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Law Letter

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Auditor General for Local Government Act

Background

In November, 2011, the Province introduced Bill 20 – *The Auditor General for Local Government Act* in November 2011. The Act would establish an office of the Auditor General for Local Governments of British Columbia ("AGLG"). The government has stated that the primary purpose of the AGLG is to help local governments find efficiencies in spending and improve program effectiveness by providing neutral, non-binding advice.[1] According to a government: press release,

> "the AGLG's role has been designed to maximize value for money by enabling the AGLG to undertake performance audits and provide information to assist local governments in choosing how best to respond to their communities' priorities. Like all auditors general, the AGLG would make recommendations for improvements, not impose solutions."[2]

The proposed act has the support of certain segments of the business community and taxpayer associations; however, the Union of British Columbia Municipalities ("UBCM") has not shown a similar level of enthusiasm. At its 2011 convention, the UBCM published a policy paper on the issue and resolved to disagree with the necessity to create an office of the AGLG "due to the fact that requirements of such an office are already met under existing local government legislation and regulations".[3]

Notwithstanding its disagreement with the proposed legislation, the UBCM recognized the

[1] News release, *Search Begins for Audit Council Members, Min. of Community. Sport and Cultural Development, Feb. 4/12.*

[2] *Ibid.*

[3] Resolution made at the UBCM annual convention, UBCM, Sep. 19/11.

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resolve of the government to pass the legislation and published and endorsed a policy paper on the issue at its 2011 convention. The UBCM also instructed its executive to continue negotiations with the government with respect to the proposed legislation on the basis of the recommendations and principles detailed in the policy paper. The principles and recommendations in the UBCM policy paper included the following:

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- The proposed AGLG legislation should involve consultation between the province and local governments to promote effective information sharing, healthy debate and mutual understanding of respective interests should be encouraged.
- Changes to the accountability framework as a result of the proposed AGLG legislation should build on existing systems, avoid duplication and meet specific objectives;
- The proposed AGLG legislation should maximize public accountability benefits while respecting local autonomy and recognizing local capacity;
- The proposed AGLG's powers should not exceed that of a typical federal or provincial auditor general and the legislation should prohibit the AGLG from considering the merits of local government policies or objectives; and
- The administrative and governance structure for the proposed AGLG should strike an appropriate balance to ensure the AGLG is sufficiently independent to be able to undertake their work free from political or other interference and also ensure the AGLG is accountable to the local governments within their audit mandate in relation to their own efficiency, effectiveness and compliance with the legislative framework.[4]

Each of these recommendations will be considered in relation to the provisions of Bill 20.

Overview of Bill 20

The proposed AGLG Act under Bill 20 consists of 6 Parts. Part 1 consists of the definitions of terms used in the Act. Part 2 of Bill 20 provides for the appointment of the AGLG by the lieutenant governor in council on recommendation of the minister. Before making the appointment, the minister must consider the recommendation of

[4] *Policy Paper #1 RE: Municipal Auditor General*, UBCM, Sep. 19/11.

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the audit council created under Part 3 of the Act. The purpose of the AGLG as described in Part 2 is:

> "to conduct performance audits of the operations of local governments in order to provide local governments with objective information and relevant advice that will assist them in their accountability to their communities for the stewardship of public assets and the achievement of value for money in their operations."[5]

To qualify for appointment, the AGLG must be a "qualified individual" as that term is defined in Part 1, meaning a person authorized to be an auditor under section 205 of the *Business Corporations Act*. Candidates or holders of elected public office and employees of the province or a local government may not be appointed. In general terms, the AGLG has similar powers to those of the Auditor General of British Columbia.

Part 3 of the Act establishes a five-member audit council also appointed by the lieutenant governor in council on recommendation of the minister. The role of the audit council includes recommending qualified individuals for appointment as the AGLG, commenting on AGLG changes to the annual service plan, commenting to the AGLG on performance audit reports, the AGLG's annual report and any other reports prepared by the AGLG. The audit council is also charged with disseminating information and reviewing and monitoring the performance of the AGLG.

Part 4 of the Act details the annual service plan and reports that are to be prepared by the AGLG. The annual service plan includes the budget for the AGLG's operations as approved by the Treasury Board and a statement of goals, objectives, themes and other matters in respect of

the AGLG's activities for the fiscal year addressed by the report and the following two fiscal years.[6] The AGLG is also required to prepare an annual report in each year which includes the audited financial statements and information in respect of their activities and progress in relation to the goals, objectives and measures for that year in the annual service plan.[7] Part 4 also requires the AGLG to prepare performance audit reports in respect of performance audits conducted by it.[8] The AGLG

[5] S. 3.

[6] S. 22(2).
[7] S. 25.
[8] S. 23.

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may also prepare and publish other reports about recommended practices identified or developed by the AGLG.[9] Parts 5 and 6 round out the AGLG Act with general and transitional provisions respectively.

Bill 20 and its provisions for consultation between the province and local governments

Local governments in British Columbia have historically carried out consultations with the provincial government on matters concerning their interests individually and collectively through such organizations as the Union of British Columbia Municipalities. Bill 20 would not change this but it would add an additional avenue for consultation. Under section 18, the minister is required to consult with the Union of British Columbia Municipalities before recommending appointments to the audit council created under the proposed legislation. This consultation may be carried out "in the manner and to the extent" the minister considers advisable and also includes a requirement that the minister consult in the same fashion with persons or organizations that are representative of business, taxpayers or local government professionals.[10]

In addition to this consultation requirement, the audit council created under section 18 requires members to have knowledge, skills, education or experience in one or more specified areas including "accounting, auditing, governance of the Province or local and regional governance".[11] Presumably, members of the audit council with this experience would bring a municipal perspective to the council's role and at least indirectly contribute to consultation between the province and local governments on matters relating to the AGLG. However, there is no requirement that any member of the audit council must have this experience and conceivably, the audit council could be composed of individuals without any local or regional governance experience.

Individual local governments are also provided with an opportunity for consultation in the preparation of performance audit reports. The Act requires the AGLG to provide a proposed final performance audit to the local government whose operations are the subject of the report. The local government is then given no less than 45 days to provide comments on the proposed final performance audit report. The AGLG is then required to include a summary of the local government's comments in the final performance audit report.[12]

Bill 20 and the Financial Accountability Framework for Local Governments

Bill 20 intends to add another level of financial accountability to the already stringent financial accountability requirements for local governments in British Columbia. Under the existing financial accountability requirements of the *Community Charter* and *Local Government Act*, local governments are limited in how they can spend and borrow. Their finances are subject to annual audit, to public disclosure and to oversight by the Inspector of Municipalities. In addition to the requirements for financial plans, balanced budgets and financial reporting, local governments are also accountable to their electors and of course, the most important measure of accountability are municipal elections held every three years.

Bill 20 proposes to expand on these measures by empowering the AGLG to conduct performance audits of the operations of local governments "in order to provide local governments with objective information and relevant advice that will assist

[9] S. 26.
[10] S. 18(6).
[11] S. 18(5).
[12] S. 23.

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them in their accountability to their communities for the stewardship of public assets and the achievement of value for money in their operations."[13] Performance audits are described in the Act as a review of the operations of a local government, as the operations relate to a matter or subject specified by the auditor general, an evaluation of the extent to which the operations are undertaken economically, efficiently and effectively and recommendations to the local government arising from the review.

Unlike audits that attest to the accuracy of a local government's financial statements and records or compliance audits, performance audits can be more wide ranging and subject to the discretion of the auditor. According to the International Organization of Supreme Audit Institutions:

> "performance auditing is more flexible in its choice of subjects, audit objects, methods, and opinions. Performance auditing is not a regular audit with formalized opinions, and it does not have its roots in private auditing. It is an independent examination made on a non-recurring basis. It is by nature wide-ranging and open to judgments and interpretations. It must have at its disposal a wide selection of investigative and evaluative methods and operate from a quite different knowledge base to that of traditional auditing. It is not a checklist-based form of auditing. The special feature of performance auditing is due to the variety and complexity of questions relating to its work."[14]

Given the wide-ranging, discretionary and complex nature of performance audits, local governments cannot anticipate what aspects of their operations or services will be audited and much less, the outcome of a performance audit.

What local governments can do is examine their existing and proposed operations and services to ensure they are conducted economically, efficiently and effectively.

Maximizing public accountability benefits while respecting local autonomy and recognizing local capacity in Bill 20

While the performance audit to be conducted by the AGLG is by its nature wide-ranging and open to judgements and interpretations, the Act prohibits the AGLG from calling into question the merits of policy decisions or objectives of a local government.[15] This satisfies a key recommendation of the UBCM that the AGLG not have power to second guess local governments on the policies or programs they choose to undertake. The AGLG may only assess the economy, efficiency and effectiveness of those policies and programs. The AGLG is also prohibited from carrying out any of the duties or responsibilities of the municipal auditor or the audit committee under Division 2 of Part 6 of the *Community Charter* or comparable provisions under the *Vancouver Charter* and other similar legislation. As well, while the AGLG may make findings and recommendations in its performance audit reports, the local government is not obligated to follow those recommendations.

The powers of the proposed AGLG in Bill 20

The Act provides the AGLG with powers typical of auditors general in other jurisdictions. The AGLG may select in their sole discretion the performance audits to be conducted and may enter into an agreement with a local government to conduct a performance audit relating to a matter that is specified in the agreement.[16] Local governments are compelled to give to the AGLG access to records, information things, facilities,

[13] S. 3.
[14] *Performance Audit Guidelines: ISSAI 3000 – 3100* (INTOSAI), p. 12.
[15] S. 3(5).
[16] S. 3(4) and 4(1).

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works and explanations necessary for the AGLG to conduct the performance audit.[17] Depending on the subject of the performance audit, this power to compel extends to any person or organization with whom the local government has entered into an agreement or arrangement, to any person or organization who has been granted money by the local government, to any participant in a regional district service agreement.[18] The AGLG is also given power to compel persons to answer questions and order disclosure and failure or refusal by a person to do so makes the person liable to be committed for contempt on application to the Supreme Court.[19]

The Act restricts the AGLG from disclosing a record or information obtained in the performance of their duties under the Act except in certain prescribed circumstances. These exceptions arise when it is necessary for the AGLG to disclose information to conduct a performance audit and carry out their responsibilities, in a prosecution for perjury, of when the AGLG considers there to be evidence of the use of money contrary to the *Community Charter* or *Local Government Act*.[20] Confidential information disclosed to the AGLG that is subject to solicitor-client privilege also retains that privilege in the possession of the AGLG.[21]

In the course of a performance audit, the AGLG must prepare a final performance audit report. Before release to the public, the AGLG must provide a copy of the proposed final performance audit report to the local government whose operations are subject to the report. The local government may provide comments to the AGLG on the report within the time given by the AGLG which may not be less than 45 days.[22] The AGLG must include in the proposed final report a summary of the comments given by the local government and then submit the proposed report to the audit council which may provide its own comments with respect to the proposed report. After finalizing the performance audit report, including the summary of the local government's comments, the AGLG must provide the report to the local government whose operations were the subject of the report and after doing so, must publish the report.[23] The Act restricts both the local government and the audit council from disclosing the proposed final performance audit or the local government's comments until after publication of the final audit report.

In addition to the power to issue performance audit reports, the AGLG is empowered to identify and provide information about recommended practices arising from a performance audit that the auditor general considers may be applicable or useful to other local governments.[24] The AGLG may then prepare and publish reports about the recommended practices after first providing the proposed report to the audit council which may provide comments on the report before it is published.[25]

Administrative and governance structure of the AGLG in Bill 20

Under the provisions of the proposed AGLG Act, once an AGLG has been appointed, the AGLG appears to have sufficient independence to be able to undertake their work free from political or other interference. The AGLG is appointed for a term of five years and may only be removed from office for cause or incapacity. The auditor general may be appointed for a second five-year term but may not be reappointed after the second term

[17] S. 13(2).
[18] S. 13.
[19] S. 14 and 15.
[20] S. 16(2), (3), (6).
[21] S. 16(4).
[22] S. 23(1), (2).
[23] S. 23 (5).
[24] S. 3(3).
[25] S. 26.

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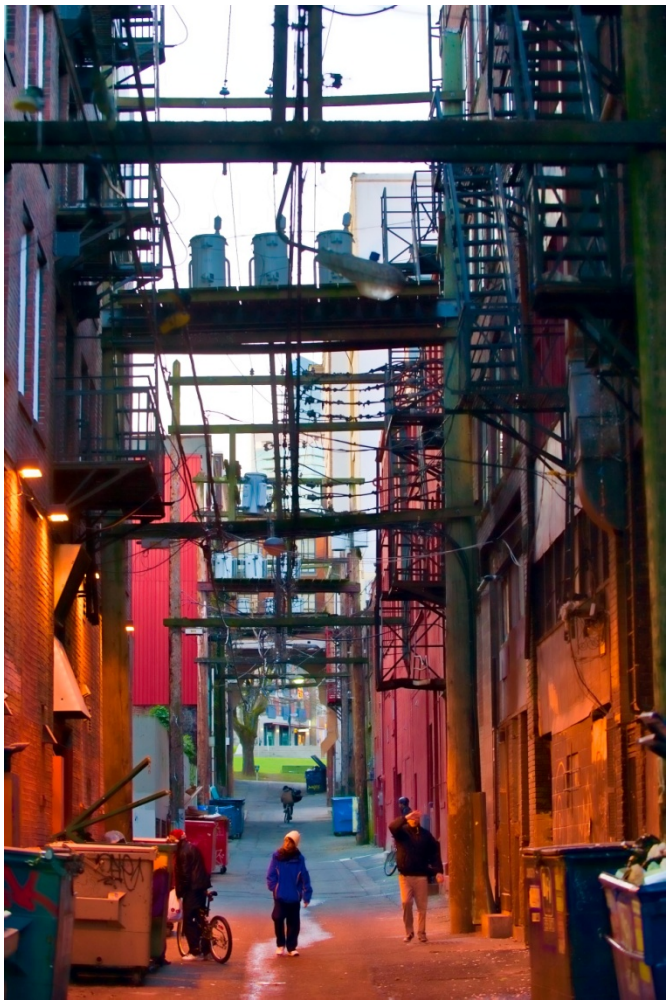
ends.[26] During the AGLG's term of appointment, subject only to the published annual service plan, the AGLG may in their sole discretion, select the performance audits to be conducted.[27] As explained above, the AGLG is given broad powers to carry out their mandate and the proposed Act also allows the AGLG to appoint a deputy and other employees necessary to exercise the powers and performance of the AGLG. The only explicit constraints to the AGLG's powers arise from the audit council's power to comment and make recommendations on the AGLG's annual service plan which the AGLG must consider before it is approved.

The accountability of the AGLG to local governments is indirectly addressed in the makeup of the audit council detailed above and the audit council's powers of review, comment and recommendation with respect to the AGLG and their operations. The AGLG's accountability to local governments is also addressed in the ability of local governments to comment on proposed performance audit reports before the final report is released. This will entail at least some measure of dialogue between the AGLG and local governments as the AGLG carries out their responsibilities.

One potential concern for the independence of the AGLG arises from the proposed appointment process for the AGLG. The lieutenant governor in council makes the appointment on recommendation of the minister who in turn must consider the recommendations of the audit council. The minister is not bound to follow the recommendations of the audit council but rather only consider that recommendation. Furthermore, members of the audit council are also appointed by the lieutenant governor in council on recommendation of the minister under section 19(1)(a). The minister must consult with the Union of B.C. Municipalities and the business, taxpayer and local government community; however, there is no requirement that the minister follow the recommendations of those stakeholders. The opposition has criticized this proposed



appointment process in the legislative debates concerning Bill 20 because the process does not provide for approval of appointments by the legislature. It remains to be seen whether the proposed appointment process merits this criticism.

[26] S. 2.
[27] S. 4.

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Conclusions

As of the date of this article, Bill 20 is making its way through the committee stage of the legislative process. The government has indicated its intention to have Bill 20 passed into law before the summer and with its majority in the legislature, there is a reasonable likelihood of that occurring with many, if not all, of the provisions outlined above included in the Act that is ultimately passed by the legislature. Arguably, local governments in this province already have the highest level of accountability to their electors when compared to the provincial and federal governments; however, the AGLG Act will bring with it another measure of accountability to local governments. Local governments should consider the ramifications of Bill 20 for their own operations and begin preparing now for its implementation.

Lindsay Parcells

Recent Defamation Case Law of Note for Local Governments

The law of defamation seeks to strike a balance between freedom of expression on one hand, and the protection of reputations on the other. Defamation occurs where the defendant publishes words that refer to the plaintiff and that tend to lower the plaintiff in the estimation of others. Not all entities are entitled to assert a claim in defamation. In 2009 a BC Supreme Court ruling definitively held that local governments cannot sue for defamation for damage to their governing reputations, as freedom of expression includes the right of citizens to criticize their governments. That said, individual officers or employees of a local government may still sue for defamation to their personal reputations.

If the plaintiff proves that words complained of were defamatory, then the onus shifts to the defendant to advance a defence in order to escape liability. One defence in particular, the defence of qualified privilege, has been the subject of a number of recent cases involving local governments.

The defence of qualified privilege protects the occasion upon which the communication is made, rather than the communication itself. Qualified privilege arises where a communication is made in the discharge of a legal, moral or social duty, or where there is a common interest between the party making the statement and the party receiving it. If established, this defence can absolve the defendant of liability even if the words complained of are not true.

The defence will fail if the plaintiff proves that the defendant was predominantly motivated by malice, in the sense of ill will or an indirect motive that conflicts with the duty created by the occasion. Malice may also be established by showing that the defendant either knew that she was not telling the truth, or was reckless in that regard, and can be inferred if the language of the communication is stronger that the circumstances warrant. Excessive publication of the communication can also defeat the privilege.

In *McVeigh v. McWilliam*, 2010 BCSC 34, the defendant, while the Chair of the Gillies Bay Improvement District Board, presided over a special general meeting of the ratepayers of the Gillies Bay Improvement District. The meeting was called to determine whether the public maintained confidence in the Board, in light of the plaintiff's very critical public campaign against it. At the meeting the defendant handed out and read from two documents, which the plaintiff claimed defamed him. The judge found that the

Defamation Case Law (continued from page 8)

documents contained statements that alleged or implied that the plaintiff acted irresponsibly or improperly or maliciously, in persistently advancing unfounded accusations of misconduct or unfounded allegations of impropriety on the part of others, and that these statements were defamatory.

However, the judge also found that the defence of qualified privilege was made out, as the defendant had a legal, social and moral interest in addressing the criticisms levied against the Board, and the ratepayers had an obvious corresponding duty or interest in receiving the information. The judge also held that the defendant's main purpose in publishing the defamatory words was to respond to the criticisms levied by the plaintiff, which he was entitled to do.

In *Hunter v. Chandler*, 2010 BCSC 729, the plaintiff, a representative on the Peninsula Recreation Commission, alleged that the defendant (a Councillor) defamed him by calling his professional ethics into question and by accusing him of being in a conflict of interest. The judge found that qualified privilege protected the defamatory communications between the defendant Councillor and the chair of the Peninsula Recreation Commission, as the defendant had a concern, (although misplaced) with respect to a conflict of interest on the part of a representative appointed by the Council to a public body. The judge held that communications between public officials in the course of their official duties are protected by a qualified privilege, and the communications in this case fell within this rule.

However, the defendant had also defamed the plaintiff in conversations with an additional individual, a member of the public, by stating that the plaintiff was in a conflict of interest despite the fact that the defendant knew a legal opinion was being sought (but had not yet been obtained) with respect to this very issue. The judge held that these communications were not protected by qualified privilege, as on the defendant's own testimony he knew it was inappropriate to discuss the situation until the legal opinion was obtained.

While not related to the defence of qualified privilege, a recent decision of the Supreme Court of Canada with respect to online defamation is also significant for local governments. In *Crookes v. Newton*, 2011 SCC 47, the Court was asked to rule on a novel question: if a person posts a hyperlink to defamatory material, does that in and of itself constitute "publishing" the defamatory words?

The Majority of the Court held that in order to safeguard freedom of expression, it would be inappropriate in include simply posting a hyperlink within the meaning of publishing defamatory words, as a hyperlink is on its own content-neutral. In particular, hyperlinks that simply refer readers to another source of information, but do not in and of themselves communicate the content of that information, do not publish defamatory words. Noting that an author who hyperlinks to a third party source of information does not control the content of that information, the Majority held that it is the actual author or poster of the defamatory words who is publishing them. This ruling provides some comfort to local governments that hyperlink third party information on their websites.

Sara Dubinsky

Delegation Primer

Questions related to delegation powers come up quite frequently from clients (*Does this have to go to Council? Can the CAO sign that agreement? Does Council have to reconsider the denial of a permit?*). Although the answers to those questions

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often depend on what is in a client's delegation bylaw, the starting point is always whether the power can or cannot be delegated at all and then whether there are special terms and conditions governing its delegation. Below is a basic primer on delegation, including lists of powers that can and cannot be delegated and matters that must be given a right of reconsideration by Council, if delegated.

General Power to Delegate

Section 154(1) of the *Community Charter* provides, in broad terms, that a municipal Council may delegate its powers to Council members or council committees, municipal officers or employees, or another body established by the Council (except for a corporation).[28]

Examples of powers or duties that can be delegated by a municipal Council include the following:

- The power to purchase and enter into contracts (s. 8(1) *Community Charter*)
- The granting of a licence (s. 15 *CC*)
- The disposal of municipal property including real property (s. 26 *CC*)
- The temporary closure of highways and traffic control (s. 38(2) *CC*).
- The issuance of building permits and occupancy permits (s. 54 *CC*)
- The cancelation or suspension of a business licence (s. 60(4) *CC*)
- Fire Inspector powers including the inspection of premises for fire safety and the imposition of requirements for fire safety (s. 66 *CC*)
- Establishing an athletic commission to oversee prize fighting (s. 143 *CC*)
- Establishing an audit committee to review auditor's report – but the powers can only be delegated to Council members (s. 170(1) *CC*)
- The holding of a public hearing (s. 891 *LGA*), subject to s. 155 of the *Charter*
- The enforcement of municipal bylaws (s. 260 *CC*)
- The issuance of a development permit (s. 920 *LGA*)
- The issuance of a temporary use permit (s. 921 *LGA*)
- The requirement to provide security prior to the issuance of certain permits (s. 925 *LGA*)
- Reduction of DCC charges for eligible developments: s. 933.1 *LGA*
- Consideration of applications for and issuance of heritage alteration permits (ss. 950 and 972 *LGA*)
- Ordering a heritage inspection (s. 956 *LGA*)

Councils can also delegate any other power that does not specifically say that it must be exercised "by bylaw".

Matters that cannot be delegated

Section 154(2) limits the powers and functions that may be delegated by a municipal Council. In particular, that section states that a Council may not delegate the following:

(a) the making of a bylaw;

(b) a power or duty exercisable only by bylaw;

(c) a power or duty established by this or any other Act that the council give its approval or consent to, recommendations

[28] Delegation powers for regional district boards are granted by s. 176(1)(e) and regulated by ss. 191 to 194 of the *LGA*.

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on, or acceptance of an action, decision or other matter;

(d) a power or duty established by an enactment that the council hear an appeal or reconsider an action, decision or other matter;

(e) a power or duty to terminate the appointment of an officer;

(f) the power to impose a remedial action requirement under Division 12 [*Remedial Action Requirements*] of Part 3.

Some of the matters that fall under these categories and therefore cannot be delegated include the following:

a) Powers and Duties that can only be exercised by bylaw

- Regulating or prohibiting in relation to services, public places, firearms and other weapons, trees, public health, animals, cemeteries, building and other structures, business, etc. (s. 8(3) *Community Charter*)
- Entering into an inter-municipal scheme for the purposes of services, regulation, etc. (s. 14 *CC*)
- The granting of an exclusive or limited franchise (s. 22 *CC*)
- The exchange or disposition of dedicated park land (s. 27 *CC*)
- The reservation or dedication of municipal property for public purposes (s. 30 *CC*)
- Regulating the use of highways (s. 36 *CC*)
- The permanent closure of highways or the removal of highway dedication (s. 40 *CC*)
- The adoption of a financial plan (s. 165 *CC*)
- Revenue borrowing (s. 176 *CC*)
- Short term capital borrowing (s. 177 *CC*)
- Establishing a reserve fund (s. 188 *CC*)
- The imposition of a fee (s. 194 *CC*)
- The imposition of taxes (ss. 197, 200, and 211 *CC*)
- Providing a tax exemption (s. 224 *CC*)

b) A Power or Duty Established by the Community Charter or another Act that Council give its approval or consent to, recommendations on, or acceptance of an action, decision or other matter

- Placing a note on title that building regulations have been contravened (s. 57 *Community Charter*)
- Making recommendations on the issuance or renewal of a liquor licence (s. 11.1 and 11.3 *Liquor Control Act*)
- Recommendations on applications to include or exclude land from the Agricultural Land Reserve (s. 34(4) *Agricultural Land Commission Act*)
- Approving an expropriation (s. 18 *Expropriation Act*)
- Issuance of a development variance permit (s. 922(8) *Local Government Act*)

c) A power or duty established by an enactment that the council hear an

Delegation Primer (continued from page 11)

appeal or reconsider an action, decision or other matter

- Reconsideration of the suspension of a business licence: s. 60(5) *CC*
- Reconsideration of a remedial action requirement: s. 77 *CC*

Terms and Conditions

In delegating its powers, Council may establish any terms and conditions it considers appropriate. In certain cases, a local government is required to set terms and conditions. For example, s. 925(1) gives a local government the power to require that an applicant for a permit issued under Division 9 of Part 26 of the *LGA* provide security in an amount stated in the permit. If the local government delegates the power to require security, the delegation bylaw must include guidelines for the delegate as to how the amount of security is to be determined: s. 925(4).

Rights of Reconsideration

Section 156 of the *Community Charter* modifies the common law rule that a delegator cannot reconsider the decision of its delegate. That section provides that Council, by bylaw, establish a right to have decisions delegated under s. 154 reconsidered by Council.

If the *Charter* or another Act establishes a right to have a delegated decision reconsidered by Council, the Council must, by bylaw, establish procedures for the reconsideration, including how a person may apply for the reconsideration: s. 156(2). In addition, if there is a right of reconsideration, the person making the decision must advise the person subject to the decision of this right: s. 156(4). If Council does reconsider a matter, it has the same authority as that it had conferred on the delegate: s. 156(3).

Below is a list of matters that, if delegated, *must* be given a right of reconsideration by Council:

- If Council has delegated its powers under s. 8(3)(c) [trees], the owner or occupier of real property that is subject to a decision of a delegate is entitled to have Council reconsider the matter;
- The authority to grant, refuse, suspend or cancel a business licence: s. 60(5);
- The issuance of development permits: s. 920(12) *LGA*;
- The issuance of temporary use permits: s. 921(15);
- The power to waive or reduce a development cost charge for an eligible development: s. 933.1(6) *LGA*;
- Applications for heritage alteration permits: s. 950 *LGA*

In conclusion, as they always say, “delegatus non protest delegare”.

Marisa Cruickshank

Green Development Fundamentals – Zoning and Impact Studies

Zoning is a powerful tool that can implement most of a local government’s green development policies and objectives. The basic power to zone is found in s. 903 of the *Local Government Act*.

Compact Land Use

Zoning is the critical legal tool in respect to compact land use. The advantages of compact land use include “strengthened local economy…convenient access to goods and

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services…improved human health through reduced air pollution and more active transportation…reduced infrastructure costs and lessened property tax burden…increased housing choices that meet changing demographics and demand…cut costs on rising energy expenditures"[29].

A compact community has a smaller per capita footprint on the land base and reduces servicing costs, with other benefits including human health amelioration, climate change mitigation, farmland protection, reduced commuting times and other matters[30]. Compact community mechanisms include mixing houses, jobs and green infrastructure; doing more with less land; encouraging transit-supportive land uses; and increasing livability of neighbourhoods.

Tools for creating compact communities include zoning and subdivision bylaws, including bonusing density or transferring density to intensify or act re incentives for increasing the quantum of development in a neighbourhood; clustering development with higher densities so as to protect surrounding areas as public open space in its natural state; mixing uses in a neighbourhood to create a community of interest and "one stop shopping" in a neighbourhood; and permitting increased densities in relation to transit and transportation and in relation to infrastructure. The legal tools for this include the zoning power to increase density under s. 903(1)(c)(ii). The zoning bylaw may also downzone surrounding areas[31].

Amenities

The zoning bylaw may also establish conditions relating to the conservation or provision of amenities that will entitle an owner to a higher density under s. 904 of the *Local Government Act*. Such a zoning bylaw provision must first establish different density regulations for a zone, one generally applicable for the zone and the other to apply if the higher density conditions are met; in such case, it is critical to ensure that the base regulations generally applicable for the zone are practical and economic and not merely fictional[32].

In an amenity zoning bylaw, a local government may provide for conditions that may act as incentives for clustering density and proceeding with mixed uses. There are a number of green development strategies that may be implemented by way of density bonusing or transfers. A council or board may encourage green buildings by providing for density bonuses in exchange for such amenities under s. 904 of the *Local Government Act*. As discussed in relation to the section on "Compact Communities", a council or board in an amenity zoning bylaw may provide for conditions that may act as incentives for clustering density and proceeding with mixed uses as well as encourage high performance or green buildings, greenways, trails, bikeways, open space, water access, wetland or other natural conservation, and more.

In regard to a s. 904 zoning bylaw amendment, there is no statutory definition of "amenities" so local government discretion in this area is significant. The local government may amend its zoning bylaw to provide for a widespread program and policy of incentives by "pre-zoning" for amenity bonuses. In the alternative, the local government may amend the zoning bylaw ad hoc in regard to specific proposed developments. An amenity zoning bylaw under s. 904 must establish different density regulations for the zone, one

[29] BC Climate Action Toolkit published by the Green Communities Committee, a joint Provincial-Union of British Columbia Municipalities Committee to provide a range of practical strategies, actions and guidance to support local governments. www.toolkit.bc.ca.
[30] http://smartgrowth.bc.ca/Default.aspx?tabid=95.
[31] *PNI v. Victoria (City),* [2004] 3 S.C.R. 575, 2004 SCC 75

[32] *Lambert v. Resort Municipality of Whistler et al.*, 2004 BCSC 342.

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generally applicable for the zone and the other to apply if the higher density conditions are met. In regard to the latter, it is important to calculate the quantum of density bonusing in relation to the value of the amenity so that the scheme will be effective. The amenity zoning should be consistent with the official community plan, which may contain overarching policies respecting the density bonusing scheme.

Under s. 905(1) of the *Local Government Act*, the local government may by bylaw enter into a phased development agreement with a developer. A board or council and an owner may enter into a development agreement providing for amenities, the inclusion of specified features in the development, the phasing and timing of the development, and "other matters covered by the agreement". In return for the amenities, the specific features and the other matters covered by the agreement, the developer is protected by the provisions of the agreement that ensure that specified zoning bylaw provisions (and development permits that vary the citing, size or dimensions of buildings for uses) will continue in force and effect despite downzoning or other zoning amendments during the term of the agreement (up to ten years under s. 905.2(1)).

Impact Studies

The power to require development approval information is a useful adjunct to the zoning tool. This gives the development community a predictable, certain policy governing the requirement for consulting reports and other information in relation to development applications, and gives the local government the authority to require the developer to provide and pay for the information.

S. 920.1(3) of the *Local Government Act* provides that if an official community plan includes a provision under s. 920.01 that specifies circumstances in which development approval information may be required and designates development approval information areas, the local government or an officer or employee authorized under s. 920.1(4) may require an applicant for zoning, a development permit or a temporary commercial industrial use permit to provide the local government at the applicant's expense with "development approval information". Such information is defined in s. 920.1(1) as information on the anticipated impact of the proposed activity or development on the community including, without limitation, impact on the natural environment of the area, transportation patterns, local infrastructure and other things. If the official community plan includes such a provision, the board or council must by bylaw establish procedures and policies on the process for requiring development approval information and the substance of the information that may be required.

A development is exempt from local government development approval information requirements if the proposed activity or development is a "reviewable project" as defined in s. 1 of the *Environmental Assessment Act*[33].

The key elements of the development approval information provisions are the power to require the impact information in relation to the natural environment of the area, along with information on other matters not limited to those listed in s. 920.1(1), and that the information (reports, studies, surveys, etc.) are to be provided at the cost of the developer.

Don Lidstone

[33] *Environmental Assessment Act*, SBC 2002, c. 43.

Baziuk v. Shelley, 2012 BCSC 295

The petitioner, Mr. Baziuk, was an unsuccessful candidate for Councillor in Harrison Hot Spring's 2011 municipal election. Mr. Baziuk challenged the right of one of the four successful candidates, Mr. Shelley, to hold office because of the fact that Mr. Shelley was a volunteer firefighter at the time of the election. According to Mr. Baziuk, the remuneration received by Mr. Shelley for this volunteer work rendered him an employee of the municipality and thus ineligible from being nominated, elected to, or holding office as a member of local government pursuant to s. 66(2)(b) of the *Local Government Act*, R.S.B.C. 1996, c. 323.

Upon being elected as municipal Councillor, Mr. Shelley had requested that the Fire Chief donate all current and further remuneration for his work as a volunteer fireman to charity. Due to the irregular payment schedule for his remuneration, however, the Court held that at the time of the election Mr. Shelley was entitled to monetary compensation for his current and past work. According to Mr. Justice Masuhara, "[h]is request after the fact that his remuneration be donated to a charity cannot repair the fact that he was disqualified from holding office" (para. 16). Mr. Justice Masuhara held that Mr. Shelley's disqualification did not mean that Mr. Baziuk, who had finished fifth in the election standings, should be declared Councillor in Mr. Shelley's stead. Rather, Masuhara J. held that the electorate should have an opportunity to vote on the fourth seat and ordered a by-election.

Matt Voell

Catalyst Paper Corporation v. North Cowichan (District), 2012 SCC 2

In early 2012 the Supreme Court of Canada released its reasons in Catalyst Paper's appeal of the dismissal of its challenge to the property tax scheme of the District of North Cowichan (the "District"). In a nutshell, Catalyst's complaint was that the major industrial property tax rates in North Cowichan were too high, as compared to residential rates in the District. Catalyst argued before the Supreme Court that the lower courts had misapplied the 'reasonableness' standard of review as set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, by failing to require the District to demonstrate the rationality of its tax scheme. In *Dunsmuir*, the Supreme Court had held that if the applicable standard of review is reasonableness, the decision must be reasonable, "having regard to the processes followed and whether the outcome falls within a reasonable range of alternatives in light of the legislative scheme and contextual factors relevant to the exercise of power." Given this language, Catalyst argued that the standard of reasonableness required that the tax bylaw fall within the range of reasonable outcomes, having regard solely to objective factors relating to service consumption.

The Supreme Court, in reasons penned by Chief Justice McLachlin, disagreed. The Court held that "courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal Councillors may legitimately consider in enacting bylaws" (para. 23), including, according to the Court, an array of social, economic, political and other non-legal considerations. The Court held that the reasonableness standard, in the context of municipal law, is only infringed if "the bylaw is one no reasonable body informed by these factors could have taken." After applying this statement of the law to the facts in *Catalyst*, the Court held that the *Community Charter* provides

Catalyst Paper Corporation (continued from page 15)

municipalities with a virtually unfettered legislative discretion to establish property tax rates with respect to property classes (para. 26), and therefore, like the BC Court of Appeal before it, found that the bylaw fell within the range of reasonable outcomes.

Matt Voell

Order F12-05, City of Fort St. John, 2012 BCIPC No. 6

A recent order of a BC Information and Privacy Commissioner Senior Adjudicator held that a report relating to an investigation of actions of the Mayor of the City of Fort St. John (the "Mayor"), was subject to solicitor-client privilege and need not be disclosed by the City of Fort Saint John (the "City"). The order also held that the City was correct to refuse disclosure of complaint letters received prior to the City's request for a legal opinion on the grounds that their disclosure would unreasonably invade third-party privacy.

An applicant made a request for records relating to a decision by City Council to impose sanctions on the City's Mayor. The City withheld records from the applicant on the basis that they were protected by solicitor-client privilege; that their disclosure would reveal the substance of the Council's *in camera* meetings; and because the requested disclosure would be an unreasonable invasion of third-party privacy. The records at issue included complaint letters sent to the City's CAO impugning the Mayor's conduct, as well as a report created by an investigator hired by the City to investigate those complaints. Senior Adjudicator McEvoy found that while the report itself was not legal advice (despite the fact that it was written by a lawyer), the factual summary created by the investigator was integral and inextricably connected to the legal advice ultimately provided by the City's lawyers, and for this reason was privileged and protected from disclosure by section 14 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("FIPPA"). Furthermore, Senior Adjudicator McEvoy held that section 22 of FIPPA prohibited disclosure of the woman's complaint letters as such disclosure would be an unreasonable invasion of third-party privacy. Based on these findings, he found it unnecessary to determine whether the disclosure of the requested documents would reveal the substance of the City Council's *in camera* meetings.

Matt Voell

Antrim Truck Centre Ltd. V. Ontario (Transportation), 201 ONCA 419

In 2004 the Province of Ontario contemplated building a new four-lane section of a highway, which, unfortunately for the applicants, severely impeded road access to the truck stop they owned and operated on the old highway. The applicant, Antrim Truck Centre, took the position that the undertaking to build the new highway substantially interfered with its use and enjoyment of its property, and applied for compensation for injurious affection under the *Expropriations Act*, R.S.O. 1990, c. E.26. Ontario's *Expropriations Act*, like BC's *Expropriation Act*, R.S.B.C. c. 125, ss. 41-42, provides for claims for injurious affection where personal and business damages result from the construction of works by a statutory authority, in circumstances where a statutory authority does not acquire part of the land. In a recent BC case where injurious affection was pleaded, Mr. Justice Pitfield described the claim as one that "may be advanced against any defendant in whom a power of expropriation has been vested by statute but not exercised"

Antrim Truck Centre Ltd (continued from page 15)

(*Gautam v. Canada Line Rapid Transit Inc*., 2010 BCSC 163 at para. 48, aff'd 2011 BCCA 275).

The Ontario Court of Appeal ("ONCA") adopted the three part test for a claim for injurious affection articulated in *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906, namely: (a) the damage must result from an act rendered lawful by statutory authority; (b) the damage must be actionable but for the statutory authority; and (c) the damage must be occasioned by the construction of the public work, not its use. The actionable claim argued by Antrim was nuisance, which requires the applicant to make out substantial and unreasonable interference. Such an analysis, according to the ONCA, involves a balancing of the competing interests of the involved parties, carried out through a consideration of four factors (severity of the interference; character of the neighbourhood; utility of the defendant's conduct; and sensitivity of the plaintiff). While Antrim argued that an action for injurious affection required no such 'balancing', the ONCA held that because the claim for injurious affection in this case was based on the tort of nuisance, an integral part of which is a balancing process (see also *Susan Heyes Inc. V. Vancouver (City)*), the "important principles of tolerance and accommodation necessary to sustain harmony amoung neighbours in an increasingly dense and complex society require a balancing of the interests of both parties" (para 109).

Applying these factors to the facts of the case, the ONCA held that while the Ontario Municipal Board did consider reasonableness, it failed, *inter alia*, to "recognize the elevated importance of the utility of the [Ministry of Transportation's] conduct where the interference is the product of "an essential public service"" (para. 129). The ONCA stated that as "[h]ighways are necessary: this one particularly so given the public safety issue...there is no debate that the actions of the MTO were not only socially beneficial, but also necessary" (para. 135). Accordingly, the ONCA found the interference with Antrim's truck stop to be reasonable. Leave to appeal to the Supreme Court of Canada was granted to Antrim Truck Centre on February 2, 2012.

Matt Voell

Lidstone & Company Personnel

Paul Hildebrand is Associate Counsel at Lidstone & Company. Paul is the head of the law firm's Litigation Department. He won the Gold Medal in law at the University of British Columbia in 1980. Paul has a Doctorate in Economics in addition to his Law Degree and Master of Science degree in mathematics. For

Lidstone & Company Personnel (continued from page 17)

nearly 29 years, Paul Hildebrand has practiced law in the area of complex litigation, including a 12 year stint with McAlpine & Company, one of the leading complex litigation firms in Canada. Paul is responsible for the conduct of our local government clients' litigation matters, including defense of claims, insurance matters, suing other parties, injunctions, appeals, and other litigation related matters. He also has expertise in regard to arbitration, mediation and conciliation. He has done securities work, including financings for public and private companies, and real estate transactions.

Don Lidstone Q.C. has practiced generally in the area of local government law since 1980. His municipal law focus is in the areas of constitutional, administrative, and environmental law, particularly in respect of governance, land use/sustainable development, regulatory approvals, and legislative drafting. Invited to speak regularly at conferences, symposia and universities, he has chaired the Sustainable Region Initiative (Governance and Finance), Liquid Waste Expert Review Panel, Fire Services Review Panel, Whistler Waste Blue Ribbon Panel, and the Municipal Law Section of the British Columbia Branch of the Canadian Bar Association. Don has published numerous papers and manuals and consulted on the development of the *Community Charter* and other municipal statutes in a number of provinces. He was designated Queen's Counsel in 2008.

Lindsay Parcells practices municipal law with a particular interest in land use, real property, corporate, commercial, mediation and environmental matters. Lindsay joined Lidstone & Company in September, 2011 with 19 years of legal experience practicing law on Vancouver Island and in Calgary. He was called to the Alberta bar in 1992 and the British Columbia bar in 1995. Lindsay completed a Masters degree in Municipal Law from Osgoode Hall Law School in 2009 and a combined Bachelors of Laws and Masters of Business Administration degree from Dalhousie University in 1991. Before attending Law School, he served for one year as a legislative intern at the Alberta Provincial Legislature. Lindsay is currently Treasurer of the Municipal Law Section of the BC Branch of the Canadian Bar Association.

Marisa Cruickshank advises local governments in relation to a variety of matters, with an emphasis on constitutional, administrative and environmental law issues. Marisa completed her law degree at the University of Victoria. She was awarded five major scholarships and academic awards. She also served as a judicial law clerk in the British Columbia Court of Appeal.

Sara Dubinsky is a graduate of the University of Victoria Faculty of Law. Sara summered with a boutique litigation firm in Vancouver and appeared at the Braidwood Commissions of Inquiry on behalf of the British Columbia Civil Liberties Association, where she articled. Sara is a litigation lawyer and handles bylaw enforcement matters. She also provides legal opinions on a wide variety of issues, and is the go-to person in our firm for conflict of interest opinions. Sara received three awards in law school for her performance in the Wilson Moot Competition.

Lisa van den Dolder completed her law degree at the University of Victoria. During that time, she had co-op terms as an advisor at the University of Bristol's Law Clinic in England, and as a Contract and Policy Analyst at the Capital Regional District in Victoria. Lisa has a Master's Degree in English from the State University of New York at Buffalo. Lisa completed her undergrad at Thompson Rivers University with a BA in Psychology and English, and before studying law she managed website content for Halifax Bank of Scotland and Hilton International in the UK.

Matt Voell obtained his law degree at the University of British Columbia. After completing law school Matthew worked as an Ethics and Research Fellow in the areas of health and intellectual property policy, and completed the first half of his articles at a public law litigation boutique in Victoria, BC. Prior to commencing articling Matthew partially completed a Master of Laws graduate degree, and in his spare time continues to work on his graduate thesis. Matthew has also volunteered with the Access Pro Bono Society of British Columbia and the UBC Law Student Legal Advice Clinic.