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BARRISTERS AND SOLICITORS

Municipal Decision-Making in a Physically Distanced World

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Fine Print

- ❖ Intended to be general information, not legal advice - should always seek legal advice particular to your situation
- ❖ Situation is changing extremely rapidly, so ensure you're current - several points in my presentation would not have been true three weeks ago
- ❖ Covering broad strokes but focus largely on British Columbia's legislative regime - each jurisdiction will be somewhat different in approach

Structure

- ❖ 1. Legal Framework
- ❖ 2. Electronic Council Meetings
- ❖ 3. Electronic Public Hearings
- ❖ 4. Privacy and Accessibility



Legal Framework

Legal Underpinnings

- ❖ Decision making requirements can be restricted not only by statutory limits but also under the common law through court decisions
- ❖ “The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference.”
 - ❖ *London (City) v RSJ Holdings Inc.*, 2007 SCC 29, para 38

Administrative vs Legislative Decision Making

- ❖ What amount of transparency and public accessibility is required will depend on the nature of the decision
- ❖ Decisions that are administrative in nature, focused on individual rights and interests, require a municipality to provide procedural fairness to those impacted (“interested parties”)
 - ❖ Ex. a rezoning bylaw
- ❖ This includes things like notice of the decision to be made, disclosure of relevant materials, and an opportunity to make submissions

Legislative Decision Making

- ❖ If a municipality is “acting legislatively”, impacting the community as a whole, procedural fairness is not generally engaged
 - ❖ Councillors are still constrained by legislative requirements and political considerations
- ❖ Regardless all municipal decisions have to fall within the authority and parameters set out by legislation
- ❖ Common law requirements complement and interpret that statutory authority, rather than replacing it

Electronic Council Meetings



Legislative Authority

- ❖ Many jurisdictions permit the use of electronic council meetings, but the specifics differ from jurisdiction to jurisdiction
- ❖ In Ontario prior to COVID-19 electronic meetings were permitted but members appearing electronically did not count towards quorum
- ❖ In BC governed by s. 128 of the Community Charter (and similar legislation for districts), but also a recent Ministerial Order

Section 128

- ❖ S. 128 of the Community Charter permits Special Meetings to be held electronically, as well as permits the attendance of members of council at Regular and Committee Meetings electronically
- ❖ Several requirements
 - ❖ Must be authorized by, and conducted in accordance with, the relevant procedural bylaw
 - ❖ Must allow participants to hear, or watch and hear, each other
- ❖ Additional requirements
 - ❖ For Special Meetings, the technology must allow members of the public to hear, or watch and hear, the meeting (except for closed portions) at a specified place, and must have a designated municipal officer present
 - ❖ Also have to provide notice that includes the nature of the meeting and where the public can attend
 - ❖ For Regular Meetings or Committee Meetings, the technology must allow the public to hear, or watch and hear, the meeting (except closed portions)

Ministerial Order M083

- ❖ Ability to hold electronic meetings in BC was dramatically opened up, on a temporary basis, by Ministerial Order on March 26 in response to COVID
- ❖ No longer have to allow the public to attend open meetings, and prohibiting attendance will not be deemed to have closed the meeting
- ❖ Even if it is contrary to the Community Charter or not set out in a procedural bylaw, municipalities can hold meetings electronically
- ❖ No lack of clarity - in BC until further notice you can hold an electronic council meeting and you do not need to make it open to the public

Electronic Public Hearings

Public Hearings

- ❖ While BC's Local Government Act requires public hearings for official community plan bylaws, zoning bylaws, or early termination of land use bylaws that provide a reasonable opportunity to be heard or present written submissions, with limited exceptions
- ❖ Additional consultation requirements can also be required for community plans, but consultation is left open to broad interpretation by municipalities:
 - ❖ “the nature of the opportunities to consult, and the persons or entities consulted, are matters to be decided by the City Council...[consultation] includes informal communications, meetings, open houses, delegations, and correspondence. The essence of the requirement is that those consulted have the opportunity to question and provide their comment, and that the local government weigh that comment, before advancing in the legislative process.”
 - ❖ *Gardner v Williams Lake (City)*

Disclosure and Participation

- ❖ Notice should give the flavour and nature of the decision being made and go to those whose rights are impacted
 - ❖ *Canadian Pacific Railway Co. v Vancouver (City)*
- ❖ Must provide to interested parties materials, reports and other documents material to the decision
 - ❖ *Pitt Polder Preservation Society v Pitt Meadows (District)*
- ❖ “When the City is considering rezoning a property, local residents have two important rights. They have 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. They also have the right to express this opinion to the City at a public hearing.”
 - ❖ *Community Association of New Yaletown v Vancouver (City)*
- ❖ That disclosure needs to occur before public consultation in order to provide the public an opportunity to meaningfully contribute

Electronic Public Hearings

- ❖ The Local Government Act still contemplates a process that includes at least some element of in-person hearings and access to disclosure (s. 466):
 - ❖ Notice required must include “the place of the hearing” and “the place where and the times and dates when the bylaw may be inspected”
- ❖ Public hearings were not dealt with in Ministerial Order 083
- ❖ As a result, it appears that at least some physical attendance option must be available

Public Hearing Options

- ❖ While an in-person public hearing is likely still required if a municipality is proceeding with matters that require a public hearing, nothing within BC prevents municipalities from supporting that hearing with electronic participation options and promoting those options heavily, learning from the consultation processes available
- ❖ You could even strongly encourage participants to stay home and attend via electronic means if at all possible
- ❖ Any public hearings would need to comply with public health officer orders
- ❖ Consultation efforts can also likely be satisfied by electronic or other not in-person means



Privacy and Accessibility

Privacy

- ❖ Generally if you're using electronic tools that store personal information (ex. a citizen's personal email address) outside of Canada, you need their informed consent
- ❖ Within BC, that requirement is temporarily suspended for public bodies by Ministerial Order M085 if the following terms are met:
 - ❖ the tools or applications are being used to support and maintain the operation of programs or activities of the public body or public bodies,
 - ❖ the use of the tools or applications support public health recommendations or requirements such as physical distancing or working from home; and,
 - ❖ any disclosure of personal information is limited to the minimum amount reasonably necessary for the performance of duties
- ❖ As well, the public body must ensure the tool or application is reasonably secure and must make reasonable attempts to have the data removed from the tool or application "as soon is operationally possible" and the public body meets its retention requirements (typically one year after a decision based on the personal information)

Accessibility

- ❖ “At a minimum, “consultation” anticipates bi-lateral communication in which the person consulted has the opportunity to question, to receive explanation and to provide comment to the local government upon the proposal.”
 - ❖ *Gardner v Williams Lake (City)*
- ❖ Obstacles to that participation that block the ability of people consulted from contributing could result in a finding that consultation did not occur
- ❖ Providing multiple avenues for review and input lessens those obstacles
- ❖ Accessibility not only concerned with the tool, but how persons with disabilities may be able to utilize that tool

Questions?

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