ASK A LAWYER: PROVINCIAL HOUSING LEGISLATION Q & A

PIBC Peer Learning Network

PIBC PLANNING INSTITUTE OF BRITISH COLUMBIA

PEER LEARNING NETWORK

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Local governments are required to address many legal considerations when updating their regulations to comply with the Province's new housing legislation. The new and complex legislation has raised many legal questions concerning definitions, implementation, public processes, and existing regulatory conditions. The PLN "Ask a Lawyer" webinar provided an opportunity for practitioners to participate in a Q&A session with lawyers Bill Buholzer RPP, FCIP, Don Lidstone K.C., and Janae Enns RPP, MCIP, and moderated by planning lawyer and PIBC Board member, Lui Carvello RPP, MCIP.

This Q&A summarizes the information given by the lawyers in response to questions submitted by participants. The full webinar can be viewed online at: https://www.youtube.com/channel/UCOSv_M_NSJmENVcsOOJ8LBQ

This Q&A is not intended to replace legal advice, but rather to provide information and help local governments find answers to general inquiries having a legal element.

Exemptions & Zoning Amendments

Noting potential exemptions from SSMUH (where increasing density would significantly increase the threat/risk from the hazardous condition that cannot be practically mitigated), what is the Local Government's exposure to liability should they choose not to explore/investigate potential risks?

Local governments and regional districts have an obligation to take some action if they have threshold knowledge of potential harm or danger to humans or property. This knowledge may come, for example, in the form of an engineering report, or from a written or a phone-in complaint. As soon as a local government or regional district has threshold knowledge of a specific hazard, the corporation has a duty to take action. Taking action occurs on a spectrum and could be as small as a prosecution under the regulatory bylaw that applies in the circumstances or as serious as an injunction. At the other end of the spectrum, a local government could do some work to address the hazard, call in emergency services, or have the Province involved in the case of a wildfire. There is no need to go looking for hazardous conditions, but as soon as the corporation or anyone at the corporation has any knowledge of the risk, the local government or regional district is required to take some action on that spectrum. A policy decision is required to act in response to the threshold knowledge of a hazardous condition.

Where the anticipated threat/risk may be due to access/egress from emerging risks such as wildfire, and where the QPs defined by Section 55 (1) (c) to (f) of the Community Charter do not include Emergency Service personnel, how should local governments best address these considerations of risks, especially when access/ roads/highways are potentially managed/ administered by multiple jurisdictions or another level of government (MoTI) such as within a regional district?

Controlled access highways or arterial highways fall under the responsibility of the Province. Regarding access or egress risks for properties that may not be able to be serviced by emergency response vehicles (e.g., fire rescue), local governments and regional districts should have a servicing agreement supplementing the MMCD and a servicing bylaw supplementing the MMCD, as well as the enforcement of the fire safety provisions of the Building Code, to the extent that the bylaw doesn't deal with building construction requirements that are prohibited under the Building Act. Local governments and regional districts have the authority to withhold building permits if the Building Code requirements for emergency response are not satisfied.

Would rezoning a hotel-strata site to a commercial zone and restricting the use of each unit to under 180 days a year ensure an exemption from the Short-Term Rental regulations?

No. The rezoning and use restriction described in the question might not trigger an exemption. The short-term rental regulations expressly provide that the Short-Term

Rental Accommodations Act does apply to strata-titled hotels. There is an exemption from the principal residence requirement for strata-titled hotels if there is a rental agreement in place that bars the property owner host from living at the hotel but, apart from that limited exception, if a strata-titled hotel provides accommodation for a rental term of less than 90 consecutive days, it will trigger the application of the Short-Term Rental Accommodations Act, where the Province could potentially enforce the legislated requirements on the hotel operator. There is an inherent risk in rezoning or granting permissions to short-term rental operators where there are going to be inconsistencies with the governing provincial legislation.

Can local governments rezone to remove lands from a "Restricted Zone" after December 7, 2023? The Policy Manual states clearly on p. 6 that this cannot be done. However, there is no such clarity in the legislation. An example of how this could be used: a local government rezones lands to permit a single-detached home, secondary suite AND coach house, which is not captured by the Restricted Zone definition, thus exempting these lands from any 4- and 6-unit requirements of the SSMUH legislation (i.e., permit 3 units this specific configuration to avoid having to allow 4 and 6 units, or even 2-unit duplexes).

No. As of December 7, 2023, the zoning power has to be exercised in such a way that those minimum density entitlements are put in place. The kind of zoning changes described in the question would not be achieving all of those density entitlements on the land.

If an existing zone allows SFD and row houses with a substantial minimum lot size (over the size required for 4 units under SSMUH), is this considered a restricted zone? Most of the lots in the zone would not be large enough to meet the requirements for row housing.

The minimum density entitlements have to be provided for on every parcel in the zone, so the fact that more dense development is permitted on other, larger parcels in the zone doesn't have any bearing on whether another parcel is in the restricted zone.

If a zone allows only SFD plus an assembly or commercial use, is the SFD portion considered a restricted zone?

The focus of the legislative requirements is on the permitted density of residential density in the zone, so if there is any residential development allowed in the zone at all, regardless of what else is permitted in the zone, the residential entitlements must meet minimum density requirements.

If a zone(s) already allows for a secondary suite and/or ADU (up to 3 units), but under the new legislation would be required to permit up to 4 units, is it considered a Restricted Zone?

Yes, it is. For the purposes of the fourth sub-section of s. 481.3 that outlines entitlements over and above what's required in s. 481.3(3), it is a restricted zone.

If the zone already allows the minimum required units, does the zoning bylaw need to implement the Ministry's Site Standards in the Provincial Policy Manual?

No, all that the legislation requires is that the local government consider the Site Standards and the Provincial Policy Manual when making its zoning bylaw updates, so there's no statutory requirement to implement or incorporate the specific Site Standards in the zoning bylaw. If zoning bylaw regulations do diverge from those Site Standards, it is prudent to document evidence that you have considered these Site Standards and provide a rationale for why you're not incorporating them. This can be set out in a staff report to provide evidence if someone goes to challenge the bylaw for inconsistencies with the Provincial Policy Manual in the future.

Bill 44 contains a clause that requires cities to permit certain uses: Section 481.3(2) "…a zoning bylaw adopted ON OR AFTER June 30, 2024, must permit…" However, much of the supporting info to this requirement (policy manual [p 15], webinars & Q&As) says cities must permit these requirements BY June 30, 2024. In our read, cities could take a gradual approach and ensure every zoning bylaw amendment (if it contained a restricted zone) adopted on or after June 30, 2024, complied with the legislation. Please comment about whether this gradual approach meets the legislative requirement of Bill 44. Can you also comment on how the Provincial policy manual can assert the requirement to comply is "by" June 30, 2024, when the legislation says, "on or after"?

June 30, 2024, is the drop-dead deadline for which all the zoning bylaws have to comply. The Minister has made it clear that there is going to be no extension unless you happen to be one of those communities that gets approved for an extension. Local governments can adopt amendments prior to June 30, 2024. As long as the zoning bylaw complies with the minimum requirements by June 30, 2024, then a gradual approach is fine thereafter.

Please provide information on requirements for Villages under 5,000. Are there zoning bylaw templates available to amend single family zones to permit a secondary unit? What would be restrictions for zone (e.g., lot size, water and/or sewer, off street parking)?

The Provincial Policy Manual provides recommended Site Standards for lots subject to the two unit requirement, which applies to all local governments including those with populations under 5,000, in Package A of the Site Standards. You can refer to the Site Standards as a starting point, but again there's no statutory obligation to adopt those exact standards. Lidstone is involved in a project with Small Housing BC, who is working on creating some template bylaws and the Province mentioned in one of its webinars that they are working on pre-approved designs for these low-scale density developments that are supposed to be released this summer. However, specific bylaw amendments are always going to be customized in accordance with the local context and policy considerations.

Many of our residential zones have site specific amendments to enable a single-family dwelling on a smaller parcel size, for example. At present, most of our residential zones permit "one single family dwelling, with or without a secondary suite" as a clearly stated principal use. With this noted as a principal use, is it implied that secondary suites are permitted in that zone where single family dwelling is mentioned, or do we need to amend every section to add "secondary suite" with every mention of single-family dwelling?

Given that wording, secondary suites are permitted. The construction of the zoning bylaw itself will always be individualized for each community and there's no strictly correct or incorrect approach for that as long as the density complies with the legislative requirement under Bill 44 and under the TOA. It doesn't matter if there's a catch-all regulation that allows for secondary suites in connection with the single-family dwellings or if the secondary suite use is listed in each individual zone.

A definition of "urban containment boundary" has not been provided, but provincial staff have expressed that there is a "common understanding" of the term. Provincial staff have also indicated that areas previously designated as "growth areas" may constitute an "urban containment boundary". Should we be taking direction from provincial staff on the "common understanding" of what an "urban containment boundary" is, or should we be seeking legal input?

The legislation contemplates that there might be a regulation made to define what is an urban containment boundary, suggesting that the drafters of the legislation realize that there might be some uncertainty about what exactly that means. The questions I've been hearing have to do with Official Community Plans (OCPs) and Regional Growth Strategies (RGSs) that have policies about urban containment without necessarily using that phrase "urban containment boundary." There might be land use designations that suggest that, on one side of a particular designated line, certain kinds of development are being encouraged, but on the other side of that line, development might be discouraged. Whether those policies and associated maps constitute, for the purposes of this legislation, an urban containment boundary is a very complicated question that would require an understanding of the entire content of the OCP or RGS to understand what the significance of those terms are in that context. If that phrase is used and if there is a map that indicates a boundary associated with the use of that phrase, then it's clear that counts for the purpose of those incremental housing entitlements. But, if it's anything short of that, I'd suggest that the local government ought to be getting a legal opinion as to whether there is or is not an urban containment boundary in the OCP or RGS.

The SSMUH Provincial Policy Manual & Site Standards document indicates that "...local governments must not unreasonably restrict use or density of use that must be permitted under the SSMUH legislation, nor can they avoid the application of SSMUH requirements, including...[altering] the location of urban containment boundaries or service areas". Does this mean that once an urban

containment boundary is established (via an OCP or RGS), that the boundary cannot be altered in such a way that reduces the expanse of the boundary?

The legislation is always speaking with respect to the existence of an urban containment boundary (UCB), just as it's always speaking in relation to the question of population. As populations change, the consequences of those population figures for the density entitlements will change and it seems that, as UCBs change, there will also be consequences of that in relation to density entitlements. But it would be inadvisable to adjust UCBs for the purpose of avoiding density entitlements that are prescribed in this legislation.

Can you speak to existing Phased Development Agreements and Development Permit Areas for form and character under the new legislation? What are the rules around creating new ones?

Existing Phased Development Agreements (PDAs) and Development Permit Areas (DPAs) are generally going to continue to apply to SSMUH developments despite any of this new legislation. However, with respect to PDAs, section 516(6) of the Local Government Act prescribes exceptions that would authorize an amendment to zoning bylaw provisions that are locked in under the agreement. It provides that changes to enable the local government to comply with an enactment of BC or Canada will apply to the development without the written agreement of the developer. This exception precludes the ability for local governments to contract out of complying with provincial land use enactments through the use of PDAs.

Local governments may wish to seek further legal advice regarding an existing PDA that purports to restrict density that would otherwise be required under the new housing legislation. As the terms of the agreement in the context of the new legislation and s. 516(6) will have to be reviewed.

Apart from the risk noted above, local governments can enter into PDAs and create new form and character DPAs that may apply to residential developments captured under these legislative schemes. However, the PDAs and DPAs cannot unreasonably restrict or prohibit SSMUH density or be used as a tool to intentionally circumvent these density requirements under the legislation. As long as there is a sound policy rationale, these tools are still available for planners to use, subject to the PDA risk noted above.

Regional Districts & Communities Under 5,000

Could you please elaborate on S.472(1.1) of the Local Government Act? Specifically, what is meant by "prescribed board" and "prescribed class of regional districts"? Where are these prescribed?

This will likely be prescribed in regulations in the future. Whenever the Province uses the word "prescribed" in a statute or in a regulation, it means that the information you need to know, the regulating content, will be in an Order-in-Council or a Regulation of the Province.

Will all regional district electoral areas now need an OCP, whereas in the past certain areas opted in or out?

Most likely, no. What the legislation currently sets out is that prescribed regional districts will be required to adopt an OCP. We don't know what this is going to entail yet. It's going to be set out in the future regulations, which haven't been released (anticipated for release in early 2024 as per the Province's website).

For regional districts, Housing Needs Reports (HNRs) are mandatory for every Electoral Area. If an Electoral Area has a recent Housing Needs Report completed (2021 or 2022), would these need to be redone as per the new legislation?

There is no specific answer in the legislation as it exists, but there will be information in the upcoming Ministry Regulation in regard to Housing Needs Reports for Electoral Areas. For 2024, the Province will likely expect the Regional Boards to update these HNRs in the context of the new legislation.

For Housing Needs Reports (HNRs) in Villages under 5,000: Have any regional districts proposed to take this as a regional approach for the 20-year new requirement? Are there engineering firms available to support Villages doing servicing analysis to incorporate into an HNR? We could use some support on how to get started on the new HNR.

This is not a legal question, but there might be some regional districts that would be engaging consultants to do housing needs reports for a number of different Electoral Areas or even municipalities within their boundaries.

Servicing & Site Area Requirements

How do the new SSMUH requirements work for secondary suites and ADUs for parcels that do not conform to the minimum site area requirements in the zoning bylaw?

The SSMUH legislation does set out specific lot sizes to determine the density that must be allowed when making those updates to the zoning bylaw, so if there is conflict between what the zoning bylaw says and what the SSMUH legislation says with respect to lot sizes, then the zoning bylaw might need to be amended to comply with these new minimum site area regulations. For example, the SSMUH density requirements set out a density between three to six units that, in part, can vary depending on the size of the lot. If the lands are less than 280m^2, then three units might be required but, for bigger parcels of land, additional units could potentially be required under the SSMUH legislation. Local governments would have to confirm that the zoning bylaw meets the lot size requirements as set out in the legislation. Local governments cannot implement stricter lot size requirements for the SSMUH density than what is permitted under the legislation.

Where there are existing very small unserviced lots in a regional district, will zoning have to be changed to allow a secondary suite or ADU even if onsite servicing can't accommodate the additional density? What about for lands serviced by community water systems where there is no capacity for new connections?

The lands are subject to the additional one-unit requirement in any event. It applies across the board. The inadequate servicing exemption only applies to the three-to-six-unit requirement under SSMUH. However, if the infrastructure is likely to result in health or safety risks as a result of increased density, local governments can apply to the Minister for an extension to the June 30th deadline. The same answer would apply to land serviced by community water systems where there is no capacity for new connections.

Will SSMU regulations apply to neighborhood level sewage systems operated by a regional district, but only serving a small group of homes? These systems are sometimes in rural locations not well suited for additional density.

The exemption for the SSMUH density for the three-to-six unit requirement is specifically worded "for land that is not connected to a water or sewer system provided as a service by a municipality or regional district." Here, since the sewage system is provided by the regional district, it's not going to trigger that exemption, so the SSMUH requirements would apply. It is an unfortunate situation given the wording of the legislation and it potentially might be a circumstance where the local government could consider writing to the Minister for an extension because there is that authority to apply to the Minister if there are significant infrastructure constraints that might result in health and safety risks.

Can you speak to site viability issues (e.g., Is the city responsible to make sites viable for the permitted density? Would they have to buy them otherwise?)

The short answer is, no, local governments are not responsible to make sites viable for these new density entitlements. All that's required under the legislation is for local governments to amend their bylaws to permit the new SSMUH density. It doesn't mean that these developments have to be feasible in every situation across the board. It's still going to be very much open to landowners and developers to determine whether a SSMUH development is viable for a particular site. Further, the applicability of the SSMUH density is going subject to those areas of overlap with provincial legislation and other local government regulations and even contractual agreements on title. Therefore, the SSMUH requirements may not always apply to sites that are not viable for the increased density. There is no obligation for local governments to acquire lands that are not suited for the legislated density or acquire them in any way.

Hazard Areas

Can qualified local government officials act in the capacity of a "qualified professional" (QP) to satisfy the requirement to certify that "development of the land to a density of use required to be permitted under the applicable provision of the Act would significantly increase the threat or risk from the hazardous condition"? (i.e., does the report from a QP need to be from a third party, or can it come from qualified QP who works the organization?)

No, it doesn't. The criterion is simply that the person who's providing the information has the appropriate academic qualifications and professional memberships. It doesn't matter if they're an outside consultant or somebody in-house.

Covenants

If the local government has signed a covenant restricting density to one dwelling unit per parcel, can the owner challenge the covenant and force the additional density?

There is a procedure available under the Property Law Act for someone whose property is charged by a restrictive covenant to apply to court to have the covenant modified or discharged entirely. I would expect that if it's a covenant in favor of the local government, the owners first recourse would be to ask the local government Council or Board, now that it has changed the zoning to allow more density on the parcel than is permitted by the covenant, whether the local government would release the covenant. If the local government says no, the owner can apply to a judge to have the covenant

modified or discharged. One of the grounds on which a judge might order the covenant modified or discharged is that it's obsolete and obsolescence in relation to the land use covenant will be impacted by what the zoning allows. A judge might be persuaded that the covenant held by the local government is obsolete because the local government has changed the zoning.

Can local governments require covenants preventing subdivision on properties that allow an ADU (e.g., in communities under 5,000)?

So far, we are not into provincial policy reaching into the jurisdiction of approving officers, so if there's a situation where an approving officer is being required to deal with a subdivision application and the approving officer knows what the permissible density is under the applicable zoning on all of the proposed parcels, the approving officer might be of the view that it's against the public interest to create parcels that have those kind of density entitlements given the proposed parcels' suitability for septic fields or whatever the criterion might be that they are concerned about. That analysis could result in a requirement for a covenant to be placed against one or more of the parcels that are being created that would limit the density of development to something lower than the zoning allows.

What flexibility does a municipality have with respect to ecosystem protection? Can new forest or riparian covenants be put into place to restrict where development occurs?

Those options continue to be available as long as those powers are exercised for bona fide purposes.

Stratas & Housing Agreements

How do municipalities deal with bare land stratas? Are there any special considerations for small-scale multi-unit housing proposals on bare land strata lots? Should a local government request that the applicant provide authorization from the strata corporation for permit application to build additional housing units on strata lots?

As a general rule, I think it's best for local governments to stay away from having anything to do with monitoring or enforcing compliance with private arrangements like restrictive covenants, statutory building schemes, strata bylaws; those are private matters. My advice is always to keep your eye on the ball, administer and enforce public law requirements arising out of the Building Code, the building bylaw, and the zoning bylaw, and leave those other matters for private parties to deal with.

Can you comment on Housing Agreements?

I don't think Bill 44 means anything for Housing Agreements. A comment that I think could be made in relation to Phased Development Agreements, Housing Agreements, and other contractual arrangements, is that the government knows how to terminate private contracts. It has done that with land use contracts, for example, so if they were of the mind to deal with private contracts like covenants and building schemes that restrict the housing densities that they are seeking under these Bills, they would deal with that expressly. They haven't done that, so we infer from that that they are, for the time being, content to let these other kinds of restrictions operate.

Heritage Properties

How can local governments address heritage properties and incorporate local interests?

There is an exemption under the SSMUH density for lands that were already designated under a heritage bylaw on December 7th. There is also an exemption for lands that are protected under the Heritage Conservation Act, so depending on the nature of the heritage property, these exemptions could potentially be engaged. There is nothing in the new legislation that prohibits local governments from designating and protecting heritage properties in their normal course; local governments just can't use these regulatory powers in a manner that unreasonably prohibits or restricts these new density requirements. There just has to be a strong policy rationale for imposing development restrictions on heritage properties that are subject to the housing legislation.

How do you address heritage buildings that are not yet designated?

There is a new prohibition from entering into Heritage Revitalization Agreements that restrict applicable SSMUH density, so that is something, depending on the circumstances, the planner dealing with the file might want to look into more. But apart from this prohibition, as long as there is a sound policy rationale, local governments can generally continue regulating heritage buildings in the normal course to incorporate those local interests and values, but this is an area that you should consider on a case-by-case basis to decide what particular regulatory power is best to achieve those objectives and also just to get a better sense of the legal risk in exercising those regulatory powers.

How should municipalities deal with pressures to de-register and de-designate?

There will always be those pressures, but there is nothing in the new legislation that requires local governments to deregister or to de-designate heritage properties. In fact, in my view, it does the opposite. It provides exemptions for properties that are

designated for heritage protection; therefore, whether the Council or the Board wants to un-designate the properties is entirely a policy decision in the full discretion of the Council or the Board. There's no statutory obligation to do this.

Parking

Do municipalities have the authority to set a maximum limit on the amount of parking a development can build (both before and after Bill 47)?

Yes, they do. You have a number of communities in the States and Canada (e.g., Edmonton) that have provided for maximum limits on the amount of parking. Bill 47 actually prohibits residential parking in transit oriented areas, other than if you're dealing with disability parking.

With Bill 47 removing residential parking minimums, what is your take on residential visitor parking? Can cities still set visitor parking requirements in TOAs?

I don't think cities can require residential visitor parking in TOAs. The legislation expressly prohibits local governments from requiring off-street parking spaces for residential use in transit oriented areas. The legislation does provide a really limited exception to this and it's just for disabled persons parking, so beyond disabled persons parking there are no other exceptions under the legislation that would allow for residential visitor parking in TOAs. Such a requirement, in my opinion, could be subject to challenge.

Transit Oriented Areas

The regulations and policy manual make it clear that by June 30, 2024, a TOA Bylaw should be passed that includes a "map, plan, or other graphic material" (p. 33 of TOA policy manual) "showing the boundaries of each TOA" (p. 31 of TOA policy manual), and that "local governments should use the Tables in the regulations to identify the density requirements which apply within a given TOA" (p. 29 of TOA policy manual). However, it is not clear whether local governments are expected to show the height/density requirements in the TOA Bylaw itself, or if the TOA Bylaw could just contain a map showing the TOA boundaries/affected parcels and make reference to the regulations for determining applicable height/ density requirements.

On the question of the density entitlements, it is probably not a good practice to incorporate height and density requirements in the bylaw. Strictly speaking, all that is required is a one sentence bylaw that designates a transit oriented area (TOA) or several

TOAs with a map attached to the bylaw that says "these are the TOAs referred to in the bylaw." The density entitlements are in a provincial regulation and, in circumstances where it's possible that the Province will, in the future, change those regulations, it might not be a good idea to have the current regulations enshrined in the bylaw because that will set up a difference that will then have to be dealt with by a bylaw amendment. It's best to leave the density figures out of the bylaw as they have traction in the Act and regulations, and they are automatically applicable.

In terms of where that designation should be done, which could be associated with the question of whether there needs to be a public hearing, this is not a zoning bylaw and it's not an official community plan. It's a one-off bylaw required to designate these areas so there is no public hearing requirement. The bylaw could be a standalone bylaw, it could be incorporated in the zoning bylaw, or it could be incorporated in the OCP. If you have a Municipal Code, it could be another chapter in your Municipal Code. It doesn't really matter where it is, but there is no public hearing requirement associated with it.

Can a local government pre-designate land in TOA areas that overlap with known hazard lands (e.g., steep ravines, flood hazards) or are close to riparian areas that were formally single-family zones as a SSMUH? Or should we rely on development permits and market forces to dictate how the land can be safely developed?

If a TOA overlaps a known hazard area, there's an obligation in the statute to designate the areas. The legislature has presumably determined that requiring local governments to designate the areas is, from a policy perspective, quite all right even though there might be all sorts of conditions in those areas that make them inappropriate for development of that density. That policy approach presupposes that there are ways to manage those location-specific limitations, such as development permit designations, and the authority of the building official to require some sort of hazard assessment before issuing a building permit. All of those regimes remain in place.

CACs & ACCs

Can a municipality continue to negotiate and collect CACs from developers until an ACC bylaw is in place?

In my view, the ACC scheme does not replace or void the ability for local governments to negotiate and collect CACs in connection with a rezoning, so that can continue to occur until an ACC bylaw is in place and also after.

What is the legal status of existing and possibly future CACs in relation to the new ACC legislation?

CACs have always been a murky area because there's no statutory authority for them. However, the imposition of a CAC is generally defendable as part of the discretionary

nature in assessing discretionary land use applications, such as rezoning applications.

In the Hansard (the legislative debate) for the SSMUH legislation, this exact question was posed: "what's going to happen to the CAC schemes after this ACC legislation has been passed?" The Minister of Housing very clearly said that CACs can continue to be an option for local governments and this new ACC scheme is just another tool that's available for financing purposes and collecting amenities. If a CAC policy is challenged for being void due to the new ACC legislation, part of the court's analysis involves reviewing the context of the legislation and it will review the Hansards. Given the Minister's express acknowledgement that CACs can continue, there is likely a strong argument that CACs remain an option despite the new ACC legislation.

If a zoning bylaw already includes wording related to charges (e.g. contribution to a community septic system) associated with the development of additional units over a base number of dwellings in the zone, does this requirement need to be removed if additional units must now be allowed under the new legislation?

SSMUH density cannot hinge on conditional density rules or density bonus schemes. The SSMUH density has to be automatic under the zoning bylaw. There is one minor exception and that's where you're dealing with the sixth unit in the TOA near high frequency bus stops and, in that case, that can be conditional on providing either affordable or special needs housing and other than that limited exception, the density has to be automatic and not conditional and not subject to a density bonus scheme. Under the zoning bylaw, the base density would be SSMUH and there could be conditional density rules for any density or units that exceed the SSMUH requirements.

Council Decisions & Processes

What happens if a Council rejects an OCP compliant application at 1/2/3 reading? What is the process? What recourse does the applicant have? What reasons would justify a Council rejecting an OCP compliant application?

A rezoning application is always going to be at the discretion of Council or the Regional District Board, so there's never going to be an obligation to adopt or approve a rezoning application. A Council or Board can simply reject a rezoning application at any stage of the process where the application essentially dies at first, second, or third reading and goes no further in the process. But Council or the Board do have a duty to assess such applications in the public interest, so they can't just reject it for irrelevant grounds, which would be called "bad faith" and subject to challenge. As far as recourse goes, if a rezoning application is rejected, the applicant can always reapply, or it's open to them to apply for judicial review and have the matter heard in court. As far as reapplying goes, often the Development Procedure Bylaw sets out a time limit where, if an application is denied, the applicant can't reapply within a set time frame.

Can Council turn down a SSMUH zoning bylaw amendment in areas where it is a requirement from the province?

Up until June 30th 2024, Council can turn down an amendment that is a SSMUH requirement under the legislation, but after June 30th there's no discretion on the part of a Council or a Board to bar that density under the zoning. It is an automatic requirement from the province as of June 30th. Some municipal mayors have made public comments that they're not going to adopt SSMUH requirements because it's not something that their community is supportive of. The Minister can give local governments a notice that their zoning bylaw must be consistent with the June 30th SSMUH requirements within 30 days and if local governments don't follow up and take the action required by the Minister, then you absolutely have to worry about Cabinet authorizing the Minister to enact an amendment that would apply as if it were the zoning bylaw in your community. In other words, they can supersede Council's jurisdiction and discretion and require the June 30th SSMUH density requirements by a unilateral act of the Province. The problem with that is that the Province will use the provincial guidelines and only one part of the guidelines is not discretionary and all the guidelines don't have to be complied with if you have good reasons for not confining with them. The guidelines are very basic and they don't create a comfortable community that has character or that reflects the history of the neighbourhood, so you don't want to end up with a Provincial bylaw in your community.

In a community smaller than 5,000 (only secondary suite provisions apply) that has OCP policies encouraging higher density, can Council turn down a zoning bylaw amendment that is similar to SSMUH where we can't have a public hearing because it complies with OCP? I am assuming they can, provided the decision is fair and reasonable.

In these circumstances, Council has full authority to reject a proposed zoning amendment for a SSMUH-type development since those legislated density requirements don't apply in this situation. There could be a multitude of policy reasons for Council to turn down such a rezoning application. For example, there could be environmental concerns, hazardous concerns, so there are a number of policy grounds that Council could consider, it doesn't just have to be on specific density reasons. Council always has discretion to reject a zoning application if it determines it will not be in the public interest.

I am confirming that for all areas (not just the TOA's) if a rezoning has already had First Reading then the 'old' process is still to be followed. How should local governments deal with in-stream applications?

If they've had first reading, then they are in-stream and are grandparented. The old process would still apply in that regard, not just in relation to the TOAs.

Bill 47 appears to fetter Councils' rezoning authority, in that it prevents applications from being refused for reasons of height or density. If this is true, are Councils also prevented from refusing applications on the basis of parking, given that minimum parking requirements will no longer be permitted in TOAs, or is the prohibition on setting requirements distinct from decision-making authority?

Since local governments are prohibited from requiring residential parking in TOAs, an application in a TOA cannot be rejected solely on grounds of parking since parking regulations cannot apply to that particular development in any event. As far as fettering Council's rezoning authority goes, that is correct. Bill 47 does essentially bar a local government from rejecting a rezoning application based solely on the density and height of what is proposed, if what is proposed is permitted under the TOA legislation. However, local governments can still reject TOA applications on other policy grounds, but as far as parking goes, since they can't actually enforce a parking requirement on this development, I would not see that being a viable policy ground to reject an application for.

The TOA Guide says that local governments can turn down rezonings for reasons other than density, such as the preservation of heritage buildings and features. What other insights do you have into the ability for a Council to turn down rezoning application that complies with the height/density mandate for a reason other than height/density?

Local governments cannot reject rezoning applications in TOAs for height or density if the height or density proposed in the development is permitted under the TOA legislation. But local governments can consider heritage preservation, environmental concerns, servicing constraints, and the wide range of other policy issues that planners should be considering in a rezoning application in TOAs. The Province also made it expressly clear in its webinars that there's no obligation for local governments to approve every single rezoning that complies with the TOA density minimums because there could be competing policy reasons to reject such applications.

Public Hearings

If a local government chooses to adopt a new zoning bylaw in order to ensure compliance with s.481.3 as opposed to amending an existing zoning bylaw, is the local government prohibited from holding a public hearing on the new zoning bylaw per s.464(4)?

The criterion for the application of the prohibition is whether the sole purpose of the bylaw is to comply with these density entitlements, so if it's a whole new zoning bylaw then it doesn't seem to me that the prohibition would apply.

If a public hearing is required for a new zoning bylaw, how does a local government ensure public comments are limited only to those aspects unrelated to SSMUH requirements?

I question whether that would be a practical solution, even if there was a point to attempting it. I don't think there is a point to attempting it because I don't think the prohibition applies.

If a rezoning involves land-uses other than residential (outdoor assembly for example), but the residential floor area exceeds the floor area of other uses, will a public hearing be prohibited?

With respect to the general prohibition on public hearings, all that counts is the floor area. It doesn't matter if there are other areas of the parcel that are used for non-residential uses, it's all about building floor area.

Bill 44 prohibits public hearings from being held for the purpose of implementing SSMUH requirements into a Zoning Bylaw. Are public hearings required for the identification of Transit-Oriented Areas as required by Bill 47? Does it make a difference if the TOA is identified in a standalone bylaw vs within a Zoning Bylaw?

These are not zoning bylaws, so whether they're standalone or an amendment to the zoning bylaw, there's no public hearing required.

When is a public hearing not a public hearing (If it walks like a duck etc.). Our Procedures Bylaw allows the public to comment on any item on the agenda that is not subject to a public hearing. This "public input" is one of the first items on the Council agenda. If a rezoning bylaw meets all of the requirements to prohibit a public hearing, ipso facto, there is no public hearing and, pursuant to the Procedures Bylaw, the public can comment on the rezoning application at the beginning of the meeting. Would this constitute a de facto public hearing? How do we differentiate between what is and is not a public hearing?

I wonder who would complain if there was a public hearing held when the statute prohibits it? It might be an interesting theoretical question that's been posed here, but we have to come to some sort of legal conclusion and there are Council Procedure Bylaws and Board Procedure Bylaws that seem to entitle members of the public to come to the meeting and actually speak, even though they're not a member of the Council or Board, about any matter that's on the agenda. Even when a public hearing is prohibited, there has to be a notice published before the first reading of the bylaw, which is going to look an awful lot like an invitation to come to the meeting to speak about it, whether that's what the notice says or not. I think that there are circumstances where, if it mattered that a prohibited public hearing had in substance occurred, allowing a member of the public to speak at a Council or Board meeting about the merits of a

zoning bylaw, for example, in respect of which there's a public hearing prohibition, could be a problem. I've noticed that some of these Procedure Bylaws currently mention that, while there's a general right to speak to a matter that's on the agenda, usually there's an exception where the matter is a bylaw that has been the subject of a public hearing because the local government knows that it's procedurally unfair to allow one party or another to speak to a bylaw after the public hearing is closed.

I've been thinking that it would be perhaps a good idea to consider adding to those Procedure Bylaws a provision that also eliminates presentations from any member of the public on a matter in respect of which a public hearing is prohibited by the statute, so that the person presiding would be in a position to, first of all not put the person on the speakers list if that's what they intend to speak about or, secondly, to actually interrupt them and ask them to stop speaking about a particular matter if it's a matter in respect of which a public hearing is prohibited.

Who will decide whether a rezoning is consistent with the relevant OCP, resulting in a public hearing being prohibited?

I presume that means, as between the elected officials and the staff, who's going to decide. Ultimately, it might be a judge who has to decide, but as between the elected officials and the staff, I have always thought that it's a judgment call that ought to be made by staff or, at the very least, there ought to be a very strong recommendation from staff. I think that, as with such matters as interpreting the scope of a permitted use in a zoning bylaw, it's inadvisable to get the elected officials weighing in on that question because they're inclined to pay more attention to whether they think the use is a good use to occur in the zone or not, rather than what the bylaw actually says. Similarly with regard to questions of consistency, elected officials may be inclined to consider the question of consistency based on their attitude towards the development in respect of which the question has arisen, rather than what the official community plan actually says. Exposing these judgment calls to the political arena may not be an advisable choice. I recognize that there may be some jurisdictions where elected officials insist on playing that role, but it's something professional planners certainly ought to discourage.