

LIDSTONE & COMPANY

BARRISTERS AND SOLICITORS

MEMORANDUM

TO: British Columbia Clients
FROM: Don Lidstone, Q.C.
DATE: May 4, 2020
RE: COVID-19 Order - Electronic Public Hearings
FILE: 99999 - 044

ELECTRONIC HEARINGS

The Province issued Ministerial Order M139 on May 1 to authorize local governments to hold public hearings electronically during the provincial state of emergency. The state of emergency has been extended to May 12 but may be extended again for a longer period.

The order replaces M083 to include all rules governing council and board meetings and hearings in one order. The new Order M139 provides that a statutorily required public hearing for an official plan, zoning, land use contract termination, phased development agreement, heritage revitalization agreement or heritage designation bylaw may be held by means of electronic or other communication facilities, such as teleconference, phone or internet conference. This applies despite the *Local Government Act* (LGA), council or board procedure bylaws or development procedure bylaws.

Local governments must be able to conduct their business in accordance with public health advisories to reduce the threat of COVID-19 to the health and safety of members and employees of local government and members of the public. In-person public hearings became a problem as of March 16, 2020 when the Provincial Health Officer issued a COVID-19 order prohibiting the gathering of more than 50 people. This prohibition, combined with 2m social distancing, resulted in the cancellation or delay of in-person hearings. Order M139 addresses this concern.

PROCEDURE OF HEARINGS

Whether council members or board directors are attending electronically or in person, the public hearing may proceed if the members of the public are

able to make oral or written submissions to the council or board on the subject matter the bylaw, and only if the hearing (subject to Order M139) otherwise satisfies the applicable case law respecting notices, opportunity to be heard, opportunity to comment on or rebut other submissions, and minutes.

The Chair of the public hearing is permitted to establish procedural rules for the conduct of the hearing [section 465(3) LGA]. The Chair should read a statement at the commencement of the hearing to describe in detail how the public may participate with oral or written submissions, including via the electronic or other communications facilities.

Nothing in the new order prohibits in-person hearings along with electronic hearing processes. We do not recommend holding only an in-person oral public hearing, as an argument can be made that the public could not or did not attend because of the provincial health orders or concerns.

If you decide to hold a public hearing where members of the public may be physically present, under the order of the Provincial health officer, no more than 50 persons (including staff and elected members) may be in the hearing chamber, each should be spaced at least 2 metres apart (or in accordance with the most recent public health guidelines), and if more people attend they must be able to attend in a place where they can participate in the hearing by the electronic or other communications means. This may change if the Province issues further orders regarding public separation. Where possible, any in-person public hearing should be broadcast and recorded and made available for viewing by members of the public, with an opportunity for the public to respond orally or in writing to submissions made at that hearing before the hearing is closed.

WRITTEN SUBMISSIONS

Nothing in M139 alters the right of members of the public to make written submissions, in addition to oral submissions made electronically [section 465(2) LGA]. This should be set out expressly in the notice of public hearing. If you decide to hold a public hearing by written submissions only, without allowing oral submissions electronically under the new order, there is substantial risk a court may construe the legislation strictly and find that the hearing should have allowed the presenters to elect to make oral submissions.

NOTICE

A key issue for any public hearing, including a hearing conducted electronically, is to ensure that the section 466 LGA notice expressly sets out how members of the public will be provided an opportunity to be heard and to comment on other submissions. Nothing in the new Order M139 eliminates the need for the statutory notice of hearing. Instead of stating the place where an electronic hearing will be “held”, however, the notice will state explicitly how the hearing is to be conducted by means of electronic or other communication facilities. The notice must also provide clear instructions on how to participate by electronic or other communication facilities. It must also state how the public may access information or material, including the bylaw, that may be inspected for the hearing, and this may be made available online. Otherwise, all the notice requirements of the LGA must be satisfied, including the notice content, publication, delivery, date calculations and other information.

In any case, the chair of the hearing should under section 465(3) LGA recite for the public the reasonable rules governing the conduct of the hearing. For hearings conducted electronically, these rules must satisfy tests of reasonableness and must be communicated effectively to anyone who might be interested in attending.

A notice for waiver of a hearing must comply strictly with section 467 LGA.

If the public hearing is delegated, the notice must expressly state that fact (s. 469)(1)(a)).

WAIVER OF PUBLIC HEARING

A hearing for an official plan cannot be waived. A zoning hearing may be waived if the proposed zoning bylaw is consistent with the official plan and if statutory notice requirements are met. Sections 467(2) and (3) LGA apply to the notice.

Note: This bulletin is of a general and summary nature only and is not exhaustive of all possible legal obligations. In addition, laws may change over time and should be interpreted only in the context of particular circumstances such that these materials are not intended to be relied upon or taken as legal advice or opinion. Readers should consult a legal professional for specific advice in any particular situation.