

From: "Johnston, Sadhu" <Sadhu.Johnston@vancouver.ca>

To: "Direct to Mayor and Council - DL"

CC: "City Manager's Correspondence Group - DL"

Date: 3/31/2020 11:42:10 AM

Subject: FW: Memo on rezoning process

Attachments: MEMO to COUNCIL RE. Council's Role in the Re-Zoning Process (01107578xD3....pdf

Hi Mayor and Council

Please find attached a memo that was sent to council in 2018 on Council's role in the rezoning process. This might be of interest for the questions/discussions coming up as a part of the debate on whether to hold public hearings.

Thanks

Sadhu

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Pronouns: he, him, his



The City of Vancouver acknowledges that it is situated on the unceded traditional territories of the Musqueam, Squamish, and Tsleil-Waututh peoples.

MEMORANDUM

December 11, 2018

TO: Mayor and Council

CC: Sadhu Johnston, City Manager
Paul Mochrie, Deputy City Manager
Katrina Leckovic, City Clerk
Lynda Graves, Administration Services Manager, City Manager's Office

FROM: Frances J. Connell, Q.C. City Solicitor
Gil Kelley, Director of Planning

SUBJECT: Council's Role in the Re-Zoning Process

Rezoning involves changing the rules that govern the use and development of land. The purpose of this memo is to provide information to Council on its legislative role in the rezoning and public hearing process, according to the law and to City policies and procedures.

THE LAW

Both statute and common law impose certain obligations, during the course of a rezoning, on Council and Council members.

Vancouver Charter Duties

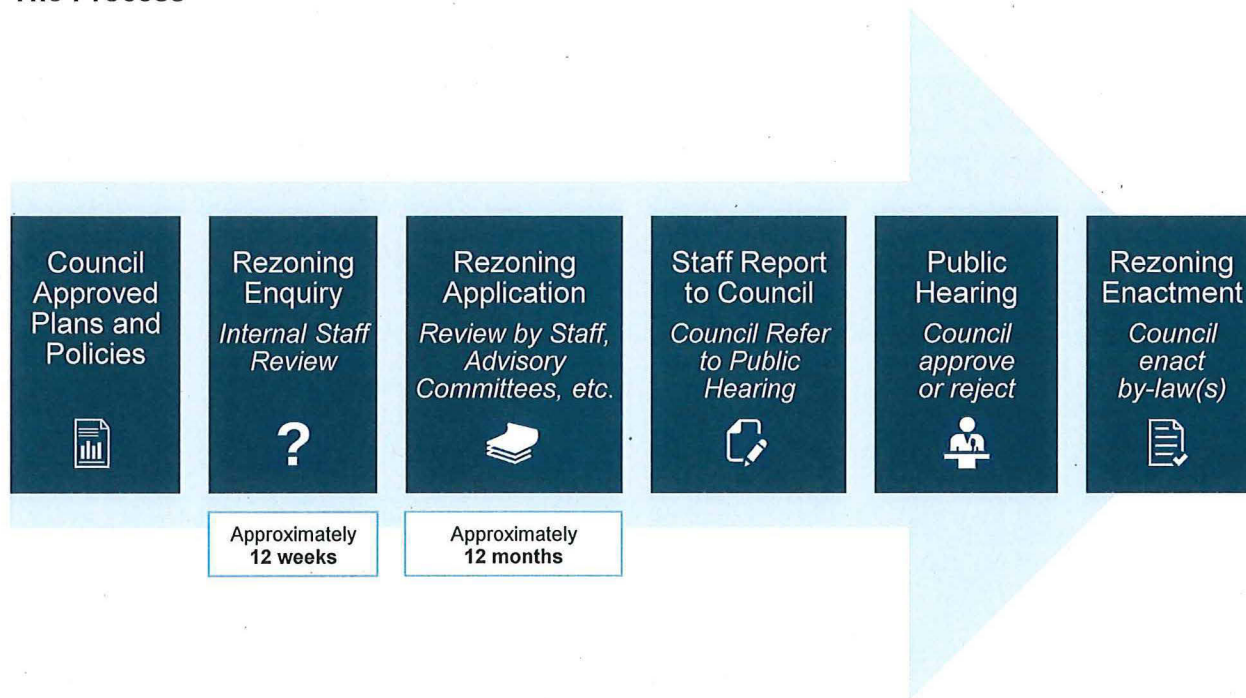
- Every rezoning that Council wishes to consider requires a public hearing [VC Sec. 566(1)]. At the hearing, Council must give all persons who deem themselves affected by the proposed by-law the opportunity to be heard.
- After the public hearing ends, Council may pass the proposed by-law in its original form, or alter it to give effect to such representations made at the hearing as it deems fit.

Common Law Duties

Courts have considered questions about Council participation in the rezoning process. Court decisions apply certain basic principles, but decisions often depend on the circumstances of the particular case. The following basic common law duties can be distilled from those decisions:

- Council members must decide whether or not to enact the proposed by-law based on information presented, and representations made, at the public hearing; after the public hearing, they must not consider any other representations from the public.
- Quasi-judicial fairness is required. Council members must act in a fair and reasonable manner, and must consider all representations made at public hearing.
- Council members may not vote on the proposed by-law if they have prejudged the matter to the extent that they were not capable of being persuaded for change based on public input through the public hearing.
- Procedures related to public hearings must be consistent and clear. If a usual procedure is deviated from in a particular case, a Court may find the deviation improper. The rationale is that even though the Vancouver Charter contains no legal requirement for the procedure, procedures once established can create a 'legitimate expectation' by the public that these practices will be followed. By way of example, staff notifies property owners within an approximate two block radius of a site, at least 14 days before the public hearing, of proposed zoning amendments even though the Vancouver Charter does not require such notification.

The Process



Both formally and informally, Council and Council members participate in the rezoning process at a number of junctures.

Pre-Rezoning Application

- Developers on occasion approach Council members before formally applying for a rezoning.
- In this situation, Councillors can listen but should avoid indicating their thoughts about the proposal.
- Even at this stage, the rules that govern Council members during the public hearing process apply, so the best course is for Council members to avoid meeting with developers and recommend to such developers that they discuss their proposal with staff and submit an application.

Pre-Public Hearing

- When staff receives a rezoning application, the review process will take some time, and will involve various Departments and may involve Council-appointed Committees.
- The process may also include public information meetings and open houses.
- Council members do not typically attend such meetings but, if they do, they should act only as neutral observers and again, if asked questions, or their opinion on the proposal, they should refer to staff and the process of rezoning.

Summary for Information or an Issues Report

At the start of the process, staff may advise Council of a new application by way of a "Summary for Information" or an "Issues Report".

Summary for Information

- Staff may decide to provide to Council, for information, a brief summary of the application (staff may do so, for example, if the development is major, and it is thought that Council may want staff to address additional issues).

Issues Report

- Staff may submit an "Issues" report to Council, usually before starting the review process or notifying neighbours.
- Staff will do so if they think the project is controversial, if City policy needs updating, if the development conflicts with existing City policy, or if staff does not support the application.
- The issues report may give Council the option to refuse the application even before it is fully reviewed by staff, or as another example, if staff do not support the application (Council can nonetheless instruct staff to process it).
- Generally, only staff speaks to an issues report. However, if refusal is an option, the applicant will have the opportunity to speak to Council. However, if policy interpretation is an issue, the public may speak, but only to the policy, not to the specific rezoning request.

Referral Report

- After staff has processed the application, staff will bring forward a report to Council outlining their assessment of the application.
- This report may recommend referral of the rezoning application to public hearing, or refusal of the application, or it may set out both options.
- Council will hear from staff where referral is recommended, or from staff and the applicant if refusal is recommended, before deciding whether to refuse an application or refer it to public hearing.
- Council does not hear from the public at this stage, since to do so would be tantamount to holding a public hearing in order to decide whether or not to hold a public hearing.
- During the time between submission of the application and referral to public hearing, Council should avoid discussions with proponents or opponents of the project or with media. If Council receives communications on the application, it should refer those to staff. In due course, all representations will be received at public hearing.
- Once Council has referred the application to public hearing, it is particularly important that Councillors avoid communications, representations or discussion on the rezoning application with anyone, including the applicant.

- Once Council has referred a rezoning application to public hearing, thus initiating the “formal rezoning process”, the requirement for fundamental fairness becomes even more critical.
- Either before or after referral, if Council members are approached on a particular rezoning proposal for comment, and some reply is unavoidable, their response should be as noncommittal as possible; staff should be advised of any such communications.
- At public hearing, Councillors who have been approached before the public hearing and have made comment should state at the outset of the public hearing the nature of any communication, and should confirm that they remain open to persuasion and are not of closed mind despite any comments they may have made.
- The constraints on receiving communications and discussion does not preclude Council from obtaining information from staff.

Public Hearing

- The purpose of the public hearing is to permit anyone with an interest in the rezoning to draw Council’s attention to relevant facts, and provide their opinions on the merits or deficiencies of the rezoning application.
- The public hearing must be properly advertised in a newspaper in accordance with the Vancouver Charter, including making the draft by-law available for review at City Hall.
- The public hearing is the forum where participants should have access to all relevant background materials, and where everyone who wishes to speak should have the opportunity to do so.
- The case law has held that Council must hear everyone regardless of the repetitive nature of the comments. The Courts acknowledge that the Chair may make reasonable rules to govern the proceedings; our public hearing rules are set out in the Procedure By-law.
- Councillors have no obligation to question, debate or discuss anything with speakers at a public hearing, and can simply listen to all perspectives and arguments, and save debate for after the hearing. Councillors should not express a conclusion or decision during the public hearing prior to its completion. This recommendation does not preclude Council members from asking staff or speakers questions for clarification.

Between Public Hearing Approval in Principle and By-law Enactment

- After conclusion of the public hearing, Councillors should receive no correspondence or submissions about the rezoning, and should not hear representations or enter into discussions on matters related to the rezoning
- If Councillors receive such correspondence, they should respond by indicating that any discussion would be inappropriate given that the public hearing has concluded and a decision is still pending
- Consideration by Councillors of representations or submissions after public hearing could result in a challenge to the by-law, and quashing of the by-law by the Court
- This requirement does not preclude a Councillor receiving clarification information from staff, or informally discussing the rezoning application with other Councillors

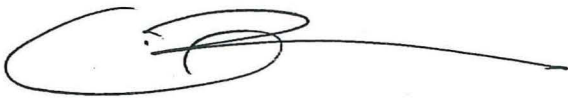
- Councillors are neither able nor expected to isolate themselves from comments in the public domain from proponents or opponents of the project, or from the media, and exposure to such commentary will not disentitle Councillors from voting on enactment.

By-law Enactment

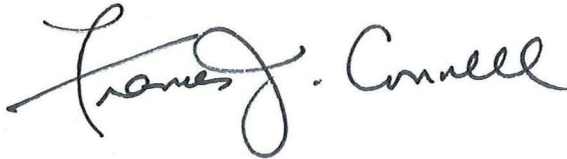
- After conclusion of the public hearing, Council may enact the by-law immediately; defer enactment to enable Council to obtain clarification from staff or, defer enactment to await fulfillment by the applicant of the rezoning enactment prior-to conditions, as set out in Council's approval-in-principle of the application.
- Whether Council chooses to enact the by-law immediately or to defer enactment, Council may approve the by-law in its original posted form or may alter it to give effect to representations made at the public hearing.
- If Council has given Approval in Principle, the normal and best practice will be for Council to enact the by-law, once a by-law reflecting all the elements that Council has approved is brought forward, along with confirmation from staff that the "conditions prior to enactment" have been fulfilled by the applicant.
- Council is, however, not legally required to enact the by-law, and it is possible that a Councillor who has voted in favour of the resolution providing Approval in Principle may have, on reflection, changed their mind and decided not to vote for enactment.
- While Council does not have to give a rationale for its decision on enactment, if a Councillor who voted in favour of Approval in Principle has decided to vote against enactment of the by-law, a very brief statement, confirming the appropriate basis for such change of mind, is appropriate.
- Such changes in intention are unusual, and can put the rezoning process at risk of legal challenge
- Any such reconsideration must be bona fide, based on legitimate planning and development considerations, focus only on information before Council and the public at public hearing, and not be caused by any factors such as the receipt of new information outside of that considered at public hearing, or because of lobbying by opponents of the development.
- If there is substantial evidence that Councillors have based their vote on enactment on improper considerations, and the by-law is challenged on that basis, the Court will quash the by-law.
- A change in vote by a Councillor will not result in the requirement for a new public hearing. A Councillor is free to change their mind based on the public hearing. A Councillor is not free to change their mind based on representations on the matter outside of the public hearing. A Councillor changing their vote and wishing to record the reasons for doing so should provide a brief statement, and then proceed to vote. If the Councillor has received representations outside the public hearing process, then they should recuse themselves from the vote.
- Other Councillors should not dispute such a change or engage in debate.
- Council has essentially developed a convention or practice that prevents many of these issues from arising, by agreeing to respect the vote held to approve the amendment in principle. This convention can be lawfully respected, but it cannot be considered to

formally and lawfully bind a Councillor from voting in accordance with their position on the matter. They have essentially said "I will respect the previous vote of Council" and not "I must accept the previous vote of Council."

- The convention to respect the outcome of the approval in principle vote helps shield Council from the "after the public hearing" issue, because they can plausibly say that a Council decision has ended the public hearing.
- If a by-law was approved in principle by a previous Council, then Council is not obligated to enact that by-law either. Every Councillor who is newly elected and every Councillor who was re-elected but did not attend the public hearing, and wishes to vote for or against the by-law will be required to review the public hearing in order to qualify to cast a vote. Councillors should also avoid meeting with a proponent or opponent, and should base their decision on the public hearing and the materials available at the public hearing.



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FRANCES J. CONNELL
Director of Legal Services