of public engagement

The project committee decided early on that it wanted to explore a principles-based approach to public engagement on land-use bylaws. In making this decision, it noted that this approach might prove to be an effective way to address many of the concerns critics had raised with public hearings.

To give this topic a thorough exploration, the project committee felt that it was important to consider the actual principles that could be applied through legislation. After 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.

213. *Community Charter* at ss 1, 2.

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.

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

Like British Columbia, Quebec has legislation on public engagement on local-land-use bylaws.[214] Unlike British Columbia, Quebec 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 report calls public engagement.

The legislation begins by enabling local governments in Quebec 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."[215]

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,"[216] 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;

214. *An Act respecting land use planning and development*, CQLR c A-19.1 at ss 80.1–80.5 [*Quebec Act*].

215. *Quebec Act* at s 80.1.

216. *Quebec Act* at s 80.2. See also *Regulation respecting public participation in matters of land use planning and development*, CQLR c A-19.1, r 0.1 [*Quebec Regulation*].

(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

(9) a reporting mechanism is put in place at the end of the process.[217]

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 Quebec. Victoria recently adopted a new statute[218] that was intended to embody the principles-based approach to local-government legislation.[219]

The act as a whole "removes unnecessary regulatory and legislative prescriptions and enables councils to govern based on five principles."[220] Within this framework, Victoria's act requires local governments to have a community-engagement policy[221] based on the following principles:

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

217. *Quebec Act* at s 80.3.

218. *Local Government Act 2020* (Vic), 2020/9 [*Victoria Act*].

219. Victoria State Government, Department of Government Services, Local Government, "A principles-based Act: Removing unnecessary regulatory and legislative prescription" (n.d.) https://www.localgovernment.vic.gov.au/council-governance/local-government-act-2020/principles-of-the-local-government-act-2020 (accessed 31 July 2024, archived at https://archive.ph/EIgkY).

220. Victoria State Government at para [2]. The principles are (1) community engagement, (2) strategic planning, (3) financial management, (4) public transparency, and (5) service performance (see Victoria State Government at para [3]).

221. *Victoria Act* at s 55 (1).

(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.[222]

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.[223]

222. *Victoria Act* at s 56.

223. International Association for Public Participation, "Core Values for the Practice of Public Participation" (n.d.) https://www.iap2.org/general/custom.asp?page=corevalues (accessed 31 July 2024, archived at https://archive.ph/Va4i9) [*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,[224] accountability,[225] inclusivity,[226] equity,[227] reconciliation,[228] and proportionality.[229]

Issues for Reform

Should the BC government provide principles-based guidance and resources to local governments for engagement on local regulation of land use?

Brief statement of the issue

British Columbia has legislation on public engagement on local-land-use bylaws. But that legislation is mainly focused on one type of public engagement: the public hearing.

BC's legislation on public hearings can be classified as following a rules-based approach. The legislation is detailed, and it requires adherence to exacting procedural standards. While it allows local governments some discretion on whether to hold a public hearing, the legislation doesn't give local governments any choices on the forms of public engagement (apart from the public hearing) and it doesn't articulate its principles and desired outcomes.

Recent amendments to this legislation have limited the reach of public hearings by prohibiting local governments from holding them in some cases. On the one hand, this move may have the effect of making other forms of public engagement more prevalent and important. On the other, it may have the effect of making other forms

224. *Quebec Act* at s 80.3 (1), (3); *Victoria Act* at s 56 (a), (b), (e); *IAP2 Core Values* at ss (3), (6), (7).

225. *Quebec Act* at s 80.3 (4), (5), (9); *Victoria Act* at s 56 (e); *IAP2 Core Values* at ss (2), (7).

226. *Quebec Act* at s 80.3 (2), (4); *Victoria Act* at s 56 (c); *IAP2 Core Values* at ss (1), (4), (5).

227. *Victoria Act* at s 56 (d).

228. *Quebec Act* at s 80.3 (7).

229. *Quebec Act* at s 80.3 (6), (8).

of public engagement less prevalent out of concern that a public meeting might run against the prohibition on public hearings in some situations.

Other jurisdictions have moved to legislation that articulates principles and goals and empowers local governments to choose the methods of public engagement that they decide can best achieve results in a specific case. Should BC follow their lead? And, if so, should this mean legislative changes or some other form of guidance to local governments?

Discussion of options for reform

This committee began its consideration of this issue as a question for legislative design, which can be framed as a yes-or-no choice. One option would be to move to principles-based legislation. The other would be to retain the current rules-based approach.

But there may also be some shades of grey to consider between these two opposed options. One such option would be to consider the use of principles in non-legislative guidance.

There are several advantages to taking a principles-based approach.

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, this approach could inject some flexibility into the law. BC's legislation is currently a mix of commands to local governments: they must hold a public hearing in some cases, and they aren't allowed to hold public hearings in others. A principles-based approach would instead articulate principles and goals to be achieved by public engagement. It would open the door to local governments applying what they decide to be the best methods of public engagement in the given circumstances. This might be something like the public hearing for certain bylaws and (for example) surveys and focus groups for others.

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.

Third, potential advances in clarity and flexibility could open the door to enhanced information gathering by local governments and improved decision making on land use. A common criticism of the public hearing is that its rigid legislative framework has undermined the broader purposes of public engagement. Giving local governments more scope to determine public engagement on land-use bylaws may help to ensure that engagement supports those broader purposes.

But there are also downsides to the principles-based approach.

Critics of this approach have argued that the principles set out in legislation are often vague, abstract, and sweeping in scope. It can be difficult to apply principles practically to specific cases. This can lead to disputes and 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.

In addition, this approach would hand a lot of power to local governments to decide on public engagement on a land-use bylaw. Inevitably, this would mean that different local governments would use different forms of public engagement. The system could become more complex and difficult to administer and navigate. There could also be substantial variation among local governments, as they individually take different approaches to public engagement.

For these and other reasons, some people might prefer the other option, which would be to retain the legislation's rules-based approach. A major advantage is this approach is that it can 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.

But there would be some downsides to retaining the rules-based approach. It really wouldn't address the current dissatisfaction with the public hearing. If that dissatisfaction is based, at least in part, on highly directive legislation (especially on procedural matters), reforms that simply added more rules would be unlikely to alleviate critics' concerns.

These two options for reform represent the ends of a spectrum of options. But—just as the background information on rules-based and principles-based information pointed out that it's not really possible to draw a sharp line between the two approaches that results in legislation that's either purely rules or purely principles—there is a range of options that may exist between the two ends of the spectrum.

Finally, another option to consider is whether this issue calls for a legislative response. The provincial government has recently released policies and guidance on some of its legislative changes regarding small-scale, multi-unit housing.[230] This approach could be extended to guidance on public engagement.

The committee's recommendation for reform

The committee favoured a non-legislative approach to this issue because it gives local governments maximum flexibility in carrying out public engagement. Whereas legislation could be interpreted as locking local governments into carrying out specific forms of public engagement, guidance will encourage them to consider public engagement and to choose the forms that best fit their circumstances and resources.

The committee is aware that there is currently some limited guidance to local governments online.[231] In the committee's view, the recent legislative amendments give the government a good opportunity to review this guidance and update it. There is increasing awareness of the importance of public engagement, even with the continued existence of the public hearing. Principles-based guidance may be particularly valuable for local governments operating in the new legislative environment created by the recent amendments.

The committee recommends:

5. The BC government should review and provide non-legislative principles-based guidance and resources to local governments for engagement on local regulation of land use.

230. British Columbia, Ministry of Municipal Affairs, *Provincial Policy Manual & Site Standards: Supporting local government with legislative requirements under the Local Government Act and Vancouver Charter for small-scale, multi-unit housing* (n.d.) https://news.gov.bc.ca/files/SSMUH_Provincial_Policy_Manual_with_Alt_Text.pdf (accessed 27 December 2024, archived at https://archive.ph/hN2I8).

231. British Columbia, "Local Government Public Engagement" (28 February 2024), https://www2.gov.bc.ca//gov/content/governments/local-governments/governance-powers/councils-boards/public-engagement (archived at https://archive.ph/SKBsg).

What principles should be included the BC government's guidance to local governments for engagement on local regulation of land use?

Brief statement of the issue

This issue arises as a consequence of the resolution of the previous issue. It deals with the obvious question of what principles should be included in the principles-based guidance and resources for local governments.

Discussion of options for reform

This issue poses an open-ended question. While it seeks a list of principles as its answer, a potential large number of individual principles could compete for spots on this list.

One option to consider is the project committee's list, which was used to stimulate readers' feedback in the public consultation that preceded this report. This list contained the following items: transparency; accountability; inclusivity; equity; reconciliation; and proportionality.

This list has the advantage of capturing leading principles of public engagement in summary form. As discussed earlier, it is also consistent with similar lists used in legislation from other jurisdictions.[232]

But this list may have its drawbacks. Several consultation respondents felt that the list was too vague. Others wanted the list to have more detail on how the principles would be applied.

The committee's recommendation for reform

The committee did favour that the government start with the committee's list of principles, which it views as capturing the main principles that have been considered by other jurisdictions and legal organizations. But the committee didn't think that the task needed to end with its list. It was reluctant to impose strict constraints on the provincial government.

To this end, the committee was strongly of the view that its list should be treated as inclusive rather than exhaustive. Its list can be seen as a starting place for the

232. See, above, at pp 80-83.

development of principles-based guidance. But developing this guidance should also include considering principles that have been articulated in other sources.

Finally, the committee took notice of an ongoing debate about the timing of public engagement. Critics of the public hearing often make the point that the fact that the public hearing must take place toward the very end of the process of considering a land-use bylaw undercuts the public hearing's utility as a deliberative and consultative forum. In the committee's view, other forms of public engagement can help to remedy this concern. For this reason, it added the principle of timeliness to its inclusive list of principles.

The committee recommends:

6. The BC government should look to good practices from within British Columbia and other jurisdictions to develop their principles-based approach to improve its guidance and resources for public engagement on local regulation of land use. Such principles may include transparency, accountability, inclusivity, equity, reconciliation, proportionality, and timely (in accordance with section 475 of the Local Government Act).

Chapter 8. Timing of 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 hearings on land-use bylaws.

The timing of public hearings has been a perennial point of contention with the current law. 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 earlier in this report,[233] BC's current legislation on land-use planning and regulation primarily 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."[234]

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."[235] "Public hearings occur late in the development approvals process," the report noted, "after considerable time (sometimes years) and

233. See, above, at pp 39-42.

234. *Local Government Act*, RSBC 2015, c 1 at s 465 (1).

235. British Columbia, Ministry of Municipal Affairs, *Development Approvals Process Review: Final Report from a Province-Wide Consultation* (September 2019) https://www2.gov.bc.ca//assets/gov/british-columbians-our-governments/local-governments/planning-land-use/dapr_2019_report.pdf (archived at https://archive.ph/1isSD) at p 14 [*DAPR Report*].

significant cost has gone into a proposed project. Consequently, change can be difficult to accommodate."[236]

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."[237] It characterized this review as being of "high importance."[238] A subsequent report by an expert panel[239] endorsed this recommendation.[240]

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.[241] 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 often 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.' "[242]

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236. *DAPR Report* at p 14.

237. *DAPR Report* at p 24 (recommendation 2.b) [emphasis added].

238. *DAPR Report* at p 24.

239. 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) https://engage.gov.bc.ca/app/uploads/sites/121/2021/06/Opening-Doors_BC-Expert-Panel_Final-Report_Jun16.pdf (archived at https://archive.ph/kD3KJ) [*Opening Doors Report*].

240. *Opening Doors Report* at p 26.

241. Working Group on Legal Frameworks for Public Participation, *Making Public Participation Legal* (October 2013) https://www.nationalcivicleague.org/wp-content/uploads/2015/03/MakingPublicParticipationLegal.pdf (archived at https://archive.ph/F5hhJ) at pp 3-4.

242. M.E. Gilman, "Beyond Windows Dressing: Public Participation for Marginalized Communities in the Datafied Society" (2022) 91:2 *Fordham Law Review* at p 552 ("hearings are typically held

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,[243] as part of a package of amendments that established the current legal framework for public hearings.[244]

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."[245] 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.[246] 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."[247]

"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."[248] Further, "several factors" may lead a court to decide that "the public is entitled to more expansive or restricted access."[249]

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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' " [footnotes omitted]).

243. *Municipal Amendment Act, 1985*, SBC 1985, c 79 [*1985 Act*].

244. *1985 Act* at 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").

245. *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, [2015] 3 SCR vi.

246. *New Yaletown* at para 153.

247. *New Yaletown* at para 153.

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

249. *Vancouver Island* at para 61. See also *Pitt Polder Preservation Society v Pitt Meadows (District)*, 2000 BCCA 415 at para 63; *Eddington v Surrey (District of)*, [1985] BCJ No 1925 at para 19 (QL) (BCCA); *Karamanian v Richmond (Township)*, 1982 CanLII 287 at para 9, 38 BCLR 106 (BCSC).

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.

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 the BC legislation on local regulation of land use require the public hearing to 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."[250] 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?

Options for reform

This report 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.

250. *Local Government Act* at s 465 (1).

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.[251] 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*.[252]

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.

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.

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251. Quebec: *Act respecting land use planning and development*, CQLR c A-19.1 at 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*, SNB 2017, c 19 at 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*, SNL 2000, c U-8 ats 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]).

252. *Vancouver Charter*, SBC 1953, c 55 at s 559.04 (2) (a) (notice of public hearing must include "the time and date of the hearing").

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*.[253] (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.

The committee's recommendation for reform

The committee wasn't in favour of legislative reform to address this issue. In its view, the case law on procedural fairness and disclosure of information constrains the ability of the legislature to address concerns about the timing of public hearings. Setting up a legislative requirement to hold a public hearing earlier in the process would simply cause more problems than it would solve.

The committee acknowledges that there are concerns about the timeliness of public engagement broadly on land-use bylaws. It took some strides to address these

253. *Alberta Act* at 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 Act* at 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."); *The Planning Act*, CCSM c P80 at ss 46 (1), 74 (1) (before or after first reading), 144 (3) (after first reading); *Planning Act*, RSO 1990, c P.13 at ss 17 (9), 34 (14.1) (no earlier than 20 days after giving notice of public hearing); *Planning Act*, RSPEI 1988, c P-8 at s 11 (2) (b) ("shall be held not less than seven clear days after the date of publication of the notice"); *Municipal Act*, RSY 2002, c 154 at 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); *Charter Communities Act*, SNWT 2003, c 22, Schedule A at s 133 (2); *Cities, Towns and Villages Act*, SNWT 2003, c 22, Schedule B at s 129 (2); *Hamlets Act*, SNWT 2003, c 22, Schedule C at s 131 (2) (all providing "[a]fter a bylaw that requires a public hearing receives first reading but before it receives second reading"); *Planning Act*, RSNWT (Nu) 1988, c P-7 at s 25 (1) ("[a]fter giving a proposed by-law first reading and before giving it second reading").

concerns in articulating its principles for provincial-government guidance on this topic.[254]

The committee recommends:

7. BC legislation on local regulation of land use should not require the public hearing to come earlier in the process to adopt a land use bylaw.

254. See above at 87-88 (recommending timeliness as one of the principles).

Chapter 9. Procedural Issues for Public Hearings

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."[255] 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.[256]

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.[257]

255. British Columbia, Ministry of Municipal Affairs, *Development Approvals Process Review: Final Report from a Province-Wide Consultation* (September 2019) https://www2.gov.bc.ca//assets/gov/british-columbians-our-governments/local-governments/planning-land-use/dapr_2019_report.pdf (archived at https://archive.ph/1isSD) at p 14.

256. Simon Fraser University, Morris J Wosk Centre for Dialogue, *Renovate the Public Hearing: Innovators Forum Report* (March 2023) https://www.renovatethepublichearing.ca/_files/ugd/f79cdf_a383088c03354ce9b3b63883ce57ced6.pdf (archived at https://archive.ph/ctyxQ) at p 4 [*Innovators Forum Report*].

257. *Innovators Forum Report* at p 4.

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.[258]

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.[259] The use of the platform is not limited to

258. *Community Association of New Yaletown v Vancouver (City),* 2015 BCCA 227 at para 153, leave to appeal to SCC refused 2015 CanLII 69439, [2015] 3 SCR vi.

259. City of New Westminster, "Be Heard New West" (n.d.) https://www.beheardnewwest.ca/ (accessed 8 August 2024, archived at https://archive.ph/5S5We).

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 and isn't focused on residential development. In these situations, input from earlier public engagement can help inform the local government's decision on whether to hold a public hearing.[260]

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 led engagement with community members of the Host Nations. Feedback from engagement with the community, Host Nation community members, people across the city of Vancouver, and other stakeholders led to the development of a Lands Policy Statement.

Through multiple stages of engagement, Indigenous values and knowledge were embedded into the planning process. The public engagement, co-hosted by the city and the landowners, included a variety of activities, such as open houses, in-person and virtual events, surveys, stakeholder meetings, and communication through

260. City staff shared with BCLI in mid-2023 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.

newsletters and presentations. The public engagement informed the development of the Lands Policy Statement, which city council approved following a public hearing.[261]

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

As noted in chapter 3, 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.[262]

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 peoples, 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

261. City of Vancouver, "Jericho Lands Policy Planning Program" (n.d.) https://syc.vancouver.ca/projects/jericho-lands/combined-cov-and-proponent-info-boards.pdf (accessed 8 August 2024, archived at https://archive.ph/jhrOw). See also City of Vancouver Shape Your City, "Jericho Lands planning program" (modified 30 January 2024) https://www.shapeyourcity.ca/jericho-lands (archived at https://archive.ph/xhfPw).

262. United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR 61st Sess, UN Doc A/61/295 (2007) [UN Declaration] at arts 21 (1), 29 (1), 32 (1). See also, above, at pp 27-28 (further discussion of rights under the UN Declaration).

through protocol agreements[263] or memorandums of understanding.[264] Legislative 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 First Nations 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

263. For example, the Council of the Haida Nation has protocol agreements with the local governments operating on their traditional territories. The Squamish and Lil'wat Nations have also entered into protocol agreements with local governments.

264. 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.

and informal opportunities to learn about how decisions affect Indigenous people and space to share concerns effectively. A full scope of consultation and cooperation 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. In some urban settings, there are coalitions of Indigenous organizations who liaise between urban Indigenous peoples and governments (including both Crown and Indigenous governments). These organizations do not represent land-based Nations, but rather provide a collective voice for urban Indigenous peoples.

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.[265]

In Surrey, the Surrey Urban Indigenous Leadership Committee provides a collective voice for urban Indigenous peoples living in Surrey. Their work involves supporting engagement between urban Indigenous peoples and governments.[266]

265. See Metro Vancouver Aboriginal Executive Council, "Home Page" (n.d.) https://www.mvaec.ca/ (accessed 8 August 2024, archived at https://archive.ph/NNAJT).

266. See Surrey Urban Indigenous Leadership Committee, "Home Page" (n.d.) https://surreyindigenousleadership.ca/ (accessed 8 August 2024, archived at https://archive.ph/OF0tR).

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 peoples.[267]

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 Nations and urban Indigenous peoples. This includes the need to recognize the intergenerational impacts of colonialism on Indigenous peoples, whether or not they reside on their traditional territories. 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 on reserve. This contributes to the ongoing displacement of Indigenous people from their traditional territories.
- The overrepresentation of Indigenous peoples 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."[268]

267. See e.g. Surrey Urban Indigenous Leadership Committee, *Statement of Community Engagement* (April 2020) https://surreyindigenousleadership.ca/wp-content/uploads/2023/11/statement-of-community-engagement.pdf (archived at https://archive.ph/fVGzw).

268. Women Transforming Cities, *The TRC Calls to Action in BC Municipalities: Progress, Barriers, and Opportunities to Accelerate Implementation* (January 2023) https://www.womentransformingcities.org/_files/ugd/285f92_e803e9cd6b35414da36fb320180d37c8.pdf (archived at https://archive.ph/IwKKe) at pp 41-43. See also Truth and Reconciliation Commission of Canada, *Calls to Action* (Truth and Reconciliation Commission of Canada, 2012) https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf (archived at https://archive.ph/NHIkH) at p 4.

- Local-government zoning decisions can impact the delivery of culturally appropriate health care for Indigenous peoples. 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 peoples.[269]
- 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.[270] Through their authority over zoning decisions, local governments exercise considerable power over the economic and social conditions of urban Indigenous peoples. 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 particular attention to "the rights and special needs of indigenous elders, women, youth, children and persons with disabilities."[271]

Issue for Reform

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

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.

269. Women Transforming Cities at pp 35-38.

270. UN Declaration at art 21 (1).

271. UN Declaration at 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 obligations and expectations around working with First Nations as rights and title holders on co-planning, including in creating opportunities for engagement and dialogue with members of the public.

This option could also 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, procedures can be adapted at a local level to include local Indigenous approaches to engagement and better meet the needs of the community.

In order for a model that encourages co-planning to also meet First Nations where they are at, Reconciliation Listening Series Participants shared a preference for a model that supports the ability to opt in and supports innovation in approaches to co-planning.

BCLI further heard from participants in the Reconciliation Listening Series that capacity support for First Nations is essential, as are frameworks for supporting ongoing relationships as opposed to point-in-time information dumps and correlated requests for input on short timelines.

It was further shared by Reconciliation Listening Series participants that encouraging innovative approaches and support for meeting Nations where they are at through legislative frameworks could help minimize the current dependency on the will of individuals in leadership roles to collaborate with First Nations.

The committee's recommendation for reform

The committee didn't favour adding additional procedural requirements. It was of the view that this approach was consistent with its earlier recommendations, which sought to preserve flexibility for local governments within the current legislative framework.

The committee recommends:

8. BC legislation on local regulation of land use should not specify any additional procedural requirements for public engagement and public hearings on land-use bylaws.

Chapter 10. Conclusion

This report has set out recommendations for reform on eight issues for reform. These issues ran the gamut from the fundamental question of whether BC's legislation on the local regulation of land use should continue to feature the public hearing as the main form of public engagement on local-land-use bylaws to considering what options might replace the public hearing. The report also considered potential reforms to fine-tune public engagement on local-land-use bylaws.

Chapter 1 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 2 summarized the public consultation that preceded this report, discussing a range of consultation events and responses to the consultation paper.

Chapter 3 set out important information on the UN Declaration on the Rights of Indigenous Peoples, BC's *Declaration on the Rights of Indigenous Peoples Act*, and the framework for this project's recommendations for reform.

Chapter 4 described BC's evolving legislative framework for public hearings on local-land-use bylaws. It also considered the purposes of public hearings and the goals of this legislative framework.

The report began its consideration of issues for reform in chapter 5. After setting out leading criticisms of the public hearing, this report considered whether the current legislation on the public hearing should be replaced.

While a minority of committee members was open to recommending that the public-hearing requirement be repealed, a majority recommended that it should be retained and recommended that legislative prohibitions on local governments holding public hearings be removed. As a whole, the committee didn't favour making public hearings a requirement in every case in which a local government is considering a land-use bylaw.

Chapter 6 considered other forms of public engagement. The chapter discussed a wide range of specific forms of public engagement. It then discussed options for reforming BC legislation to accommodate forms of public engagement other than public hearings. The committee considered these approaches but recommended that no

new legislation should be adopted to enable other forms of public engagement on land-use bylaws.

Chapter 7 delved into principles-based guidance. It examined whether BC should adopt this approach for its legislation on public engagement on local-land-use bylaws. While the committee didn't favour new legislation, it did recommend that this principles-based approach be adopted for guidance to local governments on public engagement on land-use bylaws. The committee also recommended a range of principles for consideration, as part of an inclusive list.

Chapter 8 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 hearings. Ultimately, the committee felt that the legislative framework and the case law limits the prospect of requiring that public hearings come earlier in the process to adopt a land-use bylaw. The committee recommended that no new legislation be adopted on the timing of the public hearing.

Chapter 9 considered the procedural requirements for public hearings. It asked readers to consider ways of making public hearings and public engagement more inclusive, particularly for Indigenous peoples and other people highly impacted by local government land-use bylaws and zoning decisions whose voices are often excluded from public hearings.

The committee recommended that no new legislation be adopted to add procedural requirements to the legal framework for public hearings. While the committee saw value in the options discussed in this chapter, it was reluctant to endorse new legislation because it was concerned that it could constrain local governments and burden the process of adopting a land-use bylaw.

APPENDIX A

List of Recommendations

1. BC legislation on local regulation of land use should not require public hearings on all land-use bylaws, including zoning bylaws and official community plans. **(58–59)**

2. [majority] *Where BC legislation on local regulation of land use requires a public hearing right now, that legislation should not be amended to remove all requirements for public hearings.* **(59–62)**

2. [minority] *Where BC legislation on local regulation of land use requires a public hearing right now, that legislation should be amended to remove all requirements for public hearings.* **(59–62)**

3. [majority] *There should be no circumstances in which local governments should be prohibited from conducting public hearings.* **(62–63)**

3. [minority] *There should be circumstances in which local governments should be prohibited from conducting public hearings.* **(62–63)**

4. BC legislation on local regulation of land use should continue to enable forms of public engagement on land bylaws other than public hearings. **(71–74)**

5. The BC government should review and provide non-legislative principles-based guidance and resources to local governments for engagement on local regulation of land use. **(83–86)**

6. The BC government should look to good practices from within British Columbia and other jurisdictions to develop their principles-based approach to improve its guidance and resources for public engagement on local regulation of land use. Such principles may include transparency, accountability, inclusivity, equity, reconciliation, proportionality, and timely (in accordance with section 475 of the Local Government Act). **(87–88)**

7. BC legislation on local regulation of land use should not require the public hearing to come earlier in the process to adopt a land use bylaw. **(92–95)**

8. BC legislation on local regulation of land use should not specify any additional procedural requirements for public engagement and public hearings on land-use by-laws. **(104–106)**

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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