

5.4.ii. Guidelines

PROCEDURAL FAIRNESS IN REZONINGS

Trust Council: September 25, 1993

Amended: December 11, 1993; December 9, 2009

A: PURPOSE:

1. To observe a high standard of procedural fairness when local trust committees (LTCs) consider decisions to change the zoning of land.

B: REFERENCES:

- a. *Local Government Act*
- b. Trust Council Policy 7.1.i – Administrative Fairness Principles
- c. Trust Council Policy 7.1.ii – Handling of Administrative Fairness Complaints
- d. Buholzer, W. *BC Planning Law and Practice*. Published by Butterworths, in association with the Planning Institute of BC

C: BACKGROUND:

1. As the sole body responsible for land use planning and regulation in a local trust area, LTCs make decisions about land use zoning that have significant and lasting impacts on their communities and on the interests of individual property owners.
2. There is no appeal from an LTC's decision in such matters, provided it has been made fairly and legally.
3. Local governments, such as LTCs, have a duty of procedural and administrative fairness when making decisions that affect the rights, privileges or interests of an individual.
4. The rules of procedural fairness and natural justice that are recognized in administrative case law are:
 - i. the '**hearing rule**' that indicates that those affected by a decision have a right:
 - to be notified about a decision-making process,
 - to review information that will be considered, and
 - to be heard and to respond to information that will be considered.
 - ii. the '**impartiality rule**', which indicates that decisions-makers must be free of actual or apparent bias and conflicts of interest regarding decisions.
5. To ensure a minimum level of procedural fairness, the *Local Government Act* requires local governments to follow specific procedures during the consideration and adoption of bylaws that prescribe zoning regulations. The *Act* specifies

minimum requirements for public hearings and for the forms of notices that local governments must issue in advance of public hearings.

6. The level of procedural fairness implied by procedures specified in the *Local Government Act* has been augmented over the years by administrative case law that has introduced higher standards. Court decisions have indicated that local governments should strive to meet a high standard of procedural fairness in their decision-making.
7. Evidenced-based decision making and good communication with the parties affected by a decision are also important practices that can help to ensure that processes are fair and seen to be fair.
8. These guidelines are intended to identify some best practices for local trust committees (including a quorum of a local trust committee), individual trustees and staff and to illustrate how they can achieve a high standard of administrative fairness in LTC decision-making processes, particularly regarding zoning changes. The guidelines are organized according to two 'rules' of natural justice noted above, with the addition of two sections that include best practices for evidence-based decision-making and communication.

D: GUIDELINES:

1. THE HEARING RULE

Right to be Notified

Before an LTC makes a decision about a zoning change, those whose interests may be affected (i.e. applicant, neighbours, community groups, others whose interests may be affected) must be notified about the decision-making process in accordance with statutory requirements.

A Local Trust Committee should...	Trustees should...	Staff should...
<ul style="list-style-type: none"> ○ ensure it is following the rezoning application process outlined in the Islands Trust application guide. ○ ensure it considers decisions about rezoning applications only after staff have provided appropriate notice to applicants that a decision item is on the business agenda and after the interested public has had an opportunity to access notice. 	<ul style="list-style-type: none"> ○ be aware of the rezoning application process outlined in the Islands Trust application guide. ○ ensure they are proposing motions about decisions only if staff have notified the applicant that a decision item is on the business agenda and after the interested public has had an opportunity to access notice. ○ avoid motions to add significant decisions about rezoning applications as 'late' items on an LTC agenda. 	<ul style="list-style-type: none"> ○ follow the requirements for public notice about rezoning applications, as required by the <i>Local Government Act</i> and the relevant procedure bylaw, erring on the side of ample notification. ○ provide applicants and others who express an interest in an application with copies of the rezoning application guide and review application processes with them. ○ make applicants and others who express an interest in an application process (neighbours, community groups, etc.) aware of opportunities to access meeting notices, agendas and written materials the LTC will consider regarding an application (i.e. in on-line agenda packages or in the public hearing binder available in advance of a hearing). ○ follow the process outlined in the rezoning application guide when processing applications. ○ ensure applicants and others who express an interest in an application are aware that an LTC could decide not to proceed with an application at any stage in the application process. ○ ensure applicants have timely and adequate notice that a decision item is on the LTC's business agenda and that the public have had an opportunity to access agenda notices.

Opportunity to Review

Before a decision about a rezoning application or an LTC-initiated zoning change is made, those whose interests may be affected by the decision must be given a reasonable opportunity to review the nature of the decision or action and to examine and consider the information the LTC will consider.

A Local Trust Committee should...	Trustees should...	Staff should...
<ul style="list-style-type: none"> ○ not schedule private meetings or discussions with anyone about an active rezoning application (i.e. applicants, property owners whose property is subject to an LTC-initiated zoning change, neighbours, community groups, others interested in an application). ○ ensure that all public submissions, reports and written materials that the LTC will consider about a zoning change are on the public record (with the exception of in camera legal advice). ○ if attending a 'site visit' for the purposes of understanding the physical context of an application, attend with a staff member who takes notes. Limit interaction between the LTC and the applicant (or other interested parties) to the receipt of factual information that can best be received at a site visit. 	<ul style="list-style-type: none"> ○ forward all relevant submissions, reports and written materials about a zoning change that they receive directly from the public to staff for inclusion in the public record. ○ encourage all those who have comments about an application or an LTC-initiated zoning change to submit their comments to the LTC in writing, or attend the public hearing if they would like their opinions taken into account as part of the LTC's deliberations. ○ advise members of the public that the LTC can only consider public submissions, reports or written materials if they are relevant and can be viewed or heard by all interested parties. ○ avoid making motions to add significant decisions about rezoning applications as 'late' items on an LTC agenda. 	<ul style="list-style-type: none"> ○ provide applicants (or owners of properties subject to an LTC-initiated zoning change) with an opportunity to access copies of public submissions, staff reports, recommendations from advisory bodies, advice from other agencies and any other written information the LTC will consider regarding their application. ○ ensure that public submissions, reports and written materials that an LTC will consider are available to applicants (and others who have expressed an interest) with time for them to consider the material presented and to prepare and present a submission before a decision is made.* ○ ensure that all written public submissions about specific applications or LTC-initiated zoning changes that the LTC will consider are entered into the public record and available for review by applicants and the public.* ○ advise members of the public that the LTC can only consider public submissions that are available to all interested parties. ○ attend and take notes at trustee site visits, where a quorum of an LTC and an applicant (or other interested parties) will be present. Advise applicants (or other interested parties) of the nature and limitations of the visit (receipt of factual information that can only be received at a site visit). ○ ensure relevant information is collated and made available to those who have expressed an

A Local Trust Committee should...	Trustees should...	Staff should...
		<p>interest prior to a public hearing and at the hearing*</p> <ul style="list-style-type: none"> ○ ensure that public hearing notices advise members of the public where and when they can view relevant information prior to the public hearing. ○ ensure that a copy of written submissions received at a public hearing is available for review by the public at the hearing. <p><i>* Note: These guidelines would be satisfied if materials are included in an agenda package or public hearing binder that is publicly available in accordance with normal meeting and hearing timelines. Where substantive new and different information is received as a late item at a public hearing, the LTC may wish to adjourn or recess to consider the new information and allow others to do so.</i></p>

Opportunity to be Heard and to Respond

Before an LTC makes a decision about a zoning change, those whose interests may be affected by the decision must be given an opportunity to be heard and to present information in support of their position.

Before an LTC makes a decision about a zoning change, those whose interests may be affected by the decision must be given an opportunity to hear and respond to those who present information against their position.

A Local Trust Committee should...	Trustees should...	Staff should...
<ul style="list-style-type: none"> ○ ensure that an LTC only makes a decision about a rezoning application (or LTC-initiated zoning change) after those affected (i.e. applicants, neighbours, community groups, etc.) have had <i>an opportunity to be heard</i>, either in writing or in person and <i>an opportunity to respond</i> to other information that the LTC has received or heard. ○ provide time for applicants and other interested parties to speak as delegates if the LTC is considering a decision not to proceed with an application prior to a public hearing. ○ consider whether it should adjourn or recess a 	<ul style="list-style-type: none"> ○ Ensure they are proposing substantive (i.e. non-procedural) motions about a rezoning application (or LTC-initiated zoning change) <i>only after</i> those who have expressed an interest (i.e. applicants, neighbours, community groups, etc.) have had <i>an opportunity to be heard</i>, either in writing or in person and <i>an opportunity to respond</i> to other information that the LTC has received or heard. ○ avoid making motions to add significant decisions about rezoning applications as 'late' items on an LTC agenda. ○ through their actions and behavior, support the conduct of public hearings that are seen as fair to 	<ul style="list-style-type: none"> ○ advise applicants of opportunities to present information about their application at meetings of advisory bodies and the LTC. ○ ensure advisory bodies are aware of statutory obligations to hear from applicants. ○ advise others who express an interest in an application about their opportunities to access information about the application and to be heard by the LTC.

<p>public hearing if the LTC receives a significant amount of new and different information immediately before or at the hearing, to allow sufficient time for interested parties to prepare representations on that new information.</p> <ul style="list-style-type: none"> o ensure the fair conduct of public hearings, with cordial conduct by all participants and even-handed application of any procedural rules such as time limits on speaking. 	<p>all parties.</p>	
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2. THE IMPARTIALITY RULE

Lack of Bias

Decision-makers must be free of actual or apparent bias regarding specific decisions.

A Local Trust Committee should...	Trustees should...	Staff should...
<ul style="list-style-type: none"> o not pass resolutions that make or imply any commitments regarding the eventual outcome of a proposed zoning change, before the process is complete. o not pass resolutions that make or imply a commitment to give any greater consideration to the comments or advice of any individual member of the public, group, landowner, or applicant. 	<ul style="list-style-type: none"> o be familiar with the principles of bias in decision-making. o resign from leadership positions in community or other groups that regularly have interests in zoning decisions made by their LTC. o only participate in decisions if they can honestly state that they have an open mind about the matter despite any general policy orientation to which they may be committed. o not make or imply any commitments regarding the outcome of a proposed zoning change. o not make or imply a commitment to give greater consideration to the comments or advice of any individual member of the public, group, landowner, or applicant. o where an advisory group is discussing an application, participate only as an observer (or as a resource person if no staff are present) and avoid attempts to influence the advice of the group. o not attempt to influence staff and consultants 	<ul style="list-style-type: none"> o be familiar with the principles of bias in decision-making. o advise trustees of reasonable concerns about bias, if they have such concerns or become aware that others have. o refer trustees to the Chief Administrative Officer if they wish to seek legal advice about bias concerns. o Ensure applicants, property owners and other interested parties understand that trustees cannot make or imply any commitments regarding the eventual outcome of a proposed zoning change before the process is complete.

A Local Trust Committee should...	Trustees should...	Staff should...
	<ul style="list-style-type: none"> ○ about the recommendations in their reports. ○ avoid statements before a public hearing that suggest they have already made up their minds about the decision ○ seek legal advice promptly if they feel they may be biased, or if another party alleges bias. ○ follow legal advice they receive about bias. 	

Conflict of Interest

Decision-makers must not have personal interests that prevent them, or appear to prevent them, from performing their duties impartially.

A Local Trust Committee should...	Trustees should...	Staff should...
<ul style="list-style-type: none"> ○ ensure statutory procedures are followed where a trustee has declared a conflict of interest. 	<ul style="list-style-type: none"> ○ be familiar with the principles of conflict of interest in decision-making. ○ not participate in or attempt to influence decisions if they have a direct or indirect financial or personal interest in the outcome. ○ be familiar with the statutory requirements for leaving meetings where they have a conflict of interest (including advisory group meetings) ○ seek advice promptly if they feel they may have a conflict of interest, or if another party alleges a conflict of interest. ○ follow legal advice they receive in regards to a conflict of interest. 	<ul style="list-style-type: none"> ○ be familiar with the principles of conflict of interest in decision-making and with the statutory requirements for managing situations where a trustee is in conflict. ○ ensure appropriate record keeping in meeting minutes when trustees leave meetings for conflict of interest reasons. ○ advise trustees of reasonable concerns about conflict of interest, if they have such concerns or become aware that others have. ○ refer trustees to the Chief Administrative Officer, if they wish to seek legal advice about conflict of interest concerns. ○ advise supervisor if, as a staff member responsible for a file, they believe they may have a conflict of interest that could affect the objectivity of their recommendations.

3. EVIDENCE-BASED DECISION MAKING

While not a legal requirement of local government rezoning processes in BC, ensuring that there is time to consider information about an application, that the information considered is accurate and that irrelevant information is treated with caution is a good practice that supports fair, transparent and accountable decision-making processes.

Accurate and Relevant Information

Decisions should be based on accurate and relevant information, excluding irrelevant considerations.

A Local Trust Committee should...	Trustees should...	Staff should...
<ul style="list-style-type: none"> ○ ensure there is sufficient time for trustees to receive and consider the meeting agenda package or late written materials before a meeting. ○ ensure it makes decisions at the appropriate time in the process and after trustees have had the time to consider items circulated in the meeting agenda package. ○ treat irrelevant information (e.g. personal comments about an applicant or other interested party, gossip, hearsay) with caution. ○ discourage input in correspondence or at public meetings that consists of irrelevant information. 	<ul style="list-style-type: none"> ○ allow sufficient personal time to review and understand written materials about a decision, including information provided by the applicant, staff reports, advisory group recommendations, agency comments and comments from the public. ○ discourage repetition or use of irrelevant information (e.g. personal comments, gossip, hearsay) as a factor in decision-making. ○ avoid making motions to add significant decisions about rezoning applications as 'late' items on an LTC agenda. 	<ul style="list-style-type: none"> ○ ensure there is sufficient time for receipt and inclusion of relevant information regarding applications before they are considered by an LTC. ○ follow Islands Trust templates for staff reports and ensure reports are as complete as possible. ○ ensure information in staff reports is as factual and accurate as possible, or that appropriate statements are made where information cannot be verified. ○ discourage repetition or use of irrelevant information (e.g. personal comments, gossip, hearsay) as a factor in decision-making. ○ proactively clarify inaccurate statements (if significant) that are made by others during the course of LTC decision-making processes.

4. COMMUNICATION

While not a legal requirement of local government rezoning processes in BC, good and consistent communication with all interested parties about a decision and the reasons for it is a good practice that supports fair, transparent and accountable decision-making processes.

A Local Trust Committee should...	Trustees should...	Staff should...
<ul style="list-style-type: none"> ○ after a public hearing, announce when a decision will be made, if known. ○ ensure meeting minutes accurately reflect any reasons given for decisions. 	<ul style="list-style-type: none"> ○ whenever possible, explain (in open meetings and at the time a decision is made) how they reached their decision, referring to submissions and reports on the public record, public deliberations of other trustees, as well as any personal knowledge or research that influenced them. ○ whenever possible, explain decisions with reference to relevant documents such as OCPs, the Islands Trust Policy Statement, the <i>Islands Trust Act</i> or other relevant statutes they have relied upon in making a decision. ○ after an LTC has made a decision, communicate clearly and consistently about the reasons given and avoid indicating that there were different, but unspoken, reasons. 	<ul style="list-style-type: none"> ○ record in meeting minutes any reasons given for LTC decisions about applications. ○ provide prompt written information to applicants (or property owners, in the case of an LTC-initiated zoning change) after an LTC has made a decision, including information about any reasons provided by the LTC about its decision. ○ ensure others who have expressed an interest are aware of opportunities to learn about decisions and the reasons for them.