

Minutes of the **COUNCIL IN COMMITTEE MEETING** of Pitt Meadows City Council held on **Tuesday, January 12, 2010** at 6:00 p.m. in the Meadows Room of the Pitt Meadows City Hall, 12007 Harris Road, Pitt Meadows, British Columbia.

PRESENT:

Elected Officials: Mayor D.F. MacLean
Councillor J. Becker, Chair
Councillor B. Bell
Councillor D. Bing
Councillor T. Miyashita
Councillor G. O'Connell
Councillor D. Walters

Staff J. Rudolph, Chief Administrative Officer
K. Grout, Director of Operations & Development Services
L. Darcus, Director of Corporate Services
K. Zanon, Economic Development Corporation CEO
L. Kelly, Deputy Clerk

The meeting was called to order at 6:00 p.m.

A. ADOPTION OF AGENDA

MOVED by Councillor Bell, **SECONDED** by Councillor O'Connell, THAT the agenda for the November 10, 2009 Council in Committee Meeting be adopted.

CARRIED.

B. ADOPTION OF MINUTES

1. **Minutes of the December 22, 2009 Council in Committee Meeting.**

MOVED by Mayor MacLean, **SECONDED** by Councillor Bell, THAT the Minutes of the Council in Committee Meeting held on December 22, 2009, be adopted.

CARRIED.

C. DELEGATIONS AND PRESENTATIONS

There were no items received for this Meeting.

D. REPORTS**1. Post-Public Hearing Review.**

The Director of Corporate Services updated Council on the post-public hearing process, providing them with some written material which will be posted on the secure website for their reference, and is included as Attachment 1 and forms part of these minutes.

MOVED by Mayor MacLean, **SECONDED** by Councillor Walters, THAT Council receive the verbal report by the Director of Corporate Services.

CARRIED.

2. Bylaw No. 2440, 2009 & Bylaw No. 2441, 2009 - Barnston View Road Application to Amend Land Use Bylaw No. 1250 and the Official Community Plan Bylaw No. 2352 to Permit Live / Work Spaces and Townhouses. (3060-20-2009-05-P)

(Deferred from December 15, 2009 Regular Council Meeting)

The Director of Operations and Development Services said that Items A and B of the proposed resolution were the subject of the Public Hearing on December 15, 2009; Item C is a variance permit request related to the design of the project that would reduce the rear yard setback, and is a separate matter.

A lengthy discussion ensued with the following points noted:

- Is the commercial area separate from the living space in the live / work apartments? Ms. Grout said that they share a common access; a covenant will ensure that the first floor space remains as a commercial use.
- What would happen if someone bought a unit, but did not complete it as commercial? Ms. Grout said that it would have to remain empty.
- Could the top be rented out and the bottom leased as commercial? Ms. Grout confirmed that it could.
- Is there any guarantee that the commercial will be built? Can Council hold up the three-storey residential until the commercial is completed? Ms. Grout replied that Council could include in the covenant that the commercial construction must precede the residential; Council can delay the residential.
- It was felt by some that the pub/restaurant would bring people into Sawyers Landing, and there was an interest in asking that the chapel be built. Ms. Grout said that the City cannot force a completion date for the developer to construct it.

2. **Bylaw No. 2440, 2009 & Bylaw No. 2441, 2009 - Barnston View Road Application to Amend Land Use Bylaw No. 1250 and the Official Community Plan Bylaw No. 2352 to Permit Live / Work Spaces and Townhouses Cont'd. (3060-20-2009-05-P)**

MOVED by Councillor Walters, **SECONDED** by Councillor Miyashita, THAT the Committee recommends THAT Council:

- A. Grant Third Reading to Bylaw No. 2441, 2009 to amend the Official Community Plan Bylaw No. 2352, 2007 to add a new Community Commercial / Mixed Use designation and to change the designation of 10973, 10974, 10995 and 10996 from Community Commercial to Community Commercial / Mixed Use to permit commercial and residential development within the same designation; AND
- B. Grant Third Reading to Bylaw No. 2440, 2009 to amend Land Use Bylaw No. 1250 to permit combined live / work spaces and to increase the maximum number of dwelling units permitted within the CD-11 Zone from 456 to 481 units.

See Below.

MOVED by Councillor Bell, **SECONDED** by Councillor O'Connell, THAT the Committee recommends THAT Council refer Items A & B of the resolution to staff with the understanding that the directions will include discussions between staff and the proponent with respect to the changes as discussed by Council in Committee; AND THAT any changes will involve a further Public Hearing after review by the Council in Committee.

CARRIED.

The following comments were offered by individual Council members:

- Like the smaller units that face Barnston View Road; don't like the townhouses behind it – will not encourage commercial; need something to attract commercial. Like the live / work but want the units separated.
- It is not possible to have viable commercial without traffic.
- It is an opportunity for the developer to work with the Economic Development Corporation to get commercial uses proceeding in the Sawyers Landing area.
- Parking and access is very tight and this is a concern; need a place for customers to park and then walk into the Village.

2. **Bylaw No. 2440, 2009 & Bylaw No. 2441, 2009 - Barnston View Road Application to Amend Land Use Bylaw No. 1250 and the Official Community Plan Bylaw No. 2352 to Permit Live / Work Spaces and Townhouses Cont'd. (3060-20-2009-05-P)**

- The best way to ensure commercial is to have commercial at grade and residential above.
- Like the idea of not having a “dead” street at night; like the idea that there would be residences with eyes on the street for security.
- Concern expressed that secondary suites will be put in the commercial space in townhomes; could support live / work space; adamant about the commercial space on the first floor.
- Council insists on a vision of the commercial as Village.
- Ms. Grout summarized the issues presented by Council members: (1) acceptance of the live / work unit building on the corner of Fraser Way and Barnston View Road; (2) no support for a reduced rear yard set back; (3) ground floor commercial uses with residential above; (4) something for the rest of the street that mimics the units on the corner; and (5) that phasing and timing of construction were important considerations.

C. Authorize Development Variance Permit No. 2009-008 to reduce the minimum rear lot line setback in the CD-11 zone for the proposed multi-family project on the subject site.

(K. Zanon left the meeting at 6:57 p.m.)

Items to be Deferred.

MOVED by Mayor MacLean, **SECONDED** by Councillor Walters, THAT the following items be deferred to the January 19, 2010 Regular Council Meeting:

3. Transforming the Fire Rescue Service – Provincial Report.
4. Regional Mutual Aid for Fire – 2010 Olympics.

CARRIED.

3. **Transforming the Fire Rescue Service - Provincial Report. (14-7380-04/08)**

This item was deferred to the January 19, 2010 Regular Council Meeting as per a resolution of Council under Section D.

4. **Regional Mutual Aid for Fire – 2010 Olympics. (14-7200-01/08)**

This item was deferred to the January 19, 2010 Regular Council Meeting as per a resolution of Council under Section D.

5. **Policy B-28 – Non-Payment of Consultation Fees, Other Levels of Government and Third Parties. (01-0340-50-10)**

MOVED by Mayor MacLean, **SECONDED** by Councillor Miyashita, THAT the Committee recommends THAT Council:

- A. Adopt Policy B28 – Non-Payment of Consultation Fees, Other Levels of Government and Third Parties.

CARRIED.

6. **Metro Vancouver Request for Endorsement of Submission to the Canadian Radio-Television and Telecommunications Commission (CRTC). (01-0400-50/10)**

MOVED by Councillor Miyashita, **SECONDED** by Councillor O’Connell, THAT the Committee recommends THAT Council:

- A. Endorse Metro Vancouver’s submission to the Canadian Radio-Television and Telecommunications Commission’s (CRTC’s) public hearing regarding the community channel; AND
- B. Direct staff to fax a letter directly to the CRTC supporting community control of the community channel.

DEFEATED.

7. **November 2009 Draft Regional Growth Strategy. (0510-20)**

MOVED by Mayor MacLean, **SECONDED** by Councillor Walters, THAT the Committee recommends THAT Council:

- A. Receive the report dated January 4, 2009 from the Director of Operations and Development Services for information; AND
- B. Request the following adjustments be made to the draft Regional Growth Strategy:
- B.1 Area 1 (Harris Road), as shown on the Map in Attachment C, be designated “Industrial”; AND
- B.2 Area 3 (North Lougheed), as shown on the Map in Attachment C, be identified as a “Special Study Area”; AND

7. **November 2009 Draft Regional Growth Strategy Cont'd. (0510-20)**

- B.3 Changes to the Major Road Network, approved by TransLink, be treated as RGS housekeeping amendments.
See Below.

Before the motion was put to a vote, it was:

MOVED by Councillor Bing, **SECONDED** by Councillor O'Connell, THAT the main motion be amended by adding:

- B.4 Area 2 (Baynes Road) as shown on the Map in Attachment B, be identified as a "Special Study Area".

CARRIED.

The question was then called on the main motion, as amended, and it was:

CARRIED.

E. COMMITTEE ROUND TABLE

Scheduling Workshops (Councillor O'Connell) – Mr. Rudolph said that a Strategic Workshop will be scheduled, and a Procedures Workshop has been scheduled for January 26, 2010. Council members were encouraged to provide suggestions for other workshops.

Airport Update (Councillor Bell) – the Department of National Defense has returned and the Airport is getting ready for the Olympics – we can expect increased traffic.

Centralized Mailboxes in Coquitlam (Councillor Walters) – interesting situation to keep watching.

RCMP Strategic Planning Session (Councillor Becker) – concerned that Council had not had sufficient notification in order to discuss and have a consensus to put forward at the session. Mr. Rudolph said that although Council members were invited, it is an internal session and was not intended as a Council workshop, though their input would be encouraged.

City Christmas Lights – Leave on During the Olympics (Councillor Bing) – can we leave on; staff indicated that some have already been taken down.

New Year's Day – New Race (Councillor Miyashita) – 50 people participated in the trail run.

Welcome to Pitt Meadows Sign (Councillor Walters) – trees obscure the sign and it needs better lighting. Ms. Grout said staff is working on making it more visible.

F. ADJOURNMENT

MOVED by Councillor Bell, **SECONDED** by Mayor MacLean, THAT this Meeting now be adjourned at 7:40 p.m.

CARRIED.

G. QUESTION PERIOD

1. **Draft Regional Growth Strategy.**

- A. Peter Jongbloed, 11616 195A Street, Pitt Meadows, said he was disappointed that Council had identified the Baynes Road property as a Special Study Area, rather than leaving it in the Agricultural Land Reserve.

Chair

1/13/2010

ATTACHMENT 1:

POST PUBLIC HEARING PROCESS

Public Hearings are required before the adoption, amendment, or repeal of an Official Community Plan or zoning bylaw. The purpose of a public hearing is to allow those individuals who may be impacted by the change to voice their support, opposition, or questions about the changes proposed.

Division 4 of the Local Government Act specifically defines the public hearing process for municipalities. (http://www.bclaws.ca/Recon/document/freeside/--%20L%20--/Local%20Government%20Act%20%20RSBC%201996%20%20c.%20323/00_Act/96323_00.htm)

After a public hearing has been adjourned, it is important that processes are followed that keep the integrity of the public hearing intact. Many a bylaw has been set aside due to incorrect procedures. The simple rule is that elected officials who are responsible for making a decision that is subject to a public hearing requirement should not receive any representations from interested parties after the hearing is closed, unless a second public hearing is to be convened. The courts have recognized that Council members are bound to receive additional information as individuals between the adjournment of a public hearing and any final adoption, however their decisions have resulted in two key concepts:

- Council as a group should not receive additional information after a public hearing that could influence a decision, unless it is from staff or a consultant clarifying information about a proposal or responding to issues and concerns raised at a public hearing.

- It is important that Council does not receive additional presentations or information from a proponent or opponent to the project without the other being present and provided an opportunity to respond, which would essentially trigger a new public hearing process.

There are many variations on information received after a public hearing, and attached is a document produced by Lidstone, Young, Anderson (2002) that outlines specific cases and court decisions. Included below is a list of recommendations from this document as a result of the court cases discussed:

Recommendations from 'After the Public Hearing' (Attachment):

1. Neither the council nor its committees should meet with proponents or opponents of the bylaw.
2. Individual members of the council or board (who may hold the deciding vote on a bylaw) should not solicit information from, or attend meetings with, interested parties after the public hearing.
3. Staff or consultants, may be asked to report on technical concerns relating to the proposed bylaw. However, reports should not:
 - (a) serve as a vehicle for advancing new proposals or arguments by proponents or opponents; nor
 - (b) introduce substantial new information or analysis regarding economic, environmental or land use impact matters.

1/13/2010

4. If unsolicited correspondence or reports are received following a hearing, the sender should be advised that the document will not be forwarded to council or board until after a decision has been made on adoption of the bylaw; unless staff believe that the information in the material is essential. If so, a further public hearing should be scheduled so that all affected parties can make submissions regarding the material.

(Lidstone, Young, Anderson: After the Public Hearing, 2002)

Another Key Consideration should be changes to the bylaw, or changes to the intent of the bylaw. Any changes would likely trigger a new public hearing so that the proponents and opponents would have an opportunity to comment on the changes. A caveat to this consideration is that if solutions were proposed to concerns raised at the public hearing, and the proponent is accepting of those solutions, the court may support a bylaw with no further public hearing, however this is a slippery slope and arguments could be made that the solution did not address the concerns of individual opponents who were not offered an opportunity to voice their concerns.

REFERRALS OF BYLAWS TO CIC POST PUBLIC HEARING

When a bylaw, post public hearing, is referred to Council in Committee, the following procedures should be followed to hold the integrity of the public hearing intact:

- Discussion should be between Committee members related to the information received prior to, or during the public hearing.
- Council in Committee may direct questions of clarification to staff.
- Council in Committee may request consultant reports, or staff reports, for clarification of issues or concerns raised related to information previously received or identified during the public hearing.
- Committee members Should Not discuss any emails, correspondence or discussions that have occurred about the bylaw between individuals since adjournment of the public hearing.
- Any requested changes to the bylaws will likely trigger a new public hearing.
- Any changes in “use” or “density” will trigger a new public hearing (see Attachment, pages 11-13).

LIDSTONE, YOUNG, ANDERSON

ATTACHMENT:

AFTER THE PUBLIC HEARING

December 6, 2002

By Grant Anderson

AFTER THE PUBLIC HEARING

I. INTRODUCTION

One of the more difficult decisions facing municipal officials in recent years has been the determination of proper procedure after the close of a public hearing. In many cases, a desire by elected officials to receive all possible input and to respond to concerns that have been raised at the hearing comes into conflict with the need for fair and equal treatment of different interest groups. This paper reviews the extensive case law in this area and sets out some recommendations regarding post-hearing procedure.

A. Public Hearing Requirements

A public hearing must be held before the adoption, amendment or repeal of an official community plan. A public hearing is also required before the adoption, amendment or repeal of a zoning bylaw, although Section 890(4) of the *Local Government Act* allows a municipal council or regional district board to waive the holding of a public hearing on a zoning bylaw if there is an official community plan in effect and the proposed bylaw is consistent with the plan (as it must be, in order to comply with Section 884).

In relation to official community plan bylaws and zoning bylaws, the public hearing must be held after the first reading and before the third reading of the bylaw. A public hearing held at any other point in the bylaw consideration process would be a nullity.

Although public hearings are not specifically required prior to other local government actions such as the issuance of development variance permits, or for statutory decisions such as subdivision approval, public hearings are sometimes convened on a voluntary basis. On those occasions, the common law requirements discussed in this paper will generally be applicable.

From the outset, the courts have held that non-compliance with the statutory requirements for public hearings and breaches of “procedural fairness” or “natural justice” in relation to public hearings can invalidate the bylaw which is the subject of a public hearing: *Ross v. Oak Bay* (1965) 50 D.L.R. (2d) 468 (B.C.S.C.); (1965) 57 D.L.R. (2d) 770 (B.C.C.A.).

In *Bay Village Shopping Centre Ltd. v. Victoria* [1973] 1 W.W.R. 634 the Court of Appeal stated:

“Clearly failure to hold a hearing will be fatal to an amending bylaw. In my opinion the holding of a hearing which did not comply with (Section 890) would be equally fatal.”

There are procedural requirements which apply prior to the public hearing (chiefly, the publication of proper notice and production of relevant documents) and during the public hearing, but the focus of this paper is on the conduct of the council or board after completion of the public hearing. There is a little bit of statute law, and a great deal of case law, prescribing

those things which must be done and those things which must not be done after the hearing concludes.

II. PURPOSE OF THE PUBLIC HEARING

In order to appreciate the rules which have been developed by the courts in relation to post-hearing activities, it is necessary to understand the purpose of a public hearing. The courts will consider that purpose when determining whether particular conduct has the effect of undermining the validity of the hearing and the bylaw.

The *Local Government Act* contains two statements regarding the purpose of a public hearing. Section 890(1) states that a public hearing is for:

“... the purpose of allowing the public to make representations to the local government respecting matters contained in the proposed bylaw.”

Section 890(3) states:

“At the public hearing all persons who believe that their interest in property is affected by the proposed bylaw must be afforded a reasonable opportunity to be heard or to present written submissions respecting matters contained in the bylaw that is the subject of the hearing.”

Although subsection (3) is often recited or paraphrased in public hearing notices, the true purpose of a public hearing is more accurately reflected in the wording of subsection (1). Clearly, it is the “public” which is entitled to make representations, not only that segment of the public with an interest in property which is affected by the proposed bylaw. The key words in subsection (3) are “reasonable opportunity to be heard”, which apply to all those in attendance at a public hearing.

The meaning of the phrase “opportunity to be heard” has been interpreted by the courts as “a fair opportunity to be heard and to meet any representations prejudicial to its interests”: *Hoyda v. City of Edmonton* (1979) 10 M.P.L.R. 1 (Alta.Dist.Ct.), and as “a fair opportunity to make representation”: *Spence v. City of York* (1985) 29 M.P.L.R. 85 (Ont.S.C.).

In *Re McMartin v. City of Vancouver* (1968) 70 D.L.R. (2d) 38; 65 W.W.R. 385 (B.C.C.A.), the court was considering the public hearing requirement under the *Vancouver Charter*. However, the wording was very similar to that of the *Municipal Act*. Davey, C.J.B.C. stated that the Legislature intended that:

“every person affected by the rezoning should have a full opportunity of presenting his views and conditions and the opportunity of answering the opposing arguments, whether the council was acting quasi-judicially or legislatively; therefore it

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required all submissions by the public and property owners to be made at the public hearing, so that *persons affected would have an opportunity of answering opposing views.*"

Thus the courts have emphasized that a reasonable opportunity to be heard has two aspects. First, members of the public must each be allowed to make their case regarding the adoption of the proposed bylaw. Second, each of the participants in a hearing is entitled to hear the representations that have been made by others and to submit a response to those representations.

It is the latter aspect which is at the heart of the general rule regarding the receipt of submissions after the public hearing is closed.

III. RECEIVING FURTHER SUBMISSIONS**A. General Rule**

The general rule is that the elected officials who are responsible for making a decision that is subject to a public hearing requirement should not receive any representations from interested parties after the hearing is closed, unless a second public hearing is to be convened.

Two B.C. Court of Appeal decisions are most frequently cited in respect of the general rule.

In *Bay Village Shopping Centre Ltd. v. Victoria (supra)*, the council held a public hearing, but a subsequent motion to adopt the bylaw was lost. Two weeks later, a representative of the developer appeared before council and presented a brief in favour of the bylaw. Council then reversed its decision and adopted the bylaw. The court had "no hesitation" in setting aside the bylaw, on the basis that no notice was given of the "second hearing" by council and therefore the opponents of the bylaw had no opportunity to respond to the developer's presentation.

In *Re Bourque and Richmond* (1978) 6 B.C.L.R. 130 (B.C.C.A.), the Council held two public hearings, gave third reading to the bylaw and directed that its planning committee ask the developer "to clarify some details of the proposed development" and report back to council. The Court determined that the main purpose of hearing from the developer was "in order to explain explanations from him as to certain compromises that he had apparently proposed to property owners affected by the development." The planning committee met with the developer, who "made statements concerning the development" which appeared in the committee's subsequent report to council. Council then adopted the bylaw, without making any changes.

In setting aside the bylaw, the court held that there was no distinction between the council itself hearing from the developer and the planning committee hearing from the developer, then passing along the developer's statements to Council. Bull J.A. stated:

"What is determinative, in my opinion, is that a proponent of the by-law was hearing by the planning committee in the absence of opponents of the by-law and that the report of the committee prepared following that hearing was considered by council without

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the appellants being heard thereon. There is no question that it would have been improper for council to have heard an officer of the developer in the absence of the opponents of the by-law and without their being afforded an opportunity to be heard.”

...

“I think the provisions of s. 703 are equally contravened where, as in the case at bar, a proponent of a by-law is heard in the absence of opponents of that by-law by a special committee of council which then submits a report to council. That, it seems to me, is doing indirectly what may not be done directly.”

The Court showed little interest in determining what the developer had said to the committee. The fact that he obtained a private audience and that his comments were communicated to council was sufficient to invalidate the bylaw.

The general rule was restated in *Reid v. Sunshine Coast Regional District* (S.C.B.C., New Westminster No. AA91766, February 21, 1990). In that case, the petitioners attacked a bylaw on the basis that the Regional Board had refused to hear a delegation or receive a petition after the public hearing. Hinds J. said:

“Pursuant to provisions of (Section 890) members of the public were given the opportunity to make their representations at the public hearing ... The District Board should not hear additional representations subsequent to that meeting.”

In summary the general rule that a council or board ought not to hear from a proponent or opponent of a proposed bylaw in the absence of other interested parties has been in place for over 25 years.

However, since the general rule was enunciated, the courts have developed several qualifications and exceptions to the rule. These may be grouped into three broad categories:

- (a) receipt of staff reports following the hearing;
- (b) receipt of incidental or casual communications; and
- (c) the exception endorsed in *Jones v. Delta* (1992) 11 M.P.L.R. (2d) 1 (B.C.C.A.), as discussed below.

B. Staff and Consultants' Reports

On several occasions the courts have recognized that it would not be practical to completely prohibit a council or board from receiving relevant information after the close of a public hearing. The first endorsement of the receipt of reports from local government staff and

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consultants is found in the judgment of Davey C.J.B.C. in *McMartin v. Vancouver (supra)*. In a passage that was not essential to the decision, he said:

“... I do not doubt that the council may obtain such advice as it sees fit, at least from its staff, or experts whom it may retain, on questions raised at the public hearing; even from those officials who have initiated the rezoning scheme.”

In *Duquette v. Port Alberni* (1977) 3 M.P.L.R. 177 (S.C.B.C.), the council held an *in camera* meeting with municipal staff after the public hearing, “to consider if there were modifications which could be made which would go some way to meeting the objections voiced at the public hearing”. In dismissing the petitioner’s complaint regarding that meeting, the court noted that:

“... the evidence shows that there were no representations received from any member of the public: it was a discussion between members of council and city officials ...”.

In *Re Bourque (supra)*, Bull J.A. stated:

“I wish to make it clear that I do not question the right of a municipal council, following the conclusion of public hearings, to receive advice concerning a bylaw ... from its municipal staff or from experts retained by council to advise it.”

Thus it is now a generally accepted practice to receive staff and consultant reports following a public hearing. In most cases, there should be no difficulty with the receipt of such reports. However, there are two dangers to consider:

1. It is questionable whether a court would allow a staff report to serve as a smoke screen for the receipt of further submissions from a opponent or proponent. If the primary purpose of a staff report was to pass along significant new submissions from one of the interested parties, it would likely be treated in the same way as the planning committee’s report in *Re Bourque*.
2. Since the Court of Appeal’s decision in *Pitt Polder Preservation Society v. Pitt Meadows* (2000) 12 M.P.L.R. (3d) 1, it is risky to receive significant consultant reports during the hearing, let alone after the hearing. The court held that the public has a right to review such reports and must be given a reasonable time to digest and respond to the contents of the reports.

C. Incidental or Casual Communications

Since the general rule against receipt of further submissions after a public hearing was developed, several judges have declined to set aside bylaws when information which the judges deemed to be insignificant or uncontroversial was received after the public hearing.

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In *Lewis v. Surrey* (1979) 10 M.P.L.R. 123 (B.C.S.C.), third reading of the bylaw was defeated on a tie vote. Ten days later, two councillors inspected the proposed site of the development, together with the developer's representatives and some opponents of the development. The bylaw was subsequently adopted.

In refusing to overturn the bylaw, MacFarlane J. reasoned as follows:

“In this case the council did not receive, directly or indirectly, from the proponent any information which should only have been revealed at a public hearing.

It is true that individual aldermen had visited the proposed site. There is nothing wrong, in my opinion, in legislators taking a view of the premises which are going to be the subject-matter of legislation. Some discussion took place at that time in the presence of the proponent and an opponent of the by-law but there is no evidence before me that such discussion formed the basis of a report to council, upon which council relied in any way in making its decision. I ask myself what representations were made by the developer to the individual members of council which ought to have been made at a public hearing, and am unable to identify any such representation.

The purpose of the statute in providing for a public hearing is to give all interested persons an opportunity to be heard. The statute does not say, and I do not conceive, that the Legislature intended that each member of a municipal council is thereafter and until the bylaw is passed or defeated to remain incommunicado with respect to matters relating to the by-law. It is clear that councillors cannot do so. It is obvious that constituents will write, or otherwise communicate their thoughts on the matter to individual councillors and that staff and consultants will express their opinions and pass on information to members of council. It is true that all submissions by proponents, opponents, the public, and property owners ought to be made to council at the public hearing so that persons affected will have the opportunity of answering opposing views, and the council must adhere to that principle. But that is not to say, however, that in every case where an individual alderman has received information outside of a council meeting that the whole legislative process must come to a halt, and a new public hearing be held. If that were so, the system would be so cumbersome as to be incapable of producing practical results.”

It is difficult to reconcile the result in *Lewis v. Surrey* with the decision of the Court of Appeal in *Re Bourque*. Perhaps the main distinction is that in *Lewis*, the representations were made only to two members of council and not to the council as a whole.

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In *Bourque*, the court was not concerned with the contents of the developer's presentation to the planning committee, so much as with the fact that a private session took place. In *Lewis* the court looked for evidence regarding the contents of the statements made after the hearing. Finding none, it declined to intervene. In any event, it is not recommended practice for members of council to meet with interested parties after the conclusion of a public hearing.

In several decisions, the courts have apparently concluded that information received by a council after a public hearing did not constitute new material or had no impact on the council's decision. Unsolicited letters were received by council members in *McMartin v. Vancouver* and in *Re Victoria Waterfront Enhancement Society v. Victoria* (1981) 15 M.P.L.R. 161 (B.C.C.A.). In the latter case, the letter had been received and distributed before the public hearing and part of the letter was read aloud by one of the councillors after the public hearing. In dismissing an attack on the bylaw, the court stated:

“There was no private session between a person representing the developer of the property and members of council.”

In *Bates v. Delta* (1983) 22 M.P.L.R. 242 (B.C.S.C.) a bylaw was attacked on the basis that council received a letter and a planning report after the public hearing. The letter was sent by members of a farmers institute, who complained that another letter received at the public hearing had misstated the policy of the farmers' institute. In disregarding the receipt of the letter, the court held that it “neither supported or opposed the proposed zoning change” and “was not a submission by a proponent of the bylaw”.

The court also cited a “flood gates” argument:

“If such a letter from the constituents of the municipality created an obligation upon the council to hold a new public hearing, the entire legislative process of the municipality would break down. Municipal council members would have to choose between remaining totally incommunicado from their constituents or else holding, perhaps, an endless series of public hearings.”

The staff report included a “comprehensive set of design guidelines” which had been prepared by the developers and attached a development permit application. The court held that there was no obligation to hold a public hearing in respect of a design guidelines or development permit applications and that the petitioners had access to most of the information at the public hearing in any event.

In *Rogers v. Saanich* (1983) 22 M.P.L.R. 1 (B.C.S.C.) the court held that two letters and a planning report which were received and considered after the public hearing did not contain any new information which ought to have motivated council to hold a new public hearing. The court noted that the subject matter of the materials had been reviewed at the public hearing and that one of the letters was sent by the lawyer for the petitioners, who should not be allowed to “hoist himself by his own bootstraps”.

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Therefore the receipt of unsolicited letters after a public hearing, even by the council as a whole, does not usually have any detrimental effect. However the courts will examine the contents of the letters and a letter from a proponent or opponent which presented new arguments or significant new information would be problematic.

D. *Jones v. Delta*

Jones v. Delta (1993) 11 M.P.L.R. (2d) 1 (B.C. Court of Appeal) is a high profile decision which involved the rezoning of agricultural land for golf courses. The Delta council conducted lengthy public hearings on three proposed bylaws, gave third reading to the bylaws, then adopted a resolution calling for a report from its planning department. When the planning report came forward, it was accompanied by numerous letters, petitions, and other materials.

In the 15 months which passed between the third reading and the adoption of a bylaws, a powerful farm lobby group, which had expressed concerns during the hearings, entered an agreement with the developer to express its support to the Mayor and Council in return for the developer pay for irrigation works. Council was advised that the farmers group had made the agreement and that the developer had committed to expend close to \$1,000,000.00 on irrigation work.

Before considering adoption of the bylaw, council received a copy of the agreement, as well as the letters and petitions concerning the proposal. Council then defeated a motion to hold a further public hearing and adopted the bylaw.

In the B.C. Supreme Court, the judge overturned the bylaw, holding that “it was wrong of council to consider the contents of the staff report without calling for further submissions from the public.” That result appeared to be consistent with the previous case law, given the substantial nature of the submissions received by council after the public hearing.

However, in a 2-1 decision, the Court of Appeal overturned the Supreme Court judge and upheld the bylaw. In giving her reasons, Southin J.A. appeared to downgrade the significance of a public hearing:

“In my opinion, the legislature requires such hearings so that aldermen may be informed of everything that electors and others affected wish to bring to their attention concerning the subject-matter of the by-law. Such hearings are in no way judicial because an alderman need not attend in order to vote on the by-law. Indeed, he or she need not even have a written report.”

Southin J.A. adopted an approach that involved an evaluation of the substance and impact of the information that was given to the council after the public hearing, in the context of what had been said at the public hearing. She placed an onus on the attackers to prove that they would have had something more to say if another public hearing was held:

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“What the petitioners below essentially asserted was a breach of the principle ‘audi alteram partem’.

But at the root of that principle, in a debate on public policy, is the concept that the other side will have something to say.

I, therefore, ask what other relevant material would have been proffered to council at another public hearing?

If there were such other material, one would expect that there would be something in the evidence concerning it. But there is not.”

Southin J.A. then examined the subject matter of the information in the planning report and concluded that it did not have an effect on council’s decision:

“... it is my opinion that while ‘submissions’ were received from the proponents of the by-law after the public hearing, the receiving of those submissions does not vitiate this process because they related to changes not in the substance of the proposed development, i.e., a golf course of a certain size with certain ancillary buildings and so forth, but to changes thought to improve the course as habitat, or, to put it another way, to lessen the damage to habitat and to satisfy the concerns expressed at the earlier public hearing by Mr. Weaver on behalf of the farmers. Whether something is good or bad for birds or agriculture is not a matter of fact but of opinion founded on fact.

To give effect to the argument which was made to us would mean that municipal councils could never address concerns expressed at a public hearing, or a series of public hearings essentially on the same point, without having a further public hearing. I cannot think that the legislature intended by promulgating s. 956 to discourage municipal councils from adopting measures, to lessen the harm which those opposed have argued, as the grounds of their opposition, will come from adopting the by-law. Yet that may well be the effect if the judgment below stands.”

Goldie J.A. agreed with Southin J.A., referring to the contents of the planning report as “matters of detail”. Wood J.A. dissented, expressing the view that *Re Borque* governed the situation and referring to the “sanctity of the public hearing process”.

The Supreme Court of Canada refused to hear an appeal: (1993) 14 M.P.L.R. (2d) 287.

The decision in *Jones v. Delta* has been cited as authority for the proposition that a council may now receive any representations after a public hearing. However, it is important to note that the

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council did not meet with any proponents or opponents of the bylaw and did not commission any consultants' reports following the hearing. Further, the dividing line between submissions which introduce new elements to the debate and submissions which simply address solutions to concerns already raised at the hearing is very difficult to detect. Thus the decision should be approached with caution.

E. Recommendations

In light of the case law discussed above, consider the following recommendations regarding the receipt of further information after a public hearing:

1. Neither the council or its committees should meet with proponents or opponents of the bylaw.
2. Individual members of the council or board (who may hold the deciding vote on a bylaw) should not solicit information from, or attend meetings with, interested parties after the public hearing.
3. Staff or consultants may be asked to report on technical concerns relating to the proposed bylaw. However, such reports should not:
 - (a) serve as a vehicle for advancing new proposals or arguments by proponents or opponents; nor
 - (b) introduce substantial new information or analysis regarding economic, environmental or land use impact matters.
4. If unsolicited correspondence or reports are received following a hearing, the sender should be advised that the document will not be forwarded to council or board until after a decision has been made on adoption of the bylaw; unless staff believe that the information in the material is essential. If so, a further public hearing should be scheduled so that all affected parties can make submissions regarding the material.

If submissions are improperly received following a public hearing, it is always possible to correct any damage by holding a further public hearing: *Cloverlawn Investments Ltd. v. Burnaby* [1972] 1 W.W.R. 628.

In *Neufeld v. Comox Strathcona Regional District* (S.C.B.C., Vancouver No. A914001, June 23, 1992) the Regional District's public hearing committee was advised by staff that significant new information had been received from the Ministry of Environment after the public hearing. The committee decided to receive the information and then held a private meeting with the proponent of the development. However, a second public hearing was then convened.

The court rejected the argument that the entire process had been tainted by the private meeting. Although agreeing that "it was probably improper for the public hearing committee to meet with and hear the proponents of the bylaw in the absence of representatives of the opponents", the court concluded that the second public hearing "cured whatever deficiency arose".

IV. CHANGING THE BYLAW AFTER THE HEARING

Section 894 of the *Local Government Act* provides several options following a public hearing. Section 894(1) states:

“894 (1) After a public hearing, the council or board may, without further notice or hearing,

- (a) adopt or defeat the bylaw, or
- (b) alter and then adopt the bylaw, provided that the alteration does not
 - (i) alter the use,
 - (ii) increase the density, or
 - (iii) without the owner's consent, decrease the density

of any area from that originally specified in the bylaw.”
(emphasis added)

Formerly, the *Municipal Act* allowed a bylaw to be changed after a public hearing, so long as the change did not involve the “substance” of the bylaw. A change in the permitted use of land was held to be a change of substance in *Martin v. Victoria* (1980) 23 B.C.L.R. 145, 31 B.C.L.R. 48 (B.C.C.A.) and a change to an important definition was held to be a change of substance in *Canadian Occidental Petroleum Ltd. v. North Vancouver* (1983) 46 B.C.L.R. 179 (B.C.S.C.). Arguably, the former test was too subjective, but the new test is not a complete solution.

It should be noted that before exercising its options under Section 894, the council may change its mind. In *Wingold Construction Ltd. v. Surrey* (1979) 11 B.C.L.R. 215 (B.C.S.C.), a motion to adopt the amending bylaw after a public hearing was defeated. Several weeks later, council reconsidered the matter and voted to adopt the amending bylaw. A petition was brought to quash the bylaw, on the basis that it should not have been adopted without a second public hearing. The court held that council’s general powers of reconsideration overrode any implication that the bylaw was abandoned upon its initial defeat.

A. Use and Density

The primary question in relation to a proposed change to a bylaw after a public hearing is whether there is a change to “use” or to “density”.

The concept of changes to use and density is also relevant to the scope of the notice which must be given before public hearing under Section 892(4), to the issuance of a development permit or development variance permit; and to the scope of the jurisdiction of the board of variance, which is limited by Section 901(2)(c)(iii).

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In most cases, it is not difficult to ascertain whether the permitted use of any land or building would be changed by an alteration to the bylaw. The requirement that even the smallest change of use affecting “any area” may not be done without a new public hearing is onerous, however it is not hard to interpret. Even if the permitted use of one lot is changed after a public hearing, the bylaw cannot be adopted without a further hearing.

One potential pitfall to consider is that the permitted uses of an area of land are not always changed by adding or deleting specified uses in the zone which applies to that land. Sometimes, the scope of a permitted use is changed by an amendment to a definition of that use, which can result in an alteration of permitted uses in one or more zones.

Also, note that Section 894 applies to a bylaw which adopts or amends an official community plan, even though an official plan does not directly regulate use or density. Section 894(1) refers to changes in use or density from that originally “specified” in the bylaw, not changes in uses or densities which are “regulated” by a bylaw.

Determining whether there is a change in density is another matter. The definition in Section 872 is of no immediate assistance:

“Density”, in relation to land, a parcel of land or an area, means:

- (a) the density of use of land, parcel or area, or
- (b) the density of use of any buildings and structures located on the land or parcel, or in the area;”

The circularity of the “density means density” component of the definition is frustrating.

One school of thought with respect to the interpretation of Section 894 is that the scope of “density” can be determined by reference to the zoning power in Section 903. Under that section, the power to regulate “the density of the use of land, buildings and structures” is distinct from the power to regulate “the siting, size and dimensions of buildings and structures” and the area of parcels that may be created by subdivision. It would follow that changes to any zoning regulations concerning building sizes and parcel areas could be made after a public hearing without violating Section 894.

The problem with relying upon Section 903 to interpret Section 894 is that it defies the ordinary understanding of density. Most people would view a change which doubled the number of lots which could be created in a given area, or which doubled the permitted size of a building on an existing parcel, to be changes in “density”. It seems inappropriate that such changes could be made after a public hearing without further consultation.

Some land use bylaws include their own definition of “density”, or place some regulations under the heading “density”. It is unlikely that such definitions or headings would have very much impact on a court that was called upon to decide what constitutes a change in density. When a term is employed and defined in a statute such as the *Local Government Act*, the Courts have not

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permitted individual councils or boards to apply their own definition of that term. Rather, the Courts reserve jurisdiction to themselves to determine the meaning of statutory terms.

Although there is no specific definition of density that is accepted by all planners, there is a general consensus that land use controls which regulate the number of dwelling units or the amount of floor space that may be constructed within a given area of land are regulations pertaining to density. In that respect, density may be controlled directly, (e.g. by a floor space ratio). However, it may also be controlled indirectly, by a combination of regulations dealing with matters such as setbacks, maximum height and maximum lot coverage.

The American Planning Association's "*Glossary of Zoning, Development and Planning Terms*" describes density as follows:

"A limitation on the occupancy of land. Density can be controlled through zoning in the following ways: use restrictions, minimum lot-size requirements, floor area ratios, land use-intensity ratios, setback and yard requirements, minimum house-size requirements, ratios comparing number and types of housing units to land area, limits on units per acre, and other means. Allowable density often serves as the major distinction between residential districts."

Under that concept, virtually any aspect of zoning could be characterized as a density control. Clearly, under the *Local Government Act*, a change to a single regulation such as setback or height is not a change in "density".

In British Columbia, it is appropriate to conclude that changes in "density" are involved in changes to:

- (a) floor space ratios;
- (b) minimum parcel areas;
- (c) the number of dwelling units allowed per acre or hectare; and
- (d) changes in two or more size or siting requirements which act together as density controls, so as to allow the development of more housing units on residential parcels or increases in commercial or industrial floor area on a parcel.

In short, if a change would significantly increase the number of people who can make use of a parcel, it is likely that the change involves density.

V. CONSIDERING, ADOPTING AND ABANDONING THE BYLAW**A. Adoption at Same Meeting**

Section 257 of the *Local Government Act* requires that there be one clear day between the third reading and adoption of most bylaws. However, Section 890(9) allows the adoption of an official community plan or zoning bylaw at the same meeting at which the plan or bylaw passed third reading. Thus, third reading and adoption may occur on the same date as the public hearing, or they may occur together at a later meeting.

Section 890(1) does not allow a local government to avoid a requirement to obtain an external approval of a bylaw after third reading. Section 257(3) requires that when the approval of the Minister or another official is necessary, “the approval must be obtained after the bylaw has been given third reading and before it is adopted”.

In relation to land use bylaws, the primary external approval requirement is the rule in Section 54(2) of the *Highway Act* that a zoning bylaw which regulates the use of land within 800 metres of the intersection of a controlled access highway and another highway does not apply to land unless it is approved by the Minister of Highways before adoption.

B. Report of the Hearing

Section 890(6) requires that a written report be prepared in respect of every public hearing. That provision does not specify who must prepare the report, but does provide that the report must be “maintained as a public record”. Under Section 890(7) the report must be “certified” as being “fair and accurate” by the person who prepared the report.

The written report under Section 890 is only required to contain a “summary” of the “nature of the representations” made at the hearing, not a verbatim transcript. In *Reid v. Sunshine Coast Regional District (supra)*, the court rejected an attack on the adequacy of the report.

A different type of report is provided for in Section 890(2). That subsection allows a council member or director who was not present at the public hearing to vote on the bylaw:

“... provided that an oral or written report of the public hearing has been given to the member by an officer or employee of the local government or director who held a hearing delegated under Section 891.”

Thus, the reporting requirements of Section 894(2) are even less stringent than the requirements in Section 890. The Section 894 report may be either verbal or written and no minimum contents are prescribed. Accordingly, a report prepared under Section 890 should be more than sufficient to meet a requirement in Section 894.

C. Delay in Adoption

The *Local Government Act* does not set out any time limit following the conclusion of a public hearing for the adoption of the bylaw. In theory, a bylaw could be adopted years after the public hearing.

In practice, a public hearing will eventually lose its efficacy in relation to a bylaw. Changes in context, including development of other lands, new traffic patterns and environmental changes, will eventually rob the public hearing of its relevance.

As noted above, in *Jones v. Delta* there was a fifteen month lapse between the end of the public hearing and adoption of the bylaw. However, the court characterized the bylaw as one involving a broad policy of “golf courses or no golf courses”. It is likely that more site specific rezonings would be more greatly affected by the passage of time.

In general, it does not appear advisable to wait more than a year before considering the adoption of a bylaw that has been submitted to a public hearing. Even after a few months, any significant changes in context should be taken into account before a bylaw is adopted without a further public hearing.

D. Reconsideration and Abandonment

More so than most bylaws, rezoning bylaws are the subject of second thoughts by councils and boards.

In some of the cases discussed above, a bylaw has apparently been defeated by the failure of a motion to adopt a bylaw. However, the courts appear to accept the concept such a bylaw remains alive at second or third reading and that a subsequent motion to adopt may be entertained and passed.

The requirements for reconsideration of an adopted bylaw are more stringent. There are two methods by which a decision to adopt a bylaw may be reversed.

First, the local government’s procedure bylaw normally allows a member who has voted on the prevailing side to bring a motion back for reconsideration at the next meeting of the council or board. If a motion to reconsider is adopted, the bylaw may be submitted to further debate and a motion to repeal adoption may be passed.

Second, Section 219 of the *Local Government Act* empowers the mayor to return and adopt a bylaw for reconsideration at any time within one month after adoption. The chair of a regional district has the same power, under Section 792(5), including a power to return the bylaw at the meeting of the board following adoption, even if more than one month has passed.

When a land use bylaw that is subject to a public hearing requirement is returned for reconsideration under Section 219 or 792, a further public hearing must be held before a decision is made to repeal the bylaw. Section 219(5) states:

“(5) The conditions that apply to the adoption of the original bylaw ... apply to its rejection.”

However, a council or board could waive the public-hearing requirement for a zoning bylaw, since the power to waive the hearing is included in the conditions which apply to adoption of a zoning bylaw.

VI. CONCLUSIONS

In the public hearing process, a great deal of attention is focused on the legal requirements that apply before the hearing, such as the publication of proper notice and the distribution of relevant documents. However, the legal requirements that apply after the conclusion of a public hearing are equally complex and demanding.

In any bylaw challenge relating to the adequacy of post hearing procedures, the courts will be alert for signs of favouritism or deliberate contraventions of the *Local Government Act*. Otherwise, the courts are slow to overturn land use bylaws for reasons relating to the public hearing process, recognizing that a standard of perfection is impossible and the political debate never ends.