

LIDSTONE & COMPANY

BARRISTERS AND SOLICITORS

BULLETIN

TO: BC Clients
FROM: Don Lidstone, Q.C.
DATE: December 9, 2020
RE: COVID-19 - Meetings and Hearings
FILE: 99999 - 044

NO IN-PERSON MEETINGS OR HEARINGS

The recent order of the Provincial Health Officer (PHO) on gatherings and events prohibits members of the public from attending council or board meetings or hearings in person until the order is rescinded or replaced. The order does not prohibit electronic meetings or hearings and does not apply to by-elections.

The December 9, 2020 PHO order on *Gatherings and Events* repeals the December 4 order and imposes stringent prohibitions including in-person attendance at council and board meetings, hearings, committee meetings, open houses, and other in-person meetings.

EXPIRY AND PENALTIES

This order regarding in-person meetings expires December 7 unless extended by the PHO as of noon on December 7. Given the current surge of COVID-19 infections, no one expects this order to be rescinded December 7, although some local governments are seeking amendments in relation to public hearings for which notices have already been published.

Every local government holding a meeting or hearing, and every individual attending a meeting, must comply with the order. A breach of the order is an offence under the *Public Health Act* with a fine of up to \$25,000 or an alternative penalty imposed by a sentencing judge.

OPEN MEETING WITHOUT PUBLIC PRESENT

Holding an electronic meeting is still governed by Order M0192 which authorizes electronic meetings and hearings. Local governments that are

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not able hold in-person open meetings due to the current PHO order are required to pass a resolution to provide the rationale for the 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.

ELECTRONIC MEETINGS REQUIRE “BEST EFFORTS”

Order M0192, which as stated still applies under the new *Gatherings and Events* order, authorizes council, board or other local government bodies to hold open 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 M0192 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 provide 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.

ELECTRONIC PUBLIC HEARINGS REMAIN AUTHORIZED

Nothing in the new *Gatherings and Events* order has changed the authorization for local governments to hold electronically 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 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 M0192 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 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 fairness requirements.

PROVINCIAL ORDERS AND GUIDELINES

The new Gatherings and Events Order is here:

<https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-pho-order-gatherings-events.pdf>

Order M0192 is here:

https://www.bclaws.ca/civix/document/id/mo/mo/m0192_2020

The Ministry of Municipal Affairs Guidance (dated December 4, 2020) is here: https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/local-governments/governance-powers/covid_open_meetings_guidance_dec_4.pdf

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