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Bill 26: Significant Implications for Local Governments

On November 3, 2021, Bill 26[1] ("**Bill 26**") received third reading by B.C.'s legislature and portions of Bill 26 relating to public hearings and delegating to staff the authority to issue development variance permits ("**DVPs**") came into force on November 25, 2021. By an Order of the Lieutenant Governor in Council dated January 31, 2022, most of the remaining amendments in Bill 26 became law on February 28, 2022. This article will discuss some of the major changes, which include amending the *Local Government Act*[2] ("***LGA***") to remove the default public hearing requirement for zoning amendment bylaws that are consistent with an official community plan ("**OCP**"); enabling local governments to delegate decisions on minor DVPs; offering flexibility to local governments in choosing alternative means of notice publication; and introducing, for the first time, a requirement to consider establishing codes of conduct for council/ board members or to review existing codes.

Removing the Public Hearing Requirement

Local governments are authorized by the *LGA* to adopt zoning bylaws that regulate the use and density of land and buildings, as well as the siting, size, and dimensions of buildings and uses permitted on the land.[3] Because zoning bylaws can have a significant effect on how owners may use their property, before adopting such bylaws, local governments were required to hold a public hearing to allow any member of the public who believes their interests may be affected an opportunity to be heard or to present written submissions respecting matters contained in the proposed bylaw. This approval process has been criticized as being complex and lengthy, potentially leading to "unnecessary delays and fewer homes being built, as well as a pent-up demand for housing".[4] As explained by the Hon J. Osborne, the purpose of the proposed legislative amendments was: "to help streamline and improve the speed of… … [local government] …development approvals processes, with the intention of helping British Columbians get into homes faster".[5]

Before this amendment received Royal Assent, local governments had the authority to waive a public hearing if an OCP existed for the affected area and the bylaw was consistent with this OCP. With this portion of Bill 26 coming into force on November 25, 2021, local governments are no longer required to take the extra step in the development approval process of waiving the public hearing when an amended zoning bylaw is consistent with an existing OCP, and instead, they are only required to publish a public notice before the first reading.[6] However, where a local government considers a public hearing is needed, despite the fact that the proposed rezoning is consistent with the OCP, the

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local government may still choose to hold a public hearing.

The rationale for removing the public hearing requirement where the proposed rezoning is consistent with the OCP is the same as the rationale for the previous legislation, which allowed local governments to choose to waive the public hearing, and still provided for consultation and accountability to the public of a rezoning application:

1. public consultation, as well as a public hearing, has already taken place when the OCP was adopted; and
2. a judicial review is still available to challenge a local government's determination that the zoning bylaw was consistent with an OCP, and therefore, whether a public hearing was in fact required.

As noted above, where a public hearing is not needed, local governments are obligated to give public notice of the proposed zoning bylaw before first reading takes place. This is intended to ensure that the public is informed of the bylaw amendment and to enable the provision of feedback to council/ board members through regular channels (e.g., letters and emails).

Authority to Delegate Decisions on Minor Development Variance Permits

Perhaps the more notable change to legislation, which took effect in November 2021 is in relation to DVPs. Previously, owners had two methods to seek a variance to a zoning bylaw. One was a DVP issued by a local government, and the other was an order issued by a Board of Variance.[7] These are separate processes, and one does not prohibit the other. Under the first method, owners may apply to the local government for a DVP when they seek to vary the provisions of an otherwise applicable bylaw.[8] DVPs are issued by council resolution. As a restriction on council's discretion, council must not issue a DVP that varies use or density, the application of a zoning bylaw in relation to residential rental tenure, or a flood plain specification. Under the second variance method, owners may apply to Board of Variance for an order granting a "minor" variance. The Board's principal function is to provide an avenue of relief for persons seeking a variance from certain provisions of municipal bylaws where compliance would create undue hardship. The question of whether a variance is a "minor" one must be decided by the Board in relation to all the surrounding circumstances. Generally, the Board's decision is final (there is no right of appeal unless it was made without jurisdiction).

The local government has broader powers to approve DVPs. Unlike the Board of Variance, council is not restricted to only issuing "minor" variances where there is "undue hardship". Councils were, however, before the amended legislation, prohibited from delegating the issuance of DVPs.

The recent amendments enable the delegation, by bylaw, of a local governments' power to issue DVPs to its officers or employees for minor variances in certain circumstances.[9] As with the amendments to the public hearing requirements discussed above, the amendments to the DVP provisions were designed to speed up the local government approval processes to increase the housing supply. Minor variances that fall under this new authority may include siting, size and dimensions of buildings, structures and permitted-uses; off-street parking and loading space requirements; the regulation of signs; or screening and landscaping to mask or separate uses or preserve, protect, restore, and enhance the natural environment.

In addition, regulations may later be adopted to add to this list. While these amendments enable the delegation of decisions on minor variances, the alternative avenue of seeking a variance from the Board of Variance remains available.

Where a bylaw is adopted by a local government to delegate minor variances, the bylaw must set out what minor variances are delegated, the principles to determine whether the proposed variance is minor, as well as guidance about how to exercise the delegated power. The applicant is also entitled to request reconsideration by council or the Board of the decision of the delegate.[10] This reconsideration right could have the unintended effect of increasing processing time for some applications because reconsiderations will have to be heard by Council or the Board at a scheduled meeting after the delegate has made a decision.

The local governments' obligation to give notice before passing a resolution to issue DVPs does not apply to the delegate issuing such permits, likely because local governments would have already adopted a delegation bylaw that contains the characteristics of minor variances.[11]

Modernized approach to Publication of Public Notice

Previously, local governments were required to publish public notices in two consecutive weekly newspapers and the alternative means of publication authorized by the legislation were difficult to meet.[12] In recognition that the modes of communication have significantly changed over the years, the Legislature has enacted changes to "modernize local government public-notice requirements by allowing community choice in addition to existing methods for providing public notice".[13] As of February 28, 2022, local governments have the option to deviate from the default requirement to publish the public notice in the newspaper, and instead, adopt their own public notice bylaw, allowing them to select two (or more) publication methods that are most appropriate for their community, e.g., a website, an online newspaper, or a direct mailout. However, it is worth noting that the minister retains the power to prescribe principles to be considered by local governments before the introduction of such bylaws. During the debates about Bill 26, Honorable J. Osborne suggested that the prescribed principles of effective public notice might include that the notice format is easy to access and has broad reach in the community; that the information is provided by dependable and trustworthy sources; and that the notice format is suitable for the information that is being conveyed.[14]

Moreover, pursuant to the recent amendments, the minister has the authority, when a public notice bylaw is adopted, to make regulations prescribing one of the means of publication that must be incorporated into the bylaw; requiring local governments to choose from various specified means of publications; or directing the time of publication, if done through alternative means specified in the bylaw.

The notice requirements for a special regional district board meeting were also modernized by removing the requirement to mail a notice to the board members five days ahead of the meeting. Instead, regional districts are required to post a copy of the notice at least 24 hours before the meeting at prescribed posting places and send a copy to the director. With the removal of the requirement to notify by mail, other means of producing notices would become available, including distributing notices electronically.

New Code of Conduct Requirements

Another significant impact on local governments is manifested through the introduction of new sections referencing codes of conduct in the *Community Charter*.[15] The legislature proposes to add a requirement for all local governments, the City of Vancouver Park Board, and the Cultus Lake Park Board, to consider implementing codes of conduct for their elected officials or reviewing existing codes of conduct if such exist. If passed, these amendments would require the consideration of a code of conduct within six months of the first regular council/board meeting following a general local election. Local governments that decline to incorporate a code of conduct or review an existing code would be required to make the reasons for the decision publicly available and reconsider this decision prior to January 1st of the year of the following general local election. If the prior decision is confirmed, the local government would be required to make available to the public a statement respecting its reasons for confirming this decision. The purpose is to strengthen the responsible conduct of elected officials and enhance accountability to the public.

To ensure that codes of conduct meet their purpose, local governments are required, prior to developing or updating codes, to consider prescribed principles and other prescribed matters, as well as comply with certain requirements, including those with respect to public notice or consultation. The particulars of such principles, matters and requirements have yet to be identified and we anticipate that future regulation will provide some clarity.

Based on the debates leading to the third reading of Bill 26, it is suggested that local government take into consideration the fundamental principles of integrity, accountability, respect, leadership, and collaboration, as identified by the Working Group on Responsible Conduct since these considerations will improve the local government's ability to provide good governance to its community.[10]

Key Takeaways

Overall, the amendments under Bill 26 are intended to offer local governments more powers to simplify and accelerate their development approvals processes to increase the housing supply and flexibility in terms of the way they communicate with their communities. In addition, the new code of conduct provisions will hopefully strengthen the responsible conduct of elected officials and accountability to the public.

The removal of the public hearing requirement in situations where there is an OCP, and the owner is seeking to amend a zoning bylaw in a way that is consistent with the OCP, is beneficial to both local governments and owners. If a public hearing is not required, the approval process may be shortened, with the owner being able to move forward on its proposed development faster and local governments being able to better meet the housing needs of their communities. The delegation of power to issue DVPs is another new tool afforded to local governments to speed up such approvals.

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While local governments already had the authority to waive public hearings where zoning amendments are consistent with OCPs, they may now be more inclined to do so. In turn, this may prompt some local governments to consider the scope of available consultation opportunities at the OCP stage and may result in more public interest when OCP reviews are carried out.

There is still a risk that a third party could challenge the local government's decision not to hold the public hearing by arguing that the zoning bylaw is not consistent with the OCP. This may especially be the case where the proposed zoning amendment is complex or controversial. Accordingly, developers may still want to seek the community's support for development projects, even where a public hearing is not required. Further, councils may still want to consider holding public hearings for complicated or controversial projects to gauge the level of community support for an application. Public hearings are considered an important component of the democratic process, creating transparency around local government zoning decisions.

The proposed amendments with respect to public notice requirements are intended to enhance community involvement and accountability of decision-makers. However, as explained above, in developing a public notice bylaw, local governments would need to consider certain prescribed principles. This process would raise a new set of issues for local governments to take into account. For example, a website might be perceived to be an insufficiently reliable source as it could go down during the prescribed notice period. Moreover, not all segments of the population may have access to online means of publication. Therefore, a more effective way of publishing notices could be to publish one notice online and the other by direct mailout or a newspaper. Moving forward, it will be interesting to see the guidance anticipated by regulations to support local governments in developing their public notice bylaws.

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Footnotes:

1 Bill 26, *Municipal Affairs Statutes Amendment Act* (No. 2), 2021, 42nd Parl, 2nd Sess, British Columbia.

2 *Local Government Act*, [RSBC 2015] c. 1 [LGA].

3 *LGA, supra* note 2, s. 479(1).

4 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard),* 42nd Parl, 2nd Sess, No. 123 (2 November 2021) [Debates], at 3906 (Hon. J. Osborne).

5 *Ibid,* at p. 3916.

6 *LGA, supra* note 2, s. 464, 466.

7 *LGA, supra* note 2, s. 542

8 *LGA, supra* note 2, s. 498.

9 *LGA, supra* note 2, s. 498(4), 498.1.

10 *LGA, supra* note 2, s. 498.1(2), (4)

11 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard),* 42nd Parl, 2nd Sess, No. 124 (3 November 2021), at 3931 (Hon. J. Osborne).

12 *Community Charter* [SBC 2003] c.26, s. 94.

13 Debates, *supra* note 4, at p. 3906.

14 *Ibid*, at p. 3908.

15 *Supra* note 12.

16 Debates, *supra* note 4, at p. 3911, 3912

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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