

LIDSTONE & COMPANY

BARRISTERS AND SOLICITORS

MEMORANDUM

TO: BC Clients
FROM: Janae Enns
DATE: June 18, 2020
RE: COVID-19 Order M192 - Open Meetings & Electronic Hearings
FILE: 99999-044

The Province issued Ministerial Order M192 on June 17 that continues to authorize local governments to hold electronic meetings and public hearings, while encouraging the transition back to normal operations. The order applies during the provincial state of emergency and any of its extensions.

The order replaces M139 that previously authorized local governments to hold meetings and hearings by electronic means and adopt bylaws on the same day as third reading. The new order imposes further obligations on local governments to encourage in-person open meetings when possible, incorporate electronic technologies to enhance meeting accessibility, and restricts the types of bylaws that can be passed the same day as third reading.

OPEN MEETINGS REQUIRE “BEST EFFORTS”

The new order now requires local governments to undertake best efforts to allow members of the public to attend open meetings in-person, while abiding by any of the public health requirements or recommendations made under the *Public Health Act*. The provincial M192 guidelines provide examples of “best efforts” that include: providing information to the local government staff, elected officials and the public on how the local government is meeting public health orders at open meetings; offering alternative means by which the public can provide input on agenda topics to increase accessibility; incorporating livestreaming technologies; holding controversial agenda items with high public interest in a larger facility; and providing draft agendas, minutes and archived videos of meetings to the public.

MEETING WITHOUT PUBLIC PRESENT

Local governments that are not able to comply with public health orders and hold in-person open meetings are now required to adopt a resolution to provide a rationale for the continued need to meet without the public present.

The resolution must describe what local measures are being taken to ensure openness, transparency, accessibility and accountability in respect of the meeting. The resolution may be passed in reference to a specific meeting or, if the same circumstances apply, to more than one meeting. This is authorized despite the *Community Charter, Local Government Act* (LGA), or procedure bylaws. If a local government continues to meet without the public being physically present, information regarding what efforts have been made to consider holding in-person meetings should be provided to the public.

ELECTRONIC MEETINGS REQUIRE “BEST EFFORTS”

The new order still authorizes council, board or local government bodies to hold meetings electronically. When conducting an electronic meeting the council or board must use best efforts to use electronic or other communication facilities that allow members of the public to hear, or watch and hear, the part of the meeting that is open to the public. The provincial M192 guidelines provide examples of best efforts that include: electronic meetings should attempt to resemble the in-person public meeting as much as possible; explore alternative facilities that provides the means for the public to hear, or watch and hear, the electronic meeting; explore available technology that will enable the public to hear, or watch and hear, the meeting; anticipate technology issues; and consider allowing additional time on the agenda to resolve technical issues.

If a council or board is unable to hold an electronic meeting where the public can hear, or watch and hear the meeting, they must pass a resolution. The resolution must state the rationale as to why electronic or other communication facilities were not used to allow members of the public to hear, or watch and hear, the part of the meeting that is open to the public, and what local measures are being taken to ensure openness, transparency, accessibility and accountability in respect of the meeting. The resolution may be passed in reference to a specific meeting, or if the same circumstances apply, to more than one meeting. This is authorized despite the *Community Charter, Local Government Act* (LGA), or procedure bylaws.

SAME DAY BYLAW ADOPTION RESTRICTED

Under the new order municipalities may only adopt financial and tax bylaws on the same day that a bylaw has been given third reading. This repeals the previous authority under M139 but helps municipalities to manage cash flow issues. In order for a bylaw to be adopted the same day that it has been given third reading the bylaw must be made in relation to: financial plan; revenue anticipation borrowing; municipal fees; annual property tax; parcel tax; municipal tax schemes; revitalization tax exemptions; and tax sales. For

bylaws unrelated to these areas, there must be at least one day between the third reading and the adoption of the bylaw. Nothing in the new order alters the requirement to get third party approval under section 135(4) of the *Community Charter* between third reading and adoption.

Regional District are no longer authorized to adopt bylaws at the same day which the bylaw passes third reading with only a majority votes cast. Now full compliance with section 228 of the LGA is required regarding the adoption of certain bylaws the same day with 2/3 of the votes cast.

ELECTRONIC PUBLIC HEARINGS REMAIN AUTHORIZED

Nothing in the new order has changed the authorization for local governments to hold electronic statutorily required public hearings. In accordance with the order, the notice requirements under section 466 of the LGA must include clear instructions for how the hearing is to be conducted and how to participate by means of electronic or other communication facilities. Any material that is to be made available for public inspection must be available online or by other electronic or communication facilities. All other notice requirements of the LGA must be satisfied. The Chair of the hearing is permitted to establish procedural rules for the conduct of the hearing [section 465(3) LGA]. At the commencement of the hearing, the Chair should recite the rules governing the conduct of the hearing, including how to participate and any the deadline for submissions.

Under section 465 of the LGA, all interested persons must be afforded a reasonable opportunity to be heard or to present written submissions. Although M192 is ambiguous as to whether an electronic public hearing must allow oral submissions, a “reasonable opportunity to be heard” in our view implies oral submissions. There is a substantial risk a court may construe the legislation strictly and find the hearing should have allowed interested persons to make oral submissions. Therefore, we do not recommend holding a public hearing by written submissions only.

Local governments are still required to satisfy the requirements of procedural fairness in relation to the hearing process. Under the fairness obligation it is advisable to allow every interested person to hear the speakers and have opportunities to comment on or rebut the oral and written submissions of other persons. Electronic public hearing procedures should reflect the legislative and procedural fairness requirements.

IN-PERSON PUBLIC HEARINGS

Nothing in the new order prohibits in-person hearings. With the relaxing of public health orders in conjunction with the restart plan, local governments may consider transitioning toward holding in-person public hearings. In-person public hearings would have to satisfy all public health orders, which may be too restrictive for items with high public interest. We recommend that all in-person public hearings should also be made available through electronic means to enhance engagement efforts and reduce legal risk of argument that the public could not or did not attend because of provincial health orders or concerns.

The provincial M192 guidelines can be accessed [here](#).

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