ASK A LAWYER #2: PROACTIVE PLANNING AND PROVINCIAL HOUSING LEGISLATIVE REQUIREMENTS

Q & A

PIBC Peer Learning Network

PIBC PLANNING INSTITUTE OF BRITISH COLUMBIA
PEER LEARNING NETWORK

January 15, 2025

Local governments in BC must complete the review and update of their Official Community Plans and zoning bylaws by December 2025 to comply with the Province's housing legislation. The PLN "Ask a Lawyer" webinar, held on January 15, 2025, provided an opportunity for practitioners to participate in a Q&A session with lawyers Alison Espetveidt (Lidstone & Company), Pam Jefcoat (Civic Legal LLP), Michael Moll (Civic Legal LLP), and Guy Patterson (Young Anderson).

Short 10-minute presentations from each panellist preceded the Q&A. The presentations referenced in this Q&A document can be downloaded from the PLN website at https://www.pibc.bc.ca/pibc-pln-past-events.

This Q&A summarizes the information given by the lawyers in response to questions submitted by participants. The full webinar can be viewed online on PIBC's YouTube channel at https://www.youtube.com/watch?v=s8w9XrIN5yQ&feature=youtu.be.

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.

Density Bonusing & Inclusionary Zoning

Does "in-stream protection" for new density bonus bylaws also apply to developments that have a previously approved precursor application but not a current "in-stream" application? For example, if a rezoning application was approved prior to the adoption of a new density bonus bylaw, but has not yet submitted an application for development permit or building permit, can the density bonus provisions in the zoning bylaw with respect to that development remain or do they have to be updated?

The answer is yes. Pam's presentation (linked here) did a very effective job at going through the language in the legislation with respect to what is an "in-stream" versus a "precursor" application.

The same rules are carried forward for both bonus density and inclusionary zoning bylaws. The impact of these rules is that there will be a bit of a transition period if a complete amendment to the zoning bylaw has been submitted, as described in a development application procedures bylaw, and the applicable fee has been paid prior to the adoption of a bonus density and/or inclusionary zoning bylaw(s).

Are there any significant changes expected with the most recent Bill 16 passed by the provincial government?

[Bill 16 includes] inclusionary density bonusing, tenant relocation bylaws that can be enacted, as well as site level infrastructure and Transportation Demand Management (TDM) authorities. There are a lot of new bylaw authorities and there's much more coming.

Has the Province prepared regulations or a guidance manual regarding the development servicing aspects of Bill 16?

I haven't seen a manual for development servicing aspects or about Bill 16.

As far as the Bill 16 changes, it says pretty clearly that you can require extra requirements such as road dedications, for example, for transit features and sustainable, green infrastructure.

[The Province does] have some guidance around the bylaws for new tenant relocation bylaws. I don't think it's an actual manual, but they have produced some guidance document around that.

What are the requirements for inclusionary zoning?

The legislative requirements for inclusionary zoning are focused more on process, and not content. As a result, many different versions of inclusionary zoning bylaws will be consistent with the legislative requirements. As of early 2025, the mandatory content is set out in s. 482.7(2) of the *Local Government Act*. New regulations may expand the mandatory content of inclusionary zoning bylaws.

In a very general way, the inclusionary zoning authority is the ability to require a portion of a development be affordable and special needs housing units, calculated on either on a per-unit basis or on a percentage of the gross floor area of the residential component of the development.

So long as you're meeting one of those two criteria, and the process for consultation and financial feasibility have been undertaken prior to adoption, the requirements for inclusionary zoning have mostly been met.

Pre-zoning

Can you tell us more about how to obtain land dedication from pre-zoned land and what the limitations may be?

What you're now able to do is to acquire land at building permit issuance. The limitations are that such land can only be for highway or for suitable design features and transportation infrastructure as set out in the Act.

There are also currently limits as to the depth of land you can acquire and those limits can be further altered by regulations. Such regulations have yet to be adopted.

For the highway use, I presume that the owner will have to dedicate a portion of their land as highway. For other uses, which might not need to be a linear strip, I don't know if acquisition can include fee simple or some other right over that land.

In the context of pre-zoning development sites and Bill 16, should municipalities be updating servicing bylaws or other bylaws to make use of these new powers, or simply focusing on the new zoning tools?

There are new powers, so I suggest using them. You can take land for new sustainable design features and transportation infrastructure purposes, so that should compel an update. Ultimately it is still a policy question for local governments.

Servicing & Infrastructure

What are some legal challenges potentially arising from insufficient infrastructure servicing to get to building permit for areas zoned for SSMUH that do not have the underlying infrastructure capacity?

The one challenge I would focus on is that many, many bylaws have a provision saying you could be denied either a right to connect to water or sewer infrastructure or to receive a building permit if the capacity isn't there.

I'm not sure that how well that will hold up given SSMUH. The policy documents are quite clear in saying that the requirement to increase density from one unit to three or to six is no different than if the current single-family dwellings all had everyone's extended family move in. In both cases a parcel housing three people now houses ten. Faced with a population that draws more water, emits more sewage, and creates more traffic the Provincial policy expectation is that the municipality just tries to deal with it.

The biggest potential legal challenge would be if someone applies for a permit and on paper the development complies with zoning and all other requirements, but the municipality says, "we will not issue a permit because we do not have the water capacity to serve you." The applicant could then seek judicial review and claim that "I get as much right to the water as my neighbour and if there's a shortfall, the local government should build more infrastructure using general revenue." That type of legal challenge is consistent with the build-first-upgrade-infrastructure-later trend that the Province appears to be pushing.

Community Amenity Contributions & Amenity Cost Charges

Without a bylaw enacted under LGA 482, can a municipality still negotiate a portion of affordable housing units as part of a rezoning application (i.e., as a community amenity contribution)? Can a municipality still negotiate a portion of affordable housing units as part of a rezoning application?

Pam addressed CACs in her presentation (linked here).

The answer is a cautious yes. The legislation does not contemplate CAC negotiations therefore it is an informal practice that should be guided by prior court decisions

considering the lawfulness of these kinds of voluntary payments.

The Supreme Court of Canada considered the effect and consequences when a developer pays for amenities in exchange for zoning in two decisions Pacific National Investments Ltd v Victoria (City), 2000 SCC 64 and 2004 SCC 75. These cases underscore the importance that these negotiations and the final commitment for certain amenities are voluntary. To the extent that your community wants to impose mandatory CAC policies or establish minimum contributions that each development makes towards certain amenities, ACCs, conditional density rules, or inclusionary zoning bylaws are likely better tools. There is likely a degree of legal risk if your community's CAC program operates like one of these other tools, without complying with the legal requirements.

If you look at it from a very big picture, the intent of these legislative changes is to be proactive and to try to eliminate some of the uncertainty and cost uncertainty for developers as they move forward in constructing these things.

With the ACC program, the intent is to pre-identify so that there's some certainty around the costs, to cost out what those costs for such amenities will be, and to give the development communities some advanced notice of what the overall cost will be.

But again, it's permissive under the legislation to adopt an ACC bylaw, it's not a mandatory requirement. Until a local government adopts the bylaw, it doesn't mean you can't collect for amenities, but you need to be cautious about how you do.

I'd be interested in hearing about future use of CACs within the context of the new financial tools (i.e., ACCs).

I think the ability to use CACs is still there. It's not legislatively authorized, so [use these with] caution. The Province is clearly pushing local governments to identify and create certainty around these types of costs and have some transparency around it as well.

So, I think you can still use the process, but each time we see a push to identify these types of things in bylaws, it opens the door for people to make an argument that the process, this discretionary process outside of what's authorized by legislation, may no longer be appropriate.

Under the new legislation, are municipalities still able to use Community Amenity Contributions when established in a bylaw?

The reference to when CACs are established in a bylaw is curious because, typically, you have the ability to impose a Community Amenity Contribution if it's voluntarily negotiated as part of a discretionary rezoning process. So having CAC actually dictated by bylaw could be problematic because, if it's imposed by bylaw, it's not a voluntary negotiation.

I think yes, you can still use that process, but I wouldn't recommend that you have a

CAC bylaw that you impose community amenity contributions outside of. You can use an ACC bylaw to impose amenity cost charges if you pre-identified amenities for which funds should be collected.

What is the best way for a local government to transition from their existing community amenity policy and the new ACC?

Looking at the considerations that local governments are supposed to review in establishing their amenity costs, you're looking at your housing needs reports, other policies that you have, your financial plan, and hopefully pre-identifying areas of growth where additional amenities might be required to accommodate the residents and workers that are the result of that growth. For example, if your OCP is transitioning an area from industrial to multifamily residential and you've got no community centres and no parks, then you're going to need to look and pre-identify those areas and determine the amenities that will be required and then go through the process of trying to set costs to establish the charges for them.

It's more of an organic process that will fall in line with doing your housing needs reports, updating your OCPs, updating your financial plan, and really proactively trying to identify the needs of a growing area in your community and how you're going to create a supported, livable area with the type of amenities that may be required.

[Local governments] have a bunch of tools that can be used, whether that's DCCs for a new fire hall or police station in the area, or ACCs that can get you seniors community centres. Look at the host of tools that you have and what your needs might be. There's not just one way.

Can a municipality carry on with administering their density bonus and CAC systems after 2025 if the updated, expanded DCC bylaw and new ACC bylaw are not yet in place?

I would remind people that it's not mandatory to update your bylaws, but it is a new tool that allows you a broader scope to obtain funds in connection with development that may have capital cost impacts.

So, while it's a useful tool to have in your toolbox, it's not mandatory and you're not required to update your bylaws. There may be a time and a place to do it as your community grows and develops, but there's no deadline or requirement to do so in 2025. Having not updated your bylaws, you can continue your existing processes that you're currently carrying on.

Housing Needs Assessments & Housing Targets

Does the new legislation provide any flexibility for smaller communities with limited development activity to meet housing targets?

The portions of the legislation covering density bonusing and inclusionary zoning are optional, as noted in Alison's presentation (linked here). There's no mandatory obligation to pursue either of those types of bylaws.

Guy's presentation focused on the details of the housing needs report (linked here). How the housing needs report approaches future planning might be where some smaller communities find a degree of flexibility. Once the housing targets have been set, there may be opportunities to use density bonusing and inclusionary zoning to fill in the gaps between what the market might build of its own accord and interest, and what the housing needs report reveals is part of the community's needs.

For the most part, the challenge is going to be in setting a base density that permits the amount of housing that meets the housing targets in the housing needs report. Density bonusing and inclusionary zoning bylaws depend on market demand, so a smaller community may find it challenging to use either of these tools. As a result, smaller communities may find the desired flexibility by continuing to negotiate for community amenity contributions when there is not the capacity to create complicated density bonusing and/or inclusionary zoning bylaws.

Other options smaller communities looking for flexibility in meeting housing targets include the subdivision and development servicing bylaw. These bylaws may be an opportunity to formalize practices that were previously implemented on an *ad hoc* basis. In particular, agreements for how a particular development will achieve the standards and servicing requirements in the bylaw may be another element of flexibility for smaller communities.

Are there specific provincial guidelines or templates for updating OCPs to better align with the current housing needs in the community?

Not that I'm aware of. You have to identify the total numbers as noted in the housing needs report requirements. Section 473 of the *Local Government Act*, and the new section 473.1 set out the required content for OCPs, so that is the best place to start.

Official Community Plans & Zoning Bylaws

Given that zoning bylaws were required to be updated by a specific date last year to incorporate SSMUH regulations, is it now necessary to update the zoning bylaw to align with the OCP by the end of this year? Is it practical to update both the OCP and zoning bylaw in parallel?

The requirement now is to update the OCP by the end of the year. Bill 44 granted an exemption from OCP compliance for the purpose of adopting the mandated SSMUH changes. However, by the end of the year, the updated OCP must be consistent with those changes to the zoning bylaw. If the local government is looking to do further zoning changes then you should be amending both the OCP and the zoning bylaw to ensure consistency.

Does stratification of four or six dwellings on a small lot trigger park dedication cash-in-lieu or land contribution?

Stratification (other than bare land strata) doesn't trigger park dedication because park dedication is for subdivision of land and stratification is a subdivision of building.

You have to look at exactly what kind of stratification is happening. [For example,] the bare land stratification regulation does bring in the requirement, but one of the problems is the legislation has an exemption for four units. You can, by bylaw, take away that exemption, but I haven't seen a lot of communities that have necessarily exercised that park land dedication.

Short-Term Rentals

Our town recently updated the zoning and business license bylaws to regulate STRs. What supports are available (or are there any support available) from the Province to local governments for regulating short-term rentals in their communities?

NOTE THIS ANSWER HAS BEEN UPDATED AFTER THE PRESENTATION:

On January 20, 2025, the Province of British Columbia launched a registry for operators of short-term rentals. All operators are required to include their provincial registration number on all online listings as of May 1, 2025. The Province has the ability to require

non-compliant listings removed after June 1, 2025. The Province also established a Compliance and Enforcement Unit (CEU) within the Short-Term Rental Branch in the Ministry of Housing and Municipal Affairs. The CEU has responsibility for enforcing compliance with provincial legislation. Local governments continue to be responsible for enforcing their own rules and regulations. The expectation is likely that the Provincial regulation of online service providers, including the obligation to register as a host, will dovetail nicely with the local regulations.

Michael wrote an article in the municipal world from April of last year on that topic (https://www.municipalworld.com/articles/b-c-takes-bylaw-enforcement-for-short-term-rentals-online/). The Province's approach seems to be, if you can keep the properties from being listed on the most popular websites such as VRBO and Airbnb, then you can solve the problem by stifling bookings. The local government's role is going to be telling the Provincial regulator "they're not licensed, they're not meant to operate here. Get them off the online sites that the Province is regulating."

Transit Oriented Areas

In your interpretation, would local governments be able to set parking maximums in Transit Oriented Areas?

I view the parking-specific provisions of the *Local Government Act* to be required in sense of a minimum. If a certain permitted use is present, then a minimum amount of parking must be provided to continue the use. If a land use bylaw specified a maximum amount of parking, it would just be part of the permitted land use. For example, a permitted use of the land could be generally described "multi-residential with no parking." Exactly how that would be defined and implemented would be interesting. I'm not sure how that would be received by the Province. At present in transit-oriented areas, the market is setting how much parking is provided. One might see a further limit on the amount of parking as seeking to further increase the transit-reliance in the neighbourhood. However, too little parking might affect the economics of a development to the extent that it is stifling, so there might be another—more questionable—motive altogether.

What is the process to make changes. For example, if municipalities were to adjust the height or FSR within a transit area, what will happen?

Assuming we're talking about height and FSR set out in a bylaw under Section 479, also known as a zoning bylaw (according to the definition of "zoning bylaw" in the *Local Government Act*), then the way to make changes is to amend that bylaw. The only question is whether those amendments would be offside the new Section 481.01 that says you

can't use your 479 powers to prohibit or restrict a density of use, or a size or dimension of buildings or other structures, set out in the regulations in relation to land that is in a transit-oriented area.

If you were to adjust height and FSR in a manner that was offside 481.01, you'd have a problem. Otherwise, you can go ahead and use your zoning (Section 479) powers as you always have.

Provincial Legislation

Are there any anticipated changes to provincial housing legislation and regulations this year?

The Province has indicated that it will be rolling out a number of regulations that are referenced in the bills that have already been enacted. These regulations will affect the details of the provincial housing legislation and regulations. With the recent election, it will be interesting to see if the anticipated regulations include significant changes beyond what has already been done.